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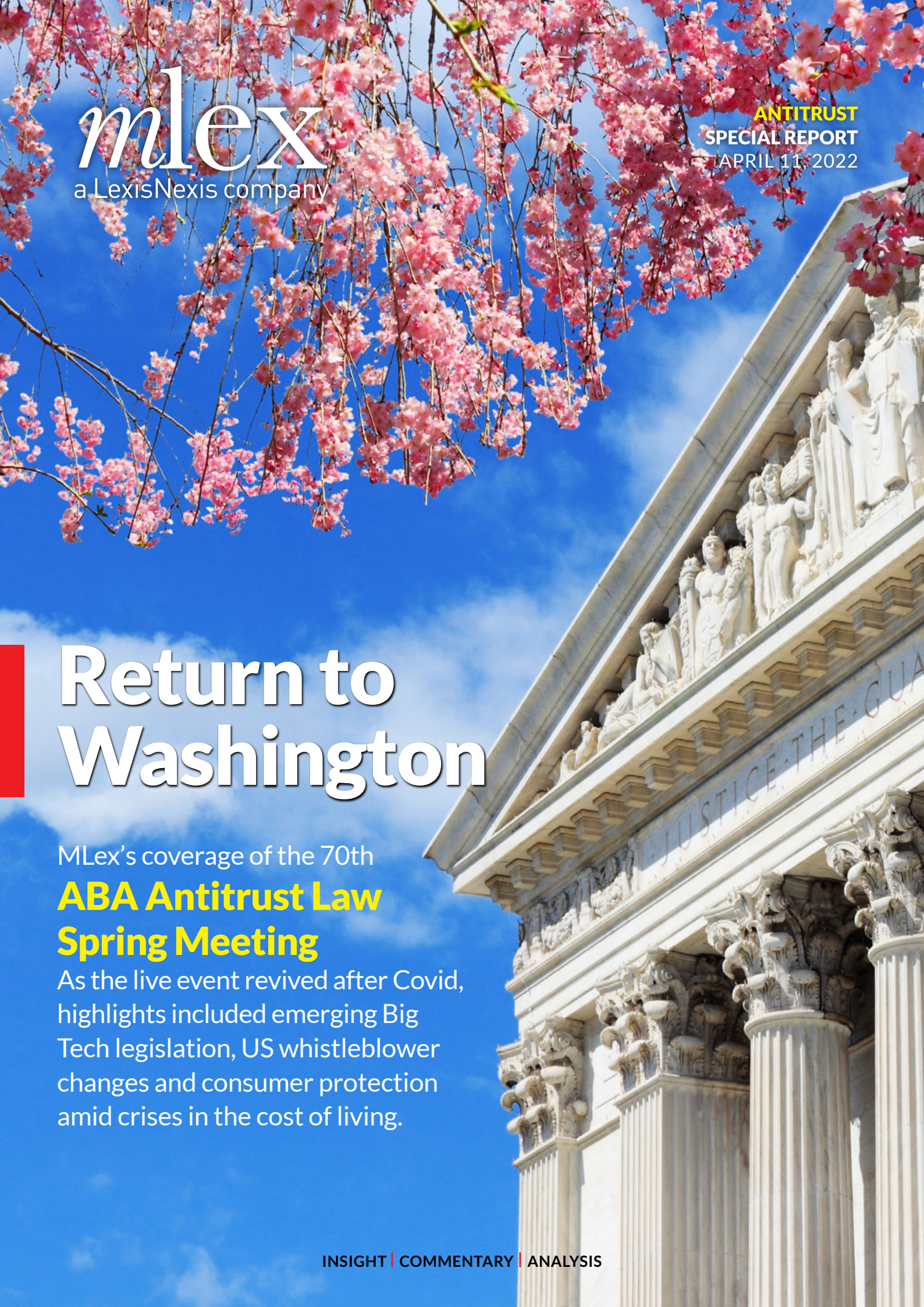

Return to Washington

MLex's coverage of the 70th

ABA Antitrust Law Spring Meeting

As the live event revived after Covid, highlights included emerging Big Tech legislation, US whistleblower changes and consumer protection amid crises in the cost of living.

Editor's Letter

Lewis Crofts
MLex Editor-in-Chief

"We're back." That was the simple message of participants last week at the American Bar Association's marquee event in the antitrust world, its Spring Meeting in Washington, DC.

The event, which every year draws thousands of attorneys and regulators from around the world, had been held remotely during Covid, but this year it returned in force with 2,887 registrations. Lawyers, enforcers, academics and journalists got back to sitting in on panels, joining "fireside chats," catching up in corridors, networking over drinks and comparing notes at dinner — all the while getting up to date on changes and developments in the world of competition law and consumer protection.

Debate focused this year on the huge developments in policing technology companies as governments in the US, the EU and elsewhere pivot away from antitrust cases to a new breed of legislation. Europe is further down the path with the Digital Markets Act, but a slew of bills sit in the US legislative machine with some expected to progress in the coming months.

While Big Tech dominated, there were also calls from enforcers to respond to the cost-of-living crisis looming for people facing higher gas bills and inflation. Regulators argued that they needed to respond to this in order to stay relevant to citizens.

The US Department of Justice also made headlines with a change to its whistleblower approach to ensure companies and individuals will still rat out price-fixers.

With up to nine or ten panels often running concurrently over the meeting's main two days, no one person could catch it all. But MLex journalists from bureaux in North America, Latin America and Europe attended almost all of the panel discussions and networking events, plus had the welcome job of being able to meet in person again with their broad base of leading regulatory, competition and legal contacts.

We are delighted to present you with a summary of our reports from both the meeting and a range of parallel or associated events during the week, giving you our unrivaled insight, analysis and commentary on key emerging antitrust themes from around the world. Do also tune in to our podcast wrapping up the week — see page 5 for a weblink and how to find it.

To inquire about seeing the coverage in full, including all the background portfolios that accompany our articles, or to find out more about our areas of coverage and subscriber services — and to ask for a trial — see the contact details on the back page of this report or visit our website directly at mlexmarketinsight.com. ■

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Ana Paula joined MLex in Brazil in 2014 writing about antitrust investigations and merger reviews. Prior to that, she worked for several trade publications and in TV. She lived in Washington, DC, where she worked for Al Jazeera English in 2010. She studied journalism and holds a postgraduate diploma in International Business Management from the George Brown College in Toronto.

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Lewis leads MLex's editorial strategy, content direction, quality and development. He has a reputation for breaking stories and providing analysis on complex legal disputes before regulators and courts around the globe. He has also developed MLex's unrivalled coverage of competition policy, litigation, regulation, Brexit and international investigations. A graduate of Oxford University, Lewis worked in academia at the Charles University in Prague prior to becoming a journalist.

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Jenna came to MLex as an M&A correspondent after nearly two years at Law360, including one year as senior reporter for telecommunications. She has past experience as an investigative data researcher at LegiStorm. Jenna graduated from Boston University with a degree in English and has also worked as a local news reporter in Pennsylvania and North Dakota.

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Victoria joined MLex in our London bureau covering Brexit, financial services and competition, and now focuses on UK mergers and acquisitions. Prior to joining MLex, Victoria was a city reporter at the Daily Mail covering transport, retail and writing the daily market report. Victoria holds a law degree from the University of Nottingham.

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Claude Marx has been a reporter for FTCWatch since February 2013 and has written on a range of subjects such as the implications of certain mergers on consumers, the regulation of advertising and attempts by Congress to overhaul the patent system. He also writes regularly for MLex. Before that, Claude spent four years writing about the impact of legislation and regulations on community banks and credit unions as the Washington reporter for *Credit Union Times*, where he covered the government's rescue of some of the financially troubled wholesale credit unions. He earned his bachelor's degree from Washington University in St. Louis and did graduate work at Georgetown University.

Kathleen Murphy

Senior Reporter

Kathleen Murphy is a senior reporter for FTCWatch and previously served as an editor in the MLex Washington, DC, office. Murphy worked as a reporter and editor for CQ Roll Call, Stateline.org and Internet World. Early in her career, she served as the Marco Island bureau chief and columnist for the Naples (Fla.) Daily News. Murphy was Marymount University's inaugural journalist in residence for the 2019 to 2020 academic year. She earned degrees from Yale Divinity School and the Medill School of Journalism at Northwestern University.

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Austin covers mergers and acquisitions in Washington, DC. He studied Law, History, and Culture and Classics at the University of Southern California before joining MLex in 2021.

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Dave joined the Washington, DC, office as a technology reporter as we built out that part of our coverage. He is a veteran cybersecurity reporter for Politico and a former editor for FierceMarkets publications. Dave studied Spanish and Italian literature at the University of Colorado, and has a Master's degree from the Columbia University School of International and Public Affairs.

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Khushita Vasant

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Khushita covers US antitrust enforcement and litigation. A former Brussels hand writing about antitrust and mergers for PaRR, she has covered the EU's actions against Google, Apple, Facebook and Amazon, to name a few. Khushita specializes in tech and patent policy coverage, which featured in the Concurrences Antitrust Writing Awards. Previously, as a financial journalist for The Wall Street Journal and Dow Jones Newswires, she wrote about monetary policy and the bond and currency markets. Khushita studied journalism at Mumbai University, and received an Erasmus Mundus scholarship for a joint master's degree from universities in Germany and Austria.

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Xu Yuan has worked for MLex since 2014, based in Hong Kong. She has reported on a wide range of regulatory topics, including antitrust, cybersecurity and data security, in mainland China, Hong Kong and Taiwan. She has broken numerous stories on policymaking and enforcement involving international companies doing business in the region and done substantial court reporting in Hong Kong. She is currently specializing in covering regulatory issues related to future mobility, including connected vehicles. She previously worked for US TV network NBC in Beijing. She received her undergraduate degree in English Literature and Linguistics from Peking University and a master's degree from the Journalism and Media Studies Centre at The University of Hong Kong.

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Our latest edition focuses on the key takeways from a bustling and varied ABA Antitrust Spring Meeting

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Contents

US Antitrust Trends

Contents

US Cartel Enforcement

US Merger Control

Contents

US Privacy & IP Trends

International Perspectives

US Antitrust Trends

US state enforcers face 'no shortage of bad guys' as they fill federal antitrust gap in enforcement, says New York official

By Michael Acton

Published on April 6, 2022

US state attorneys general have stepped in to fill a gap created by years of underenforcement of antitrust laws at the federal level and find themselves with "no shortage of bad guys" as they consider which lawsuits to bring, a New York official said today.

Chris D'Angelo, New York's chief deputy attorney general for economic justice, also questioned the view that federal judges are better placed than regulators to understand and crack down on anticompetitive conduct by companies.

D'Angelo, whose office led a landmark antitrust lawsuit against Facebook which was dismissed by a district court judge last year, and is reportedly also involved in an ongoing multi-state investigation into Amazon, was speaking on an ABA Antitrust Spring Meeting panel.

"For the first time in a very long time, the states have felt that they need to step in to fill a gap that we perceived and we saw over the last 15 or 20 years," he said. He pointed to state enforcers' attempt to block T-Mobile's acquisition Sprint in 2019 — a move which was ultimately unsuccessful — as a sign of this turning point.

"It wasn't successful of course, but we're not afraid to lose cases if we believe they are righteous and the right thing to do," he said. "Our willingness to step in and act independently of the federal government is something that's new, and it's a consequence of realizing that we can't simply rely on the federal government always to do the enforcement work, because they really weren't doing it for so long."

FEDERAL COURTS

Today, D'Angelo also discussed the challenges of bringing antitrust lawsuits in the federal courts.

"The statutes that are out there are broad, there's been some case law that has narrowed them in some ways that we think are unfortunate, but we don't think that even under that existing case law that we can't address many of the issues we see with concentrated industries, dominant tech firms."

States are also pushing for legislative change, D'Angelo said. And he pushed back against a fellow panelist's comments about federal judges being more appropriate arbiters of what constitutes an antitrust violation.

He challenged "the idea that an Article III judge is »»

somehow better equipped to apply the antitrust laws to a complicated industry than — than not congressman, but a regulator who is picked for their expertise, goes through a Senate confirmation process, and is then put in place with a team of experts."

"That that's somehow going to create outcomes that are less tethered to the realities of how the market and the world and the economy works than an Article III judge, who deals with any number of cases on any topic and maybe deals with one antitrust case a year … is somehow going to be better-equipped to apply the antitrust laws to that specific situation … it's just hard to imagine how that could be the case," he said.

The success of the Chicago school of economic thinking has resulted in the courts being "not as effective as they could be," D'Angelo said. "In the last 20 years there's been a marked shift in the way the law has been interpreted by the courts, and for every type of conduct now, defense counsel — I think in many ways aided by the federal agencies who bought into it for a period of time — have tried to put every type of conduct into a very narrow box," so that four of five different types of anticompetitive conduct that reinforce monopoly power have to be evaluated individually with a four-part test.

"But on the other hand if you took a step back and you looked at how conduct A magnified and enhanced the effect of conduct B, you might not then want to sort of apply the same rigid test to conduct B."

D'Angelo pointed to an amicus brief filed by a group of economists in support of the states' appeal of the dismissal of their case against Facebook as an example of this more nuanced take on antitrust violations.

"It's one of the reasons why people I think are saying maybe we can't look to the courts to solve this problem entirely, we need to look to a regulatory structure that's a little bit more nimble," he said. "Because Article III judges, maybe they can't apply a more nuanced test because they are not doing this every day and they need crutches like that to apply the different economic circumstances. But it's just not the way the world works." ■

"For the first time in a very long time, the states have felt that they need to step in to fill a gap that we perceived and we saw over the last 15 or 20 years," D'Angelo said. He pointed to state enforcers' attempt to block T-Mobile's acquisition Sprint in 2019 — a move which was ultimately unsuccessful — as a sign of this turning point.

Google's discovery disputes with DOJ, states offer opportunity to 'get educated' on case, Judge Mehta says

By Michael Acton

Published on April 6, 2022

Overseeing Google's discovery disputes with the Department of Justice and state enforcers suing the tech giant for its alleged monopolization of the search market offers an opportunity to "get educated" on the "sprawling" litigation, the judge in the case said today, explaining why he had not delegated discovery issues to a magistrate judge.

US District Judge Amit P. Mehta said the sheer amount of third-party discovery in the case, involving the likes of Microsoft, Apple and Samsung, had been "a bit of a revelation" to him, and that he is urging third parties to come forward with issues as early as possible to avoid any delays to the fall 2023 trial date.

The landmark lawsuits at the US District Court for the District of Columbia, filed in late 2020, have seen an often heated back-and-forth between the enforcers and the tech giant over evidence and depositions in the case.

Recently, the DOJ accused Google of hiding ordinary business communications from discovery and asked for sanctions against the company.

Speaking on an ABA Antitrust Spring Meeting panel today, Mehta explained why he opted to handle discovery in the case right from the outset and reflected on the success of the process so far.

"In these cases where the government is bringing enforcement actions, it's the trial judge's decision, and so I have used it as an opportunity to get a little bit educated about what the case is about, what the issues are in advance of the actual trial itself," he said.

Another benefit, Mehta said, is that "parties tend to be a little bit reluctant to bring discovery issues to the presiding judge, which is a good thing — so continue your reluctance."

METHODICAL CASE

Mehta compared the Google case favorably to the hectic process of handling merger cases, where tight deadlines are in play.

"The conduct litigation involving Google and the plaintiff states in that case resembles much more of a traditional litigation," he said. "For a judge for whom that's sort of our bread and butter — overseeing, particularly in DC, civil litigation — there's a slightly greater degree of comfort, at least for me in terms of managing that case." The fall 2023 trial date "gives you a sense of the pace at which that case is moving, and how sprawling it is," he said.

"What I'm trying to do — and I think it's been largely effective although some may disagree — is to make sure that two things are clear to the third parties," he said. The first is getting the message across that "you are not going to slow this case down," and the second is that "if you've got issues, bring them to my attention sooner rather than later."

The litigation against Google has drawn a number of large third-party companies into the discovery process, including the likes of Microsoft and Apple. "It actually has been a bit of a revelation particularly in this case — I saw some of this in a merger case, but it's been more acute in the Google case — of how much third-party discovery is conducted," Mehta said.

The third parties are "massive corporations with massive legal teams" and huge amounts of information running into millions of documents and requests for depositions of high-level employees.

"What I'm trying to do — and I think it's been largely effective although some may disagree — is to make sure that two things are clear to the third parties," he said. The first is getting the message across that "you are not going to slow this case down," and the second is that "if you've got issues, bring them to my attention sooner rather than later."

ECONOMIC ANALYSIS

Mehta was also asked about how he approaches economic analysis and expert reports in antitrust cases.

"What I've said in the past, and I think a lot of other federal judges have said, is that the economic evidence ultimately needs to marry up with the real-life business evidence that's being presented in these cases," he said.

In an earlier antitrust case, Mehta said he had "looked at what the real-world evidence was, and that's how I decided who to credit and who not to credit."

"Don't dumb it down but also remember the presentation of this evidence can't be pure math … it really needs to be rooted in and consistent with the real-life and business-world evidence," he said.

Mehta added that he seeks the "really critical" expert reports well ahead of time, so that he can read them carefully and ask intelligent questions, and that he appreciates executive summaries that someone without an economics degree can easily understand. ■

Execs of companies that plead guilty to antitrust crimes will lose presumption of non-prosecution, US DOJ's Powers says

By Max Fillion

Published on April 6, 2022

Executives from companies that plead guilty to antitrust crimes will no longer be afforded a presumption of non-prosecution, the US Department of Justice antitrust division's top criminal enforcer said today.

"Going forward, there will be no presumption that individuals from a company charged with an antitrust crime will receive non-prosecution protections," Powers told told an ABA Antitrust Spring Meeting event. Instead, the division will decide whether individuals get non-prosecution protections using principles of federal prosecution, Powers said.

The essential question to be asked, Powers added, is whether a non-prosecution agreement is the only way to secure an individual's cooperation and whether that cooperation is necessary for the public's interest. In considering that, division prosecutors will weigh the individual's degree of culpability, the timing of their cooperation and the importance of the matter.

The shift is part of the division's focus on individual accountability, Powers said. ■

‘Clickwrap’ arbitration agreements face growing scrutiny from US courts, California federal judge says

“Clickwrap” and “browsewrap” agreements are facing increasing scrutiny from US courts as they mull whether such arrangements can really bar antitrust cases from proceeding, a California federal judge said today.

US District Judge Jon S. Tigar from the Northern District of California said the use of such mechanisms to secure consent to go to arbitration is now increasingly seen in business-to-business contracts, with an ongoing “fight” over their applicability. Clickwrap agreements require users to click that they agree to terms and conditions, while browsewrap agreements state that, by browsing a website, a user assents to the site’s terms and conditions.

Tigar spoke on a panel addressing class certification at the ABA Antitrust Spring Meeting.

He addressed motions to compel arbitration, “a place where there is still a fight, and it is a fight that is going to grow in importance.” The motions deal with “agreements to arbitrate that are terms that are contained in a clickwrap or a browsewrap agreement,” Tigar said.

“As consumers, we are all used to clicking those terms of use [and] those terms of use often contain arbitration provisions,” Tigar said. “But now increasingly in the business-to-business context, for things like large capital expenditures or ongoing services.”

“[And] what’s happening is that the deal is getting done in a face-to-face way or on video, and then the entity is sending out its terms of use by email and the same clickwrap and browsewrap conditions are presenting themselves.”

Nothing on the screen will typically signal anything about an arbitration provision, without the user clicking through to the full list of terms, Tigar explained.

“District judges are being asked to get into things like ‘what’s the font size,’ ‘is it a different color’ — that matters, as it turns out — ‘what does it look like on a screen,’ ‘does it matter what kind of device you are looking at’?” he said.

“So that’s where the fight is, and if you are in one of those cases, if you are on the plaintiff side, I think you want to be thinking about those issues when you are drafting your complaint,” while for the defense, it will be “one of the first things” lawyers will be looking at, Tigar said. ■

By Michael Acton

Published on April 6, 2022

US DOJ simplifying language of financial, antitrust rules to help judges, juries, officials say

By Khushita Vasant

Published on April 6, 2022

The US Department of Justice is working to simplify terms related to complex anticompetitive conduct and exotic financial instruments to educate judges and juries so that they can better identify an unfair system when they see one, officials said today.

"So much of what our trial practice should be about, particularly whether it's in front of a judge or a jury, it really needs to start from a place of educating … about what the relevant law and principles are," Hetal Doshi, acting deputy assistant attorney general in the DOJ's antitrust division, said at the ABA Antitrust Spring Meeting.

"There is a way to start to think about how do we take the language of antitrust, you know, [such as] market allocation, price fixing, bid rigging, which seems so intuitive to all of us in this room and … make it much more accessible," she said.

Speaking on the same panel, Carol Sipperly, acting deputy assistant attorney general at the division, said it is important to make sure judges understand illegal anticompetitive conduct and its widespread harm.

"I do think the judges are coming to understand what this enforcement is all about … When it comes to juries understanding and judges understanding, I do think we're making progress … That's truly my goal," she said.

Doshi cited the "burgeoning area" of cryptocurrency fraud and other technical investigations that need to be simplified.

The DOJ currently has 21 criminal conduct cases pending trial and six civil antitrust and merger enforcement cases, Doshi said. ■

No-poach agreements 'undermine the American Dream,' DOJ's Price says

By Lewis Crofts & Michael Acton

Published on April 6, 2022

Deals between companies not to poach each other's staff are harming people "in a very personal way" and stopping them from improving their lives, a senior US Department of Justice official said today.

As the DOJ pursues DaVita and its former chief executive, Kent Thiry, in a Colorado federal court — an antitrust trial there kicked off Monday involving alleged no-poach agreements — the agency's director of criminal antitrust enforcement said pursuing such cases is the "right thing."

The DOJ has been probing no-poach agreements across a range of industries, with indictments brought in the healthcare and the aerospace sectors.

"These agreements are undermining the American Dream that you will be better off than your parents, that you will move up in the world," Marvin Price told the ABA Antitrust Spring Meeting in Washington, DC.

He said such agreements stop people from getting better jobs and earning more money to support their families. "They harm people in a very personal and direct way," he said, and he is "100 percent supportive" of the department's investigations. "We are doing the right thing and I am very proud of what we are doing."

To date, the European Commission has yet to punish such employment-market deals. But last year, Competition Commissioner Margrethe Vestager said the sector has attracted more scrutiny.

"Although we have not pursued a case so far, these cases are certainly on our radar," Maria Jaspers, director for cartel enforcement at the commission, said at today's conference. "We have a few cases that we are actively looking into and let's see what comes out of that." ■

US DOJ hiring seasoned litigators, trial attorneys to 'litigate on all fronts at all times,' official says

By Khushita Vasant

Published on April 6, 2022

The US Department of Justice aims to "litigate on all fronts at all times" and is going to hire more antitrust litigators to tackle the increasing workload of both civil and criminal litigation, an agency official said today.

The DOJ's antitrust division has more cases in litigation than any time in any recent memory, Hetal Doshi, acting deputy assistant attorney general in the DOJ's antitrust division, said at the ABA Antitrust Spring Meeting.

This includes six active civil litigations against Google, American Airlines, Penguin Random House, US Sugar and UnitedHealth and Change Healthcare. The agency also has 21 ongoing criminal lawsuits, including two trials that started in Colorado and Texas this week, she said.

The agency is "going to be adding to the overall trial litigation capabilities to meet this [litigation] demand, so that we can litigate on all fronts at all times," Doshi said. This would enable the agency to meet the litigation trajectory and velocity that it is hoping to have in the future, she said.

"What that would mean is that we're institutionalizing shared resources for trial teams like we have right now all over the country that are starting trials contemporaneously. … It also means that we're not going to be looking at costs as a gating factor to making our enforcement decisions," Doshi said.

The agency is expecting additional resources to be able to meet its litigation demand, the DOJ official said.

Speaking on the same panel, Carol Sipperly, acting deputy assistant attorney general at the division, said the DOJ is hiring on two fronts by recruiting trial attorneys as well as seasoned litigators who can help mentor younger attorneys.

The DOJ is trying to build a team so that any attorney will feel "absolutely compelled" to not just try cases, but try tough cases, Sipperly said. "We're continuing to hire people, but we will tell you, it's almost an easy time to put in an interest because people are feeling what's happening, and they want to be a part of it," she said. ■

Breakups need to be on the table for Big Tech, says US FTC chair's chief economist

By Mike Swift

Published on April 6, 2022

The chief economist to the US Federal Trade Commission's chair said today that structural remedies in antitrust cases affecting Big Tech and other industries are feasible and need to be restored to "the toolbox" of US antitrust enforcers.

Speaking at the ABA Antitrust Spring Meeting, John Kwoka said "the goal is to put structural remedies back in the toolbox of competition agencies." Kwoka said his economic research before joining the FTC shows that the five major US tech companies have made more than 900 acquisitions in recent years that have created "fault lines" within companies, which in some cases could be "natural divisions" for a breakup.

"It is appropriate I think that the agencies start to think about a more aggressive policy of breaking up companies along these fault lines," Kwoka said.

Kwoka didn't mention any companies by name. But the FTC is currently suing Meta Platforms, alleging that Facebook's acquisition of Instagram and WhatsApp nearly a decade ago has injured the quality of privacy protections for Americans.

Divestitures and spin-offs, both voluntary or imposed by regulatory actions, aren't all that uncommon in industry, Kwoka said, in markets such as electric utilities and telecoms. "My point is they are feasible and they are common, and these include a lot of major companies," said Kwoka, a professor at Northeastern University in Boston before joining Chair Lina Khan at the FTC.

The EU's behavioral remedies in its antitrust enforcement over Google Shopping shows that enforcers sometimes need to consider stronger remedies, he said. "At the end of the day, Google Shopping remains as dominant in terms of consumers' behavior, and so the remedy has not really been effective," he said.

Effective behavioral remedies may be particularly difficult to tailor to Big Tech companies because of the properties of the industry, and "a remedy that does not recognize this is simply a prescription for failure," Kwoka said.

Kwoka said he isn't arguing "that breakups should be done readily or as a first resort by agencies." But when behavioral remedies are not predicted to work, the FTC and the US Department of Justice "now need to think about structural remedies," Kwoka said. ■

US CFPB set to become more active in cryptocurrency, former official says

By Dave Perera

Published on April 6, 2022

The US Consumer Financial Protection Bureau will become more active in cryptocurrency enforcement, a former official today predicted.

The bureau has traditionally viewed cryptocurrency as an investment outside of its jurisdiction, said Laurel Loomis Rimon.

That posture is no longer tenable, especially given President Joe Biden's March executive order on cryptocurrency, Loomis Rimon said.

The order directs the bureau, among other federal agencies, to study the effects of digital assets and changes in payment systems. It also directs the bureau to consider "the extent to which privacy or consumer protection measures within their respective jurisdictions may be used to protect users of digital assets and whether additional measures may be needed".

The CFPB "can't stay on the sidelines anymore," the former Obama administration senior agency enforcement official said during the ABA Antitrust Spring Meeting.

The bureau doesn't have statutory language specifically addressing digital assets. But it does have authority to pursue "abusive" activities within the marketplace. Agency head Rohit Chopra has said he will revitalize use of that authority after a Trump administration lull. One area where the agency might use its authority is behind-the-scenes payment processing services, Loomis Rimon said.

Cryptocurrency services that facilitate the conversion of digital assets to fiat currency such as dollars might also be likely starting places for CFPB enforcement, she added. ■

US DOJ seeks to use increased budget to enforce algorithm-related antitrust issues, official says

The US Department of Justice is hoping to use extra funding in the agency's budget request to build enforcement capacities to tackle issues involving the use of algorithms, an official said.

The US Department of Justice is hoping to use extra funding in the agency's budget request to build enforcement capacities to tackle issues involving the use of algorithms, an official said today.

Michelle Rindone, assistant chief in the international section of the department's antitrust division, said President Biden's 2023 budget includes a request for the antitrust division to get an extra of $80 million next fiscal year. "We intend to put that money to good use and hopefully can use some of that money to increase our capacity in this area [of algorithms], to dedicate some of those resources to helping to build out our capacity in this area," Rindone said at the ABA Antitrust Spring Meeting.

But Rindone said the agency is right now "in active listening mode in terms of determining what the best next steps are for increasing our capacity in this area." The DOJ is "really trying to learn some of the challenges that other agencies have encountered in this area, but most importantly, some of the best practices that we really hit the ground running as our resource restraint starts to loosen up."

Rindone said the international section has also focused on "facilitating an interagency and international dialogue on the use of data analytics, for instance, to detect collusion that affects public procurement. She said the agency is learning a lot from its international counterparts in the UK and the EU.

Avery Gardiner, chief counsel of the Competition Policy, Antitrust and Consumer Rights Subcommittee of the Senate Judiciary Committee, said during the same panel that antitrust regulators should be given more resources to allow them to hire technologists and data scientists to deal with algorithm-related issues.

Rindone said resources are needed "not only help us investigate cases involving algorithms, but … [to] proactively use and develop algorithms to generate cases would also be incredibly beneficial."

She said algorithms can aid in the detection of misconduct. "But I think it's important to remember that even the results that are generated from such algorithms … would be certainly just an instance of … circumstantial evidence … not necessarily a definitive proof that an anticompetitive collusive agreement can happen." ■

By Xu Yuan

Published on April 6, 2022

New York federal court keeps antitrust cases on track despite Covid disruption, judge says

By Michael Acton

Published on April 6, 2022

New York's Southern District Court has stayed on top of a steady stream of antitrust litigation during the Covid-19 pandemic, despite the fact that some parts of the civil docket "exploded" in the last two years, Judge Denise L. Cote said today.

Speaking on the same panel, Alabama federal judge David Proctor noted the importance of appointing a good leadership structure in antitrust cases, using as an example the litigation against Blue Cross Blue Shield over alleged geographical market allocation, which he's presiding over.

At the ABA Antitrust Spring Meeting, Judge Cote, a senior judge for the Southern District, said the court had seen "essentially the same number of cases in the antitrust arena" filed in 2020 and 2021 as in 2019, but with far more securities cases filed in 2021.

"So some parts of our civil docket have exploded — our criminal docket in contrast really took a hit in 2020, and has only partially recovered in 2021 compared to 2019," she said. "Civil litigators, you continue to file, you continue to expect us to address your needs, and »»

I think by and large the federal court did," Cote said, adding that she's proud of the courage and ingenuity of courts around the country to adapt.

"I certainly have an up-to-date docket both on the criminal side and on the civil side," she said, noting her ruling in the Federal Trade Commission's case against 'Pharma Bro' Martin Shkreli earlier this year.

BLUE CROSS BLUE SHIELD

Judge David Proctor from the Northern District of Alabama joked that compared to his two fellow panelists — Cote and DC federal judge Amit Mehta — his court sees far fewer antitrust cases.

"We are not on a heavy diet of antitrust litigation, unless you are dumb enough to agree to accept the Blue Cross Blue Shield multidistrict litigation," he said.

Proctor explained how he manages complex cases like the litigation against BCBS. He reflected on the differences between the two groups of plaintiffs, one made up of subscribers and buyers of insurance, and the other comprised of healthcare providers such as hospitals and doctors.

"We are not on a heavy diet of antitrust litigation, unless you are dumb enough to agree to accept the Blue Cross Blue Shield multidistrict litigation," Alabama judge David Proctor said.

The two groups are "pretty much shoulder to shoulder on one of the major theories of the case, and that is the conspiracy to horizontally allocate geographic markets — now they have some different ideas about how that affected them, but they both agree that's bad, that shouldn't have happened," Proctor said.

But regarding the insurer's Blue Card program, the providers likened it to "the plagues that affected Israel," while the buyers were "perfectly happy with Blue Card" because they saw benefits to subscribers.

In that case, Proctor said he treated the appointment of lead counsel like a confirmation process for a federal nominee, arranging interviews — which he didn›t participate in directly — and appointing a special master. Proctor then had the plaintiffs nominate a slate with steering committees and lawyers who would work on the two tracks.

"They didn't agree with all the selections, but we worked it out and got a good leadership structure in place," he said. ■

US federal judges skeptical of 'hired gun' experts in antitrust cases, judge in Epic-Apple case says

US federal judges are more skeptical than juries about expert testimony and they ask themselves whether such academics are "hired guns or independent," the California judge who ruled that Apple didn't break federal antitrust law said today.

"I find experts to be much more credible when they will work for both sides," US District Judge Yvonne Gonzalez Rogers told the ABA Antitrust Spring Meeting, while adding that she finds it hard to throw out expert testimony from individuals with strong academic qualifications.

Gonzalez Rogers discussed the importance of expert witnesses at trial. At a trial last May in Epic Games' lawsuit against Apple over its alleged illegal monopolization of the iOS app ecosystem, several experts testified for both sides over the course of three weeks, offering strongly diverging views on the legality and effects of the tech giant's conduct.

That case is now before the US Court of Appeals for the Ninth Circuit, with Epic Games appealing the judge's finding that Apple didn't break federal antitrust law, and Apple appealing the judge's finding that it did break California's Unfair Competition Law.

Today Gonzalez Rogers fielded questions and gave advice on how experts should be presented at trial.

HIRED GUNS

"I think it's important for lawyers to think about who your audience is because I would pick an expert differently if I was in front of a judge than if I was in front of a jury," Gonzalez Rogers said. "Maybe they are the same people, but I do think that there are some differences."

"One is that if you are in front of a judge, you are going to have somebody who is much more skeptical, who is going to wonder: 'Are they a hired gun, literally, or are they independent?' And that matters, it matters to judges, it matters to me," she explained.

The question is: "Are you truly independent, do you really take each case, look at it. … I find experts to be much more credible when they will work for both sides," she said. "That particular piece is important, at least to me."

Meanwhile, the key issue for an expert facing a jury is their ability to persuade them, the judge said.

Gonzalez Rogers was asked what she thought about excluding expert testimony under Daubert motions, and replied that she found it difficult to throw academics out of court.

By Michael Acton

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"You're bringing me the economist from Penn next to the economist from MIT next to the economist from Stanford next to the economist from Princeton, and I'm supposed to just throw them out?" she said.

"It's hard, it's hard to do that. We don't like to get reversed. And they have expertise, they have a reason for their opinion — you all just disagree on the fundamentals. It's hard to throw people out like that. Sometimes I have. I would say it's the exception, not the rule," Gonzalez Rogers said.

EXPERT TIPS

Strong cases are built on "pyramids" of experts, Gonzalez Rogers said. "I think that the strongest experts are experts who, if they don't have the data, then they are working with other experts who are experts in those areas — and so if they are getting fed information from other experts, it's like a pyramid of experts."

Strong cases are built on "pyramids" of experts, Gonzalez Rogers said. "I think that the strongest experts are experts who, if they don't have the data, then they are working with other experts who are experts in those areas — and so if they are getting fed information from other experts, it's like a pyramid of experts."

She encouraged back-to-back expert testimony because, she said, it makes things easier for the judge or jury to digest the complicated arguments all at once. She did concede, though, that plaintiff or defense lawyers may not like such arrangements because it could disrupt the flow of their case as they set it out.

The judge encouraged experts to concede points under cross-examination "because it shows that you are thinking, that you are being independent." Another thing that can play well is using media creatively.

"I would encourage you all to really think creatively about how you present" complex economic cases, Gonzalez Rogers added. "They like it when you bring in the fancy 'here's how this works' … so be creative, that's the fun part about trials: it allows you to be creative and to talk to people and to teach them."

A dialogue must be maintained because too often experts "don't concede that the sky is blue when it's blue outside," the judge said.

"The best experts are the ones who can maintain that dialogue through cross and just undercut everything the lawyer is trying to do," she said. "But those experts, I have to tell you, they are rare — but they are incredible to watch." ■

Senior US House Antitrust Subcommittee staffer predicts passage of Big Tech app, self-preferencing bills

By Claude Marx

Published on April 7, 2022

The chief counsel of the US House Judiciary Antitrust Subcommittee said today he's "very optimistic" that lawmakers will pass two bills later this year aimed at reining in Big Tech.

"This is a make-or-break moment, it's one we we've worked hard to get to," Slade Bond said at the ABA Antitrust Spring Meeting. "They represent real recognition of the need to do more and that the status quo isn't working."

The American Innovation and Choice Online Act would set out rules preventing Big Tech companies from preferencing their own products over third parties that operate on their platforms. The Open App Markets Act would force Google and Apple to allow third-party app stores and payment services on their devices and impose other app store rules.

The self-preferencing measure was passed by the House Judiciary Committee last June and the app bill was passed by the Senate Judiciary Committee earlier this year.

On the sidelines of the conference, Bond declined to give a timetable for floor action, but said it will probably occur before the August recess.

On the House side, the bills followed the antitrust subcommittee's 16-month investigation into digital markets.

Speaking at the conference, former Federal Trade Commission member Terrell McSweeny said there could be consensus for additional money for the Department of Justice and FTC. But McSweeny, a former senior staff member of the Senate Judiciary Committee, also said there's little chance of lawmakers passing more comprehensive antitrust legislation this year.

She added that passing a major bill is a multi-year process and "I am not holding my breath." But McSweeny said that once the Senate confirms Alvaro Bedoya to be the third Democratic member of the FTC, "you could well see the FTC embark on rulemaking on labor markets."

Last year, US President Joe Biden issued an executive order urging the FTC to ban or limit non-compete agreements and ban unnecessary occupational licensing restrictions that impede economic mobility. It also called on the FTC and DOJ to strengthen antitrust guidance to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information among themselves. ■

US DOJ official says problems in state-federal antitrust enforcement cooperation may need legislative or regulatory fix

"Structural problems" get in the way of state and federal antitrust enforcers working together that may require a resolution through either legislation or regulation, a senior US Department of Justice official said today.

Sarah Allen, counsel to the DOJ antitrust division's assistant attorney general, said at the ABA Antitrust Spring Meeting that the states' relationship with the DOJ has "ebbed and flowed" over the years but has remained a little more constant with the US Federal Trade Commission.

She was responding to a question on what the relationship between states and federal agencies is like and how the enforcers ensure they are aligned.

There are "some structural problems that are more difficult to pass," Allen said.

One of these is the lag in the states' getting involved in merger reviews because of the confidentiality restrictions under the Hart-Scott-Rodino Act. It requires states to get waivers from merging parties before they can work together with the federal agencies.

"Sometimes the merging parties game the system," which really delays the mergers, Allen said. It also puts states at a disadvantage because they have to catch up.

"It's not good for DOJ or the FTC when that happens because they have to circle back and get the states up to speed. That's probably something that's going to require legislation or regulation to fix," she said.

Since starting at the DOJ, Allen said, several people from the agency's front office have expressed interest in wanting to work better with the states. "So, we want to develop new internal protocols and increase our participation with the states on non-case matters." This could be, for instance, having a DOJ representative on the states' labor committee that does open calls every other month.

Allen, who recently left her position as senior assistant attorney general and antitrust unit manager at the Virginia attorney general's office, said her new job at the DOJ is a good opportunity to work on institutionalizing the way DOJ and the states work, "so we can insulate the political pressures" that emerge. ■

By Khushita Vasant

Published on April 7, 2022

Antimonopoly law is key to solving 'great democratic crisis,' New York official Teachout says

By Xu Yuan & Michael Acton

Published on April 7, 2022

Antimonopoly laws have always had a democratic purpose and should be used to address issues such as freedom, speech and citizenship, an official at the New York attorney general's office said.

"We are in, globally and domestically, a moment of great democratic crisis," Zephyr Teachout, senior counsel for economic justice in the New York AG's office, said at the ABA Antitrust Spring Meeting today, pointing to reports about Amazon banning workers from using certain words on a company app as an example of how monopolies affect individual freedom.

"Antimonopoly tools are some of the most important tools for addressing the crisis of power and freedom," Teachout said.

She referred to reports that Amazon is developing an internal chat function to ban certain words like restroom, plantation, slave, and freedom.

"I don't think it's credible to claim that market structure is irrelevant to questions of freedom, speech and citizenship," or "to say that concentrations of private power collected in limited liability companies with unlimited life is not directly relevant to questions of freedom and democracy," she said.

As a result, Teachout said she personally "would actually favor a move towards a more structural approach, a more per se approach, precisely because I see democracy and freedom as a core purpose of antitrust laws … as opposed to asking judges to have an endless laundry list."

Issues related to assessing economy such as stability, resilience, decentralization, and local communities are "fundamentally, deeply political questions," Teachout said, noting that lawmakers pushing for legislation on antitrust issues have always talked about freedom and dignity. ■

Antitrust law can be reclaimed from courts by elected lawmakers, US judge says

By Michael Acton

Published on April 7, 2022

"Legally concrete" steps can be taken by US legislators to tighten federal antitrust law and move its evolution out of the hands of judges, US Circuit Judge Diane P. Wood said today.

Wood, who sits on the US Court of Appeals for the Seventh Circuit, speculated that adjustments could be made to the market power analysis applied in mergers, or new rules codifying what conduct is permitted by the biggest firms, but cautioned against adopting too broad an interpretation of the purpose of the antitrust laws.

Wood emphasized that as a sitting federal judge she isn't necessarily advocating a specific course of action.

Wood was sitting on an ABA Antitrust Spring Meeting panel with Zephyr Teachout, senior counsel at New York's Office of the Attorney General, and pushed back against Teachout's suggestion that a core purpose of US antitrust law is to preserve democracy and the dignity of the individual. "Maybe this is the way that judges are supposed to look at things, but I think it's not at all a given that antitrust laws are about the preservation of democracy and dignity," Wood said. The language of the statutes, after all, applies to very specific behavior by firms, regardless of the political motives of those who passed them, she reasoned.

A slew of antitrust bills are pending in Congress aimed at curbing the power of big tech companies like Google, Facebook, Apple and Amazon. Today, Wood didn't speak directly to any of these bills but said some sort of legislative action could be helpful for the courts. "Perhaps the law should be, as it is in some countries, more specific about exactly what is permitted and what is forbidden," she said. "But if we really want to say … that if you get too big it actually eats away at the very democratic foundation of our government, that may be, but you need a law to be enacted."

"And maybe you need a law that doesn't put as much authority and responsibility for developing the law in the hands of judges," she continued. The Supreme Court has repeatedly observed that the rather broad statutes of US antitrust law have left judges with wide discretion to decide how they should be applied, Wood noted. "Maybe you need more democratic accountability in the very articulation of the law, rather than tossing it over the judiciary to see what they are going to do."

Wood, who has served on the federal appeals court in Chicago for nearly three decades, had advice today for antitrust plaintiffs. First, courts need to have clear signals from plaintiffs about the remedies they require. »»

Lawyers need to decide, "do you want to require compulsory licensing of a patent, do you want to require some sort of open architecture if there is a monopolist, do you want to require just a payment of damages of some sort, do you want to stop a merger?" And then, she said, they need to ask themselves whether that remedy is something the court can impose.

She conceded that some freedom exists to view the purpose of the antitrust laws beyond simple questions of price or output. In his landmark work "The Antitrust Paradox," Robert Bork asserted that Congress was preoccupied with only these factors when it first passed the laws, she said. "Frankly that's just not true, it's not sustainable; Congress passed a messier statute than that." But reformers should "be careful what [they] wish for."

In the current debate about whether or how to curb outsized market power "you have this tension between trying to encourage the best out of all of our companies, and then the notion that there are special rules if you get to be somehow too big," she said.

In the current debate about whether or how to curb outsized market power "you have this tension between trying to encourage the best out of all of our companies, and then the notion that there are special rules if you get to be somehow too big," she said.

"I think that really what we need to focus on is: What are we asking of these companies? Are we saying something along the lines of there are certain tactics, certain business measures that are permissible in the competitive battle and others are not?" Wood said.

Wood today theorized about the steps legislators and regulators may take to sharpen the antitrust laws.

"One could imagine, as happened when the Clayton Act was passed in 1914, an effort to articulate more precisely what kinds of practices are forbidden for firms to agree about, what kinds of practices are forbidden for single firms, what's the market power threshold that you are going to use," she said.

And "maybe we have just been using the wrong market power threshold in our merger analysis and in our Section 1 concerted action analysis — and if we tightened the screws on that a little bit, maybe we would come closer to the antitrust regime that would permit those competitors to survive." And reformers could "play with the idea of per se rules," potentially triggered "at a certain market level."

"So there are actually legally concrete things that can be done, if you think that the pendulum has swung too far and has allowed our economy to become too concentrated, has deprived consumers of the kinds of choices that they should have, and has also made it difficult to maintain the vibrant infrastructure of rivals in the market that helps this country grow," Wood said. ■

Google's evolving adtech model hinders presentation of trial case, determination of remedies, says Nebraska AG

Google's constantly changing model in its advertising technology business poses difficulties for presenting facts of the case and determining what an appropriate remedy would be, Nebraska Attorney General Doug Peterson said today.

"My concern is that as I see in the adtech case that was brought by several states … they are changing their models all the time and so it seems like we are constantly chasing [that] and then, what is an appropriate remedy?" Peterson said at the ABA Antitrust Spring Meeting in Washington, DC.

Texas is leading a multistate antitrust lawsuit that accuses Google of violating federal and state antitrust and consumer deception laws through its illegal monopolization of technology used to target display advertising. Google has moved to dismiss the charges, arguing that it didn't force ad publishers into tying or unfair auctions, and that the thrice-rewritten complaint "misses the law and the facts".

The multistate case was consolidated in August 2021 with other litigation over Google's adtech business in the Southern District of New York.

"I'm realistic that there are a lot of difficulties and I do think our biggest challenge is at the trial when we are presenting the case in such a way that it doesn't get lost in minutia," he said.

In response to a question about whether state AGs should be worried about US judges' inability to grasp the workings of fast-moving dynamic technology markets, especially if they impact judgments adversely for the states and federal government, Peterson admitted there are challenges.

"That's the challenge with anyone trying any case, is to get the judge to understand the big picture. It's also a challenge particularly with antitrust cases. Every district court judge is different in their ability to respond to that," the Nebraska AG said.

"It's an important realization and understanding that each judge is going to apply the consumer welfare standard rule a bit differently," Peterson said, while saying he remained "optimistic."

"The Microsoft case gave those in the DC Circuit and district court a pretty good model of applying it [antitrust laws] so I'm optimistic about that," he said. ■

By Khushita Vasant

Published on April 7, 2022

Antitrust section of American Bar Association only 5.3 percent racially diverse

By Austin Peay

Published on April 7, 2022

Yet-to-be-published data from the American Bar Association shows that only 5.3 percent of the membership of its Antitrust section is racially diverse. The statistics were unveiled today at a sparsely attended panel on the lack of diversity in antitrust during the ABA's Antitrust Spring Meeting event.

According to the data, for which results were split up by gender and race, Black women make up 0.7 percent of the antitrust section; Asian women account for 0.7 percent; Hispanic women account for 0.5 percent, and Native American and Indigenous women make up 0.1 percent.

Racial diversity for men in the antitrust section isn't much better. The data says Black men make up 0.5 percent of membership; Asian men comprise 1.4 percent; Hispanic men account for 1.2 percent; and men that identify as Native American and Indigenous make up only 0.1 percent of the section. There is such a lack of Middle Eastern and Northern African membership in the section that the two have been combined in the ABA's data set and only account for 0.1 percent of members.

The ABA's website says its members in the Antitrust section include "attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students."

While the ABA wasn't immediately able to provide the number of members in the Antitrust section, the data shows that around 95 percent identify as white.

Meanwhile, 29 percent of the Antitrust section identifies as women, showing not just a gap in racial diversity in the group, but a lack of gender diversity as well. ■

Labor market antitrust enforcement spurred by awareness of inequality, Washington state AG official says

The increase in antitrust cases focusing on labor markets was in part spurred by the general public's increased attention to wealth disparities and income inequality, a senior official for the Washington state attorney general's office said today.

The lack of enforcement was partially due to policy choices, but it was also because "we didn't know what we didn't know," Rahul Rao, a Washington state assistant attorney general, told an ABA Antitrust Spring Meeting audience.

"In the last decade or so … the idea of income inequality and wealth disparity has just been catapulted to the forefront of everyone's mind," Rao said. "Not just the enforcement community, but to people on [Capitol] Hill, to academics in economics departments, and … at the kitchen table around the country."

The attention given to inequality inspired a lot of "cutting edge research on labor markets and labor market dynamics," Rao said.

"It has shown us things about the pervasiveness of non-compete agreements, and the wide-scale effect that has across the board," Rao said. "It's shown us that franchise no-poach agreements exist." That hadn't been recognized until an academic paper was written about it, he said.

In recent years, Rao's office has pressured at least 155 fast food restaurants and other corporate chains to stop entering agreements with franchisees not to poach each other's employees.

At the federal level, the US Department of Justice has filed criminal cases against companies and individuals for no-poach agreements, and the Federal Trade Commission is considering a rulemaking to regulate non-compete agreements in employment contracts. Several states have passed laws banning or limiting the use of non-compete agreements in employment contracts.

Rao said that although some state laws ban non-compete agreements below a certain income threshold, agreements above that threshold are not necessarily legal.

He also said that variety among state non-compete laws helps form the national conversation.

"That has allowed the economists … to get to see natural experiments at work," Rao said. "They're able to better quantify what the value is of a non-compete by looking at" different states, he said. ■

By Max Fillion

Published on April 7, 2022

Former US FTC chairs disagree on use of Section 5 in labor cases

By Khushita Vasant & Claude Marx

Published on April 7, 2022

Two former US Federal Trade Commission chairs today clashed over how aggressively the agency should use its Section 5 authority to target unfair labor practices.

"If I'm at the FTC, I'd take a crack at no poach agreements and non-compete [clauses]. I think it's worth it. ... the rules are pernicious, the contracts are pernicious," Jonathan Leibowitz, senior counsel at the Office of the Attorney General of Maryland, said at the ABA Antitrust Spring Meeting.

Leibowitz was sworn in as a commissioner in September 2004 and was designated chairman of the FTC in March 2009 by former President Barack Obama.

Enforcers also are supposed to ensure that consumers are protected from anticompetitive behavior and "if you believe that that is taking place and that the courts have been pretty difficult to prove that [to], then maybe there's a role I happen to think here for the FTC in using its, flexing its Section 5 muscle," he said.

"At the end of the day, so the worst that will happen is that a court will say no," the Democrat former chair said.

However, Maureen Ohlhausen, speaking on the same panel, insisted "that's not the worst [thing]. The agency could end up in political hot water," as the agency hasn't used its resources to pursue other enforcement where the harm is more evident, she said.

Ohlhausen, a Republican, served as acting FTC chairman from January 2017 until April 2018.

Leibowitz agreed with Ohlhausen and said while there are concerns about political hot water on one side, on the other side there are the goals of the agency. "I think we also get a good antitrust case or good conduct case." ■

US FTC's top competition official says agency will make aggressive use of Section 5 powers

By Claude Marx

Published on April 8, 2022

The US Federal Trade Commission plans to use its authority under Section 5 of the FTC Act to go after anticompetitive labor practices and cases limiting consumer choice in product repairs, Bureau of Competition Director Holly Vedova said today.

"The case law and precedent are really strong, and the FTC should use it," she said at the ABA Antitrust Spring Meeting.

She noted non-competes prevent millions of people from working for rival companies and obtaining better wages and working conditions.

She said the agency sees as its mandate to use its Section 5 authority to fill in gaps in other aspects of the law. Section 5 prohibits "unfair or deceptive acts or practices in or affecting commerce."

Last year, US President Joe Biden issued an executive order urging the FTC to ban or limit non-competes and ban unnecessary occupational licensing restrictions that impede economic mobility.

The order further called on the FTC and Department of Justice to strengthen antitrust guidance to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information.

Regarding product repairs, Vedova stressed the FTC has long maintained that when companies place restrictions on which entities can fix their products, it hinders competition and hurts consumers.

Vedova also reiterated the agency's plans to beef up enforcement by seeking more information from merging companies.

She said other competition authorities, such as the EU, collect additional details about topics such as market overlaps earlier in the merger review process. The FTC often must seek that information later, which can slow things down.

Vedova said the information will help the agency better evaluate how mergers affect labor markets; cross-market effects of transactions; and how a merger will affect incentives to compete.

The agency is developing a permanent premerger e-filing system, she added. It established one on an experimental basis two years ago and has been pleased with the results. ■

US DOJ 'just getting started' on civil, criminal antitrust enforcement, Kanter says

By Khushita Vasant

Published on April 8, 2022

Jonathan Kanter, the chief of the US Department of Justice's antitrust division, today said agency officials are "just getting started," even as the DOJ pursues more lawsuits than at any time in in recent memory.

"We are firing on all cylinders," Kanter, assistant attorney general for antitrust, said at the ABA Antitrust Spring Meeting. "We are not afraid to take on big cases and big companies. On all fronts, we are just getting started."

Kanter said the DOJ is expanding its reach "beyond the Washington, DC, Beltway" so that the agency can be faithful to the goals of US antitrust law by reaching out to a broader range of stakeholders.

The DOJ also is "not going to let up" on its criminal enforcement program and will go after individuals and companies. "We will not hesitate one bit" to seek the full extent of remedies in cases, Kanter said.

Kanter said the DOJ is currently pursuing more than 20 criminal conduct cases that are expected to go to trial, as well as six civil antitrust and merger enforcement lawsuits. ■

US FTC to seek industry bans and individual accountability, says Chair Khan

By Max Fillion

Published on April 8, 2022

The US Federal Trade Commission will keep seeking industry bans and personal accountability in antitrust cases, Chair Lina Khan said today.

"We're going to continue to push for individual accountability and industry bans where appropriate," Khan told the ABA Antitrust Spring Meeting.

A New York federal judge recently banned "Pharma Bro" Martin Shkreli from the drug industry for life, siding with a case brought by the FTC and several state attorneys general accusing Shkreli of monopolizing the market for a life-saving toxoplasmosis treatment drug. He was also ordered to pay $64.6 million.

Khan cited the win in saying the FTC would continue to push for similar outcomes in other cases where appropriate. ■

US FTC is closely following algorithmic decision-making, official says

By Xu Yuan

Published on April 8, 2022

The US Federal Trade Commission is following the development of algorithmic decision-making systems closely over the potential for a wide range of harms in connection with bias or discrimination, an official said.

The US Federal Trade Commission is following the development of algorithmic decision-making systems closely over the potential for a wide range of harms in connection with bias or discrimination, an official said.

"[This] is an area that we're watching quite closely, in part because we've heard a great deal of concern about this from many of our community partners and stakeholders," Robin Wetherill, an attorney from the division of privacy and identity protection at the FTC, said today at the ABA Antitrust Spring Meeting.

The official said artificial intelligence has enabled so great a scale of private data collection "that it allows reasonably accurate inferences of characteristics about consumers even when those consumers do opt out."

"In some cases, when consumers are presented with choices, those choices are illusory. Some consumers have even less control over how they're interacting with companies and how they're allowing companies to interact with them that isn't necessarily apparent from the dashboard," she said. ■

Connected car technology shows benefits of more 'holistic' US FTC cooperation, agency bureau chiefs say

By Mike Swift

Published on April 8, 2022

The multifaceted regulatory problems created by modern connected cars, including privacy, competition and safety, are one of the reasons the US Federal Trade Commission under Chair Lina Khan is pursuing a more holistic regulatory approach, the FTC's competition and consumer protection chiefs said today.

Speaking at the ABA Antitrust Spring Meeting in Washington, DC, Holly Vedova, director of the FTC's Bureau of Competition, said an agency policy last year that restrictions on consumers' "right to repair" products such as connected cars will face heightened antitrust scrutiny is just one example of how the FTC is trying to cross-pollinate its privacy and antitrust enforcement efforts.

Emerging technologies such as connected cars that combine the software and automotive industries are "the precise reason why Chair Khan feels we need to take this more holistic approach to everything. New businesses are just operating in completely different planes than before," Vedova said. "As a result, we've made a really big push to bring antitrust and consumer protection sides together to work more closely."

"With today's digital technology, privacy and competition go hand in hand, and monopoly power can lead a whole firm to engage in serial privacy violations," Vedova continued, which means that when the Bureau of Competition is working on an antitrust complaint, "we're considering where there are consumer protection concerns and vice versa."

"We are one team," echoed Sam Levine, chief of the FTC's Bureau of Consumer Protection. "The FTC is one team." The FTC is baking that cooperation into its daily operations, the two bureau chiefs said, such as by tracking companies' Hart-Scott-Rodino merger filings to see if those firms also are currently under investigation by the Bureau of Consumer Protection, Vedova said.

"The agency is really well formatted for this type of collaboration, I think," she said.

The increased cross-pollination between the bureaus of competition and consumer protection and the Office of Policy Planning "is already paying dividends" in concrete investigations, Levine said, "and I think our work on right to repair complements each other to deliver better outcomes for the public." ■

Bad precedent in predatory-pricing cases can hide important dynamics in digital markets, FTC Chair Khan says

By Max Fillion

Published on April 8, 2022

Bad precedent on predatory pricing has caused courts to miss important dynamics in digital markets, Federal Trade Commission Chair Lina Khan said today.

Bad precedent on predatory pricing has caused courts to miss important dynamics in digital markets, Federal Trade Commission Chair Lina Khan said today.

Current precedent offers "a fairly dim view of the likelihood that firms will engage in predatory pricing," Khan told an ABA Antitrust Spring Meeting audience. "The courts in those cases effectively say predatory pricing is an irrational business practice because you're losing money without any guarantee of recouping it."

The precedent holds that the minute a company attempts to raise prices, the market will see a flood of new entrants that come in and discipline that company, Khan said. That has led courts to impose an element requiring plaintiffs to show that the defendant will be able to eventually recoup the losses they've taken for offering predatory prices, she said, causing successful predatory-pricing cases to plummet.

This interpretation could miss important dynamics in digital markets in particular, where "data feedback loops," and other features of the market reward business strategies that are designed to capture the market as quickly as possible, Khan said. And once the market is "tipped" and a company has captured a significant share of the market, smaller firms can face significant barriers to entering the market.

"[T]hat entry that the doctrine assumes will come and discipline the firm might not occur," Khan said. "It's incumbent on the agencies to really be showing the courts ways in which we may need the law to evolve to better match some of the realities that we're seeing." ■

US antitrust chiefs ultimately seek to provide more certainty with reassessment of enforcement

By Mike Swift & Khushita Vasant

Published on April 8, 2022

Broader market forces, not US enforcers, are driving the state of uncertainty around the current reassessment of US antitrust enforcement, but the goal of that reassessment is to create more certainty, the chiefs of the US Federal Trade Commission and the Department of Justice's antitrust division said today.

"It's fair to say we presently see broad reassessment of the antitrust laws and their advocacy," FTC Chair Lina Khan said at the ABA Antitrust Spring Meeting in Washington, DC, today. "This is bigger than the antitrust enforcers. This is a national conversation; it's in many ways a global conversation. So anytime you have these moments of reassessment there can be the elements of uncertainty."

But given that current US antitrust enforcement "is not currently a model of certainty and predictability," the enforcers' goal over the long term is to provide more certainty, Khan said.

DOJ antitrust chief Jonathan Kanter echoed Khan's views that there is a "global conversation" on changes to antitrust law enforcement.

"Change means sometimes things have to change. There will be uncertainty. But we are going through the process, in my view, with radical transparency," Kanter said.

The DOJ is engaging with the antitrust bar — and not just a small set of practitioners — as well as the public, Kanter said.

"We are also expanding the scope of the people that we are talking to, and this is something that is getting overlooked," Kanter said. "And certainly, it may not be a welcome development from certain folks in the antitrust bar, but what we are doing is we are not providing special access [to] folks who can afford it, who can hire expensive lawyers. We are out there talking to the public. We are expanding the scope of our conversations."

The current ambiguity in US enforcement for merger and conduct cases leaves enforcers with a choice, Khan said. Either they underenforce the laws, and only pursue the most serious violations, or they engage in a pro-active clarification of enforcement.

"That's the route we're taking. Our effort to revisit the merger guidelines is part of this," she said. "The goals of providing more certainty and predictability are very much central to a lot of these efforts." ■

US antitrust community should look to antitrust statutes' principles, not consumer welfare standard, Kanter says

By Khushita Vasant

Published on April 8, 2022

The US antitrust community needs to go back to the guiding principles enshrined in the country's statutes instead of the consumer welfare standard, the meaning of which is fraught with disagreements, Department of Justice antitrust chief Jonathan Kanter said today.

Kanter, who is assistant attorney general at the DOJ's antitrust division, said the consumer welfare standard gets a lot of discussion in narrow antitrust circles.

"In my experience, if you ask five antitrust lawyers 'What does the consumer welfare standard mean?', you will get six different answers," Kanter told the ABA Antitrust Spring Meeting in Washington, DC. "So, the whole idea of something being a standard is for there to be agreement as to what it means."

Despite the concept having been propounded for 30 to 40 years, there's still no agreement as to what it means, he said.

Kanter said he recently witnessed well-respected antitrust scholars debating whether the standard has to do with total welfare, total surplus, consumer surplus, or consumer welfare.

He said there is no standard economic or legal definition of the consumer welfare standard. "And so, we have to start going back to first principles. Let's look at the language of the statute," he said.

"If the goal is to protect competition and the competitive process, that's what we ought to do," Kanter said. "That's how it's written on its face as written by our Congress in the United States and that should be our guiding principle."

The antitrust community can have a broader conversation academically about consumer welfare, "but I'd like to point out that something is not a standard unless there's broad-based agreement as to what it means." ■

Wilson says FTC Democratic leadership promotes Marxist worldview

A Marxist worldview imbues the outlook of the US Federal Trade Commission's Democratic leadership, according to Republican Federal Trade Commission member Christine Wilson.

Wilson said FTC Chair Lina Khan and other Democratic Neo-Brandeisians despise the rule of law, the consumer welfare standard, mergers, efficiencies, low prices, the FTC and the American Bar Association.

A united worldview connects it all, Wilson said. "They seek total control of the economy."

The "New Brandeis" school of antitrust is named after Louis Brandeis, a US Supreme Court justice in the first half the 20th century. The philosophy expands analysis of antitrust violations beyond harm to consumers.

According to Wilson, the Neo-Brandeisians view the status quo as a politicized exercise that reinforces existing inequities.

"The bottom line, according to Marx, is that capitalists steal from workers to obtain scale, lower costs, cheapen commodities and beat their rivals in the market," Wilson said, speaking to a conference via a Zoom call.* "A look at the beliefs of the NeoBrandeisians reveals many parallels. Chair Khan has sought to shift the focus from consumers to workers."

Wilson has issued scathing public indictments of the Democratic FTC leadership since Khan took office last June, and again criticized Khan for "destruction of collegiality and procedural norms" at the FTC.

"To her, staff are part of the corrupt establishment," Wilson said of Khan.

ANTITRUST AND DEMOCRACY

Wilson also referenced remarks at the ABA Antitrust Spring Meeting yesterday by Zephyr Teachout, law professor at Fordham University, regarding antitrust law's impact on democracy. Teachout's comments show "defenders of the status quo were labeled more than just wrong. They were labeled evil and corrupt," Wilson said.

Teachout drew a connection between democracy, antitrust law and diversity at a conference*, and referenced the collapse of Black-owned pharmacies, insurance companies and newspapers. ■

**Precautionary Antitrust: The Rule of Law and Innovation Under Assault Conference, April 8, 2022.*

By Kathleen Murphy

Published on April 8, 2022

US antitrust practitioners may see courts deal more with dormant commerce clause, California AG official says

Antitrust practitioners should watch for the way federal courts across different US states deal with the dormant commerce clause in lawsuits and how the clause could affect states passing laws that burden interstate commerce, a senior official from the California attorney general's office said.

"Dormant commerce clause is going to be an area that more and more of us are going to know more about, which is how do you deal with things you do in one state that might affect another state directly or indirectly," Paula Blizzard, supervising deputy attorney general in the antitrust section of the state Office of the Attorney General, said at the ABA Antitrust Spring Meeting.

Blizzard was responding to a question about the future use of state laws, particularly existing state unfair-competition laws and whether their use will be limited.

Under the dormant commerce clause, states can't discriminate against interstate commerce, and the clause can work as a check on the conduct of state governments. "So, this gets into the issue of 50 jurisdictions, and you have these two federal agencies and who knows who else mucking about? How do you figure out what to do?" she asked. Blizzard said this is an area of law practitioners will see emerge, and it came up in the Epic v Apple ruling.

The clause is "pretty straightforward" in the context of the Epic lawsuit because the injunction granted against Apple by the judge said the iPhone-maker, a company headquartered in California that drafted a contract in that state, can vote California law as the choice of law and can't enforce that contract in other states if it violates California law.

But "it would be different if, say, that decision came down in Texas, right? Can the Texas courts and maybe even the Texas state courts going up to the Texas Supreme Court, tell the California company what they can do and what they can't do?" Blizzard asked.

Many states are "looking very hard" at mergers and working on their own state laws in the area. States may want lower thresholds, or just a notification. These laws may also only be applicable to a particular industry such as hospital mergers, she said.

"So, I think there will be expanded state laws that address mergers, but it will also be in the context of the Hart-Scott-Rodino [Act] federal process," Blizzard said. ■

By Khushita Vasant

Published on April 8, 2022

Interlocking directorates to face more scrutiny from DOJ, Kanter says

By Max Fillion

Published on April 4, 2022

Interlocking directorates will face more scrutiny from the US Department of Justice's antitrust division, Assistant Attorney General Jonathan Kanter said today.

Interlocking directorates will face more scrutiny from the US Department of Justice's antitrust division, Assistant Attorney General Jonathan Kanter said today.

The DOJ can bring antitrust cases against interlocking directorates if a member of a company's board serves on the board of a competing company. The DOJ can prosecute such behavior under Section 8 of the Clayton Antitrust Act, which Kanter said provides a "bright line rule against interlocking directorates" that helps prevent collusion before it can occur.

"For too long, our Section 8 enforcement has essentially been limited to a merger review process," Kanter told an online audience today*. "We are ramping up efforts to identify violations across the broader economy and we will not hesitate to bring Section 8 cases to break up interlocking directorates."

Kanter also echoed recent remarks by the head of the antitrust division's criminal section, Richard Powers, who recently warned that the division stands ready to bring more criminal cases under Section 2 of the Sherman Act, which bars unlawful monopolization. According to the DOJ's own statistics, the agency hasn't secured a criminal conviction against an individual or corporation in a Section 2 case since 1979.

"Since the 1970s, Section 2 has been a felony just like Section 1," Kanter said. "In 2004, Congress increased Section 2's criminal penalties in lockstep with the increased penalties for Section 1 crimes."

The division will not hesitate to enforce the law if a criminal Section 2 charge is warranted, Kanter said. ■

**Spring Enforcers Summit, US Federal Trade Commission and US Department of Justice, April 4, 2022.*

US DOJ hiring, sharing resources to prepare for increased litigation demands, Kanter says

The US Department of Justice's antitrust division is hiring lawyers and engaging in more resource-sharing to meet its increased litigation demands, Assistant Attorney General Jonathan Kanter said today.

"Our goal is simple: we must be prepared to try cases to a verdict when we think a violation has taken place," Kanter told an online audience.* "And that means our capacity for litigation must grow with the demands of modern antitrust enforcement. In other words, the division must have scale to litigate multiples of our current docket."

For the first time in his memory, Kanter said, the DOJ has designated two acting deputy assistant attorneys general to oversee the agency's litigation docket: Carol Sipperly and Hetal Doshi. Both are experienced attorneys, Kanter said, who in combination with other senior DOJ attorneys will train junior litigators, supervise trial teams and help litigate especially complex matters.

The agency is "institutionalizing shared resources" and is in the process of hiring more lawyers from outside the department to grow and support its trial teams, Kanter said. "At bottom, we will work toward a steady state where the division is not constrained by the cost of litigation."

Kanter added that the agency plans to make good use of the additional $80 million for the DOJ requested in President Joe Biden's proposed fiscal year 2023 budget.

"Investment in antitrust enforcement pays enormous dividends," he said. "In addition to the massive benefits to the economy from competition, the fines that result from our criminal enforcement more than surpass our annual expenditures."

The DOJ deposited more than $8.7 billion in criminal antitrust enforcement fines and penalties into its crime-victims fund over the last 10 fiscal years, Kanter said, and provided nearly $2 billion in additional contributions to a general treasury fund over the same period.

The DOJ currently has 21 indicted criminal cases against 42 individuals, including nine chief executives and corporate presidents, Kanter said, noting the agency ended fiscal year 2021 with 146 pending grand jury investigations, the most in 30 years. ■

**Spring Enforcers Summit, US Federal Trade Commission and US Department of Justice, April 4, 2022.*

By Max Fillion

Published on April 4, 2022

US Cartel Enforcement

Quicker leniency requests from cartelists will boost US DOJ's evidence-gathering, says Powers

By Max Fillion

Published on April 6, 2022

Requiring companies to promptly self-report their participation in cartels in order to qualify for leniency from US Department of Justice prosecutors will boost the agency's ability to gather evidence on colluding companies, the antitrust division's top criminal enforcer said today.

Requiring companies to promptly self-report their participation in cartels in order to qualify for leniency from US Department of Justice prosecutors will boost the agency's ability to gather evidence on colluding companies, the antitrust division's top criminal enforcer said today.

On Monday, the DOJ announced that it was updating its leniency policy to require applicants to promptly self-report their behavior rather than merely promptly end their participation in the cartel, which was a previous requirement of the program.

The DOJ accompanied the announcement with a series of Frequently Asked Questions.

"In our experience investigating and prosecuting cartels in the past decades, we learned that prompt reporting, rather than termination is the key," the DOJ's Richard Powers told told an ABA Antitrust Spring Meeting event. "That gives the division the best chance to gather evidence through consensual recordings and other affirmative investigative techniques."

Such investigative techniques include wiretapping or other forms of monitoring communications among cartelists, it is understood. ■

Leniency applicants should offer unfiltered material, avoid posturing, DOJ official says

By Khushita Vasant

Published on April 6, 2022

Leniency applicants in cartel investigations should offer original and unfiltered material to the US Department of Justice and avoid posturing if they care about their credibility, agency officials said today.

Leniency applicants in cartel investigations should offer original and unfiltered material to the US Department of Justice and avoid posturing if they care about their credibility, agency officials said today.

Parties should come in to talk with DOJ officials early and offer access to documents as soon as talks over leniency begin, Hetal Doshi, acting deputy assistant attorney general in the DOJ's antitrust division, said at an ABA Antitrust Spring Meeting event.

"Something that's really important to me and looking at cooperation is I want to see the original materials. What I mean by that: I want access to the witnesses themselves. I want access to the documents in a very fulsome way from the very beginning," Doshi said.

"Get us the raw evidence," Carol Sipperly, acting deputy assistant attorney general at the division, said.

Information from leniency applicants about relevant and "genuine" issues saves time and boosts credibility, Doshi said. "If everything is 'the house is on fire' in your case … eventually you're not going to have as much credibility making those arguments," she said.

Sipperly said DOJ officials understand that parties want to ensure that the agency sees their point of view.

"That is very important, and that will happen, but the most important thing is to be sure that we have access to your witnesses; we should have access to your documents and other materials. That's really what the expectation is," she said.

Sipperly recalled having left meetings with leniency applicants feeling like she wasn't given the full picture.

"So, when you're coming to us, you're coming to us in a genuine mode … so that the interactions are always genuine versus posturing," Sipperly said. ■

Speed of disclosure of cartels to be evaluated based on company characteristics, US DOJ enforcer says

Cartel enforcers at the US Department of Justice will take into account the size of a company and the complexity of its operations when deciding whether it has "promptly" informed investigators after discovering potential wrongdoing, a senior official said.

Marvin Price explained that under a policy shift announced this week, companies hoping for more lenient treatment need to self-report "promptly," and hanging back to determine whether the government opens a probe will be unacceptable.

This week, the DOJ's antitrust division changed its policy on cartel whistleblowers, introducing a new requirement to win leniency reductions from enforcers: promptness. Companies seeking leniency must now promptly self-report after discovering wrongdoing, but defense attorneys say there are questions over how much time is available under the new requirement.

Price, director for criminal cartel enforcement at the DOJ, told the ABA Antitrust Spring Meeting in Washington, DC, that it was "good corporate citizenship for a company to report the conduct at the time that they discover the involvement in the illegality."

Swiftly notifying the authorities means investigators can then more easily deploy "aggressive investigative techniques," Price said.

Explaining how the DOJ will look at "promptness," Price said: "We look at all the facts and circumstances of the situation. We consider the scope and complexity of the operations of the company."

"And we do expect that companies are going to take some time, are going to need to do some internal investigation to confirm the illegal conduct has occurred and then report it."

But he said companies that delay could lose the leniency benefit. "An example of not prompt reporting: a company finds out about illegal conduct, they confirm it and then they wait and wait to see if the government does anything about the illegal conduct," he said. "And then once the government opens an investigation, the company comes in and applies for leniency."

Price said that's "not good corporate behavior" and "should not be tolerated." He explained that promptly reporting corporate conduct to a regulator is "fundamentally the right thing to do."

"This is not going to be a big issue. There will be a situation where once people see how it works out, it makes total sense for a company to be promptly reporting." ■

By Lewis Crofts

Published on April 6, 2022

US DOJ bringing difficult cartel cases 'the right thing' to do, enforcer says

By Michael Acton & Lewis Crofts

Published on April 6, 2022

The US Department of Justice is right to bring "tough" cartel cases to trial, because it has a duty to ensure that antitrust laws aren't underenforced, a senior official said today.

Marvin Price, director of criminal enforcement at the department's antitrust division, did not name a specific case, but his comments follow a DOJ setback last week when the enforcer failed for a second time to convince a jury to convict a group of chicken industry executives indicted for price-fixing.

Price, who was speaking at the ABA Antitrust Spring Meeting today, said that there is "conduct going on in a lot of industries that is very troubling from my point of view," involving "a lot of communication in different industries" between competitors.

"We know that because we get email and texts, and you can see what the competitors are talking: a lot of conversations about prices; a lot of conversations about areas where there shouldn't be conversations," he added.

But the department sometimes finds conspiracies that are tough to prove. Where they may be a lack of individuals willing to plead guilty, the enforcer has to make a call about whether it pursues the case, he explained.

In the trial of the broiler chicken executives, two key witnesses did agree to testify against their former colleagues in front of a jury. But defense lawyers argued that the department misinterpreted legitimate communications between executives in an industry where supply needs to be carefully coordinated on a day-to-day basis.

"So, I think that when you have a case in an industry where that sort of thing is going on, and you believe that you have enough evidence to prosecute that case, that you need to go forward." Price said. "That is what we have done. We decided to try those tough cases."

"I definitely think that is the right thing, I certainly believe that we have a duty to bring the tough cases," he added. "We have a duty to ensure that antitrust crimes are not underenforced and the way we do that is bringing tough cases."

Department of Justice antitrust chief Jonathan Kanter has been summoned to a Denver court next week to explain why the department believes it should and can prosecute five of the 10 executives, after dropping charges against the other five following the second mistrial. ■

US, EU cartel enforcers flag increased prospect of monitoring e-mails, searching private homes

US investigators are using "all the tools in the white-collar crime toolkit" to pursue antitrust offenders, a Department of Justice official said, rebutting the "perception" of fewer dawn raids in America.

Meanwhile, the European Commission is back conducting surprise inspections after a Covid-19 break, and may more frequently use a power to visit private homes, an enforcer said.

Covid-related restrictions on movements and the workplace meant enforcers faced difficulties deploying their sharpest weapon: a dawn raid. But an EU enforcer stressed that inspections had restarted and more are in the pipeline.

Meanwhile, a senior DOJ official said it's wrong to think there are fewer raids in America. Rather, the enforcer is using a wide range of powers to look at communications and this is turning up compelling evidence. "Dawn raids will continue to remain a crucial fact-finding tool," Maria Jaspers, director of cartel enforcement at the European Commission, told the ABA Antitrust Spring Meeting in Washington, DC. "We are back and there is definitely more to come."

Jaspers stressed that the commission has the power to go to private homes where sensitive evidence may be held. She noted the EU regulator had recently conducted such a raid and it had passed off "smoothly." "It is fair to assume that we will make more use of this power in order to secure evidence like this," she said.

Jaspers noted that the commission won't publicly announce such a move in order to protect the individual's privacy.

Marvin Price, director of criminal enforcement at the DOJ, told the same conference there's an "incorrect perception" that raiding activities are down in the US.

He put the misperception down to more investigation happening through "consensual monitoring" where the DOJ gets sight of emails and texts. "When you do consensual monitoring you can see the conspirators fixing prices, rigging bids, allocating markets. You can essentially witness what they are doing in terms of putting the agreement together and implementing [it]." He said this is "powerful evidence that really enables a jury to learn about the conspiracy from the defendants."

Raids are still taking place, Price said, but the agency is also using informants, undercover agents and warrants authorizing the interception of communications. "We are using all the tools in the white-collar crime toolkit," he said. ■

By Lewis Crofts

Published on April 6, 2022

US DOJ enforcement against collusion among employers not unique, official says

Recent criminal antitrust enforcement against alleged conspiracies among employers, such as wage fixing and limiting employees' mobility, by the US Department of Justice isn't unique or special in antitrust law, a DOJ official said.

"When we talk about labor market collusion, it's not this unique species. It's not something alien to the antitrust laws," James Fredricks, chief of the DOJ's Washington Criminal II Section, said today at the ABA Antitrust Spring Meeting.

Fredricks said the DOJ today has charged about half a dozen such cases, which are in active litigation. "This is the culmination of work over … not just the last 15 months, but over the last five, six years," he said.

The official said employee allocation is just customer allocation in the reverse, and the DOJ has brought criminal prosecution against customer allocation and supplier allocation. "In a very real way, a worker is supplying the labor. We didn't see a difference there … When employers get together and … agree to lower wages or to cap wages in some way, that is in a very real sense a price-fixing case."

"I think it's a very self-evident conclusion," he said. "We decided that because these labor market collusion cases … limited competition the same irredeemable way [as customer allocation], we are going to treat them the same."

Responding to criticism, Fredricks said: "We've been accused in some fora of changing the law, … [that] somehow the United States has changed the law by explaining how it was going to exercise this prosecutorial discretion. That's not so … We don't create regulations. What we do is enforce the antitrust laws, in this case Section One of the Sherman Act."

He said the antitrust division used its discretion to use the most powerful tool because "this is some of the most insidious type of conduct."

Workers are "vulnerable participants in the marketplace. And so allowing employers to take advantage of that and conspire among themselves to harm them [is] exactly what we should be using our most powerful tools for."

Fredricks added that arguments used by defendants in these cases to ask for a dismissal are also not unique to labor market cases.

"We are seeing those types of arguments in other contexts as well," he said. "The idea that this is somehow special, or nobody had noticed that what the applicable antitrust principles are has always struck me as just not well founded."

Noting that several of these cases arise from the healthcare space, Fredricks said the regulator is not necessarily targeting that sector. "I don't think anyone should feel especially targeted if they're in the healthcare space, nor should people outside that space feel safe if this is the kind of conduct they're engaged in," he said. ■

By Xu Yuan

Published on April 6, 2022

Massive increase in US infrastructure funding will likely boost bid-rigging, Texas AG official says

By Max Fillion

Published on April 7, 2022

A $1.2 trillion boost in US infrastructure spending under a recently passed law will likely increase bid-rigging on government contracts, a senior official with Texas' attorney general office said today.

"There's going to be a lot of money flowing into states and a lot of that money will be spent vis-a-vis projects that are bid out," Nick Grimmer, a Texas assistant attorney general, told the ABA Antitrust Spring Meeting in Washington, DC. "Any time you have a lot of that stuff going on, the opportunities for collusion just skyrocket and you can pretty much gamble that it's going to be going on."

US President Joe Biden signed the Infrastructure Investment and Jobs Act into law in November.

Grimmer said he conducts bid-rigging training with various businesses throughout his state, which boosts his office's cartel-detection capabilities. The US Department of Justice has engaged in a similar effort at the federal level with its Procurement Collusion Strike Force.

"Now, it's just a matter of can we do what we can to protect it and stop it," Grimmer said. ■

US DOJ has 60-plus open probes into bid-rigging on government contracts, senior official says

By Max Fillion

Published on April 5, 2022

The US Department of Justice has more than 60 investigations pending involving bid-rigging on government contracts, the head of an antitrust division strike force on the matter said today.

"I can't talk about any investigations, obviously, in any specifics," Daniel Glad, the head of the antitrust division's Procurement Collusion Strike Force, told a forum on global competition.* "But we've opened more than 60."

The figure marks an increase from a September 2020 update by former DOJ antitrust chief Makan Delrahim, who at the time said the agency had more than two-dozen criminal investigations open. The DOJ launched its government bid-rigging strike force in November 2019.

Glad said the size and scope of the investigations vary. "There is no standard investigation," he said. "Some of our open investigations, I want to be clear about this, are nine-figure investigations. So these are not all … a snow-plowing cartel in Kalamazoo, Michigan."

The investigations cover a range of industries, Glad said. Some focus on defense and national security, some are purely domestic investigations focused on one city, some are nationwide, some are "truly global," and some have domestic or overseas components, he added. ■

"GCR Live: Cartels 2022," Global Competition Review, Washington, DC, April 5, 2022.

US DOJ's cartel leniency program will now require participants to promptly self-report, address harm caused, Kanter says

By Max Fillion

Published on April 4, 2022

The US Department of Justice's leniency program will now require applicants to "promptly" self-report their participation in illegal cartels and to take remedial steps to address the harms caused by the cartel, DOJ antitrust chief Jonathan Kanter said today.

"Leniency is one of the division's most important enforcement tools for rooting our cartels because it incentivizes corporations involved in wrongdoing to do the right thing by self-reporting," Kanter said during a joint enforcers summit with the Federal Trade Commission.* "While these core incentives have not changed, the updates to the leniency policy will further promote accountability."

The leniency program, which allows companies who self-report their cartel behavior to the DOJ to avoid criminal prosecution and potentially reduce damages in private follow-on litigation if they cooperate with plaintiffs, has been under a steady drumbeat of scrutiny as lawyers have questioned its efficacy. The program allows the DOJ to discover price-fixing, market allocation or other illegal schemes.

Kanter didn't give much detail on what "prompt" self-reporting looks like, only adding that "a company that discovers it committed a crime and then sits on its hands hoping it goes unnoticed does not deserve leniency." He likewise didn't give details on what remedial steps addressing harms caused by the cartel would look like.

The agency is updating its Frequently Asked Questions on the leniency program in order to "simplify" and "demystify" explanations of how the leniency program works for the general public, Kanter said, adding that the agency's leniency policy will now be placed in the antitrust chapter of the DOJ's Justice Manual in the name of transparency.

"When it comes to leniency specifically, the easier we make it for the public to understand the program, the more applications we receive and the stronger the program's incentive structure is, which ultimately improves our enforcement capabilities," Kanter said.

The DOJ provided MLex with a copy of the updated FAQs shortly after Kanter's remarks. ■

**Spring Enforcers Summit, US Federal Trade Commission and US Department of Justice, April 4, 2022.*

Data will be key tool in identifying bid-rigging, Florida antitrust official says

Cracking open cartels by gathering and analyzing data to identify trends in bidding will be a key enforcement tool in the coming decade, Liz Brady of the Florida attorney general's office said today.

Brady outlined the challenges of using massive amounts of data during a panel discussion* today with enforcers from across the globe. The head of Portugal's competition authority, Margarida Matos Rosa, also said her agency is using data to identify illegal bid-rigging.

Brady said over the years, data issues have been the biggest challenge in identifying bid-rigging in public procurement contracts. There is no big national database that can show, for example, all the road contracting bids over the previous six months.

"We've tried various ways," she said. "We collect bids, we look at public data. But I don't think we have come up with sort of that perfect mechanism for which we can coordinate data. But I do think that over the next decade or so, I think that is going to be our most important tool — is the ability to gather large amounts of data and to be able to spot trends and patterns in bidding that would not have occurred if not for collusion."

The amount of data available on public contracts is massive, Brady said, and it's difficult to collect it, keep it current, and analyze it. Private data aggregators exist, but they come with their own anticompetitive risks as well, she said.

Over the years, Brady said, her state has worked with the US Department of Justice on a roadshow, meeting with people in counties and municipalities who do the everyday buying for the state. Procurement officers aren't able to generate as much bidding competition as they would like in a consolidating economy, she said. Officials give tips on how to get additional bidders into the process, Brady said.

Matos Rosa said her agency set up an ongoing roadshow as well in Portugal at the national and local levels, first advising on designing a bid and then on the main signs of collusion. The number and quality of complaints has improved, she said.

Matos Rosa said the legislature also granted access to a nationwide database for public procurement. The competition authority worked with the agency that manages the database to refine filters for accepting data from companies to ensure it is entered correctly.

Other European officials have for some time touted their efforts to use data to identify misconduct.

Last year, the Spanish competition authority said a cartel between two pharmaceutical companies fined almost 6 million euros ($7.3 million) was uncovered by the authority's in-house detection unit.

And in 2020, an official at the European Commission's competition department said ongoing EU cartel probes included a significant number of own-initiative investigations. ■

Spring Enforcers Summit, US Federal Trade Commission and US Department of Justice, April 4, 2022.

By Jenna Ebersole

Published on April 4, 2022

US Merger Control

US Justice Department will look to file merger cases faster, Mekki says

By Max Fillion

Published on April 6, 2022

The US Department of Justice will start to seek "faster access to courts" and sometimes look to block mergers before the merging companies finish submitting documents and other information requested by the antitrust division, a senior official said today.

"There are some problems you can see from outer space, and we don't need to wait, you know, a year, two years, to know where the problems lie," Doha Mekki, principal deputy assistant attorney general at the antitrust division, told an ABA Antitrust Spring Meeting event. "And where that is the case, we have to be prepared to go to court because the market is being harmed in real time."

The DOJ has already threatened to block one merger before the companies were finished complying with a "second request" for more information, Mekki said, and the companies decided to abandon. She didn't specify which merger it was.

"There was a lengthy and protracted merger review process and that was in part because the parties chose a course of regulatory arbitrage, right? They put one jurisdiction ahead of DOJ's investigation and that did not work out well," she said. "And what we saw with our staff was that the protracted posture of the merger review was already having an effect on incentives to compete that was creating uncertainty in the market." ■

New merger guidelines must be intelligible to public, US DOJ's Mekki says

By Max Fillion

Published on April 6, 2022

The public must be able to understand federal antitrust enforcers' forthcoming merger guidelines, a senior official from the US Department of Justice antitrust division said today.

"Access to justice means that it's not just the most educated, most elite antitrust lawyers and federal judges who have to understand these guidelines, the public has to understand them," Doha Mekki, principal deputy assistant attorney general, said during a panel discussion at the ABA Antitrust Spring Meeting today.

"You have to decide whether your merger is horizontal or vertical, right?" she said. "And so, when we think about promulgating new guidelines, we should probably help the reader overcome that kind of hurdle."

The DOJ and US Federal Trade Commission are in the process of reviewing and updating their merger guidelines and have asked the public to weigh in. Mekki today was asked whether there would be one set of guidelines or more.

"I can't really say more about that," Mekki said, noting that the agency had asked about that in its request for information on the guidelines. "What I will say is there would certainly be precedent for having one set of guidelines. In fact, the old non-horizontal merger guidelines that were withdrawn a couple of years ago were actually a subset of the horizontal merger guidelines." ■

US FTC Commissioner Phillips says agencies using procedure to slow antitrust merger reviews

By Curtis Eichelberger

Published on April 6, 2022

Federal Trade Commission Republican Noah Phillips said today that US antitrust enforcers have adopted a mentality that mergers have no value and agency executives are using antitrust analysis procedures to throw sand in the gears of merger reviews.

An early-termination process for mergers — where non-problematic deals receive a quick sign-off from the FTC or US Department of Justice — was temporarily frozen last year when the agency was inundated with Hart-Scott-Rodino Act filings. Phillips said at the ABA Antitrust Spring Meeting today that there is no "indication early termination is going to return."

Other procedures, such as second requests for information, warning letters and prior-approval provisions, are being used to slow the process, creating a more defiant attitude among companies seeking regulatory approval for deals, he said.

"The reason goes to the new mentality that is governing merger policy at the top of the antitrust agency," Phillips said. "There is an increasingly prevalent view among progressive antitrust reformers that mergers have no real value, they don't produce any goods, and they have a lot of costs."

He said merger policy is being blamed for a number of bad effects, such as labor taking too little of the share of economic growth and a lack of supply-chain resiliency. "So, if that is your view … then it makes eminent sense to throw as much sand in the gears of M&A activity, whether or not we have a good reason to believe there is likely anticompetitive harms," he said. "I don't think that is our job."

Debbie Feinstein, a former director of the FTC's Bureau of Competition and now a partner at Arnold & Porter, said "close at your own peril" letters — warnings letters being sent to companies after the statutory review period has expired and companies are permitted to close deals — can be confounding.

She said the agencies have always had the right to continue investigating a deal after the companies close, and have always been able to bring a case to unwind a deal or require divestitures. She said she worked on a merger with one set of agency staffers who cleared a deal, only to be called by another set of staffers who said they needed to look at the deal again.

Feinstein also cited a letter that followed a second request regarding an unorthodox theory. The company she represented certified that it had substantially complied with the second request and never heard »»

anything from the staff. But on the day the waiting period expired, she received a warning letter.

"Ask questions," she said.

Phillips said some letters are likely being issued when "we are done, but [we] don't want to say that. It signals a lack of accountability. That is a political thing."

Tanisha A. James, an attorney at the Cooley law firm, said some of the sand in the gears comes from a lack of transparency, and from misunderstandings between agency staffers and their bosses.

"You are seeing some dissension in the ranks of the staff who are rightfully going, 'This isn't how we should be spending our time, but the front office has different views so here is where we are at,' " James said.

She said the response from the companies is to harden their stance and refuse to negotiate on custodians — the company executives who play a critical role in managing a merger — and on search terms in document reviews. Instead, she said, the attitude is, "We are going to jam you."

Feinstein said she has received second requests where it was "pretty clear the staff didn't think there was a need for a second request, and I'd say, 'on what theory?' and staff would say, 'I don't know, you'll have to talk to somebody else.' That's just not good government."

"Even if you think there is a theory that warrants it, there has be enough of management telling staff what to do for staff to be able to do their jobs, and I'm hearing staff are incredibly frustrated by the fact that they often don't know how to do their jobs. You're best able to do your job if you know exactly what your bosses want you to do and they work with you and explain it."

Panel members at the conference said there used to be a perception that the agencies behaved differently from each other, and some lawyers tried to steer their deals to the DOJ. But they say the differences have narrowed and the agencies are more similarly aligned.

Phillips said the current attitude is bad for antitrust enforcement. "The cost to us as enforcers is we are perceived as being less reasonable. The staff can't articulate the theory they are exploring, which is hard to deal with, so you are getting more aggressive moves by the parties."

Phillips said companies are being subjected to inefficient regulation. "They are substantially complying, and then we are on the clock, and over time you will see an agency that is not finishing their work, is rushed to litigation and [it is] probably a big resource spend." ■

Phillips said the current attitude is bad for antitrust enforcement. "The cost to us as enforcers is we are perceived as being less reasonable. The staff can't articulate the theory they are exploring, which is hard to deal with, so you are getting more aggressive moves by the parties."

New US merger guidelines should focus on direct evidence of harm, better thinking on nascent competition, DOJ official says

By Max Fillion

Published on April 6, 2022

Forthcoming merger guidelines from the US federal antitrust enforcers should focus more on direct evidence of competitive harm and contain more critical thinking around nascent competition, a senior US Department of Justice official said today.

Forthcoming merger guidelines from the US federal antitrust enforcers should focus more on direct evidence of competitive harm and contain more critical thinking around nascent competition, a senior US Department of Justice official said today.

Horizontal merger guidelines issued by US antitrust enforcers in 2010 focused on market definition, Kathleen O'Neill, senior director of investigations and litigation at DOJ, told an ABA Antitrust Spring Meeting audience. That focus, however, misses a lot of significant competition that falls outside the box of highly concentrated markets that the 2010 guidelines inherently target, she said.

The DOJ and US Federal Trade Commission are reviewing and updating their merger guidelines. At a prior event, O'Neill said she expects the agencies to issue new guidelines by year's end.

Market concentration is only a proxy for evaluating competitive harm caused by a merger, O'Neill said. It's only helpful sometimes, she said.

"Where you have direct evidence of a merger that's likely to harm competition, we ought to be focusing on that and not myopically focusing on market concentration statistics," O'Neill said.

Direct evidence could include head-to-head competition between companies that's resulted in lower prices, higher quality or more innovation, O'Neill said. With evidence like this, the agencies might be able to avoid market definition exercises altogether, she added.

The current guidelines' focus on market concentration also does a poor job of capturing competition posed by nascent companies, O'Neill said, noting that "it's a little bit like … a square peg in a round hole."

"I think in those fact-patterns, especially where you see a dominant firm acquiring a nascent upstart, I think there can be significant competition at stake," O'Neill said. ■

FTC still not granting early termination to avoid criticism, slow down mergers, Wilson says

By Max Fillion

Published on April 6, 2022

The US Federal Trade Commission still hasn't resumed granting early termination of reviews of certain mergers because it's slowing down merger activity and resuming the practice could bring more criticism to the agency, Republican Commissioner Christine Wilson said today.

"If you want to step back, take a two-week pause, look at the process to make sure that you are catching all of the deals that need to be reviewed, that is one thing," Wilson told an audience at the ABA Antitrust Spring Meeting. "But the brief and temporary suspension has now been over a year and there is no explanation for why it persists. But I have two hypotheses."

The FTC announced the change in February of last year, with then-acting Chair Rebecca Kelly Slaughter saying the pause was part of a broader policy review the agency was conducting after a leadership shakeup with the election of US President Joe Biden. Before then, the agency sometimes terminated reviews of mergers it viewed as non-problematic before the required waiting period under the Hart-Scott-Rodino Act was up.

Wilson said the continuation of the pause is part of a broader policy to "throw sand in the gears" of merger activity, echoing comments made earlier in the day by fellow Republican Commissioner Noah Phillips.

"There is concern on the part of current leadership that truly mergers are evil and need to be constrained rather than as a necessary part of capitalism and free markets," Wilson said.

It also allows the agency to avoid criticism, she added. "If you are not affirmatively granting early terminations of any deals, then you can't be accused of allowing deals to go through," Wilson said. "And so I think a second reason for avoiding granting early termination lies in the fact that it gives fewer targets for people to criticize." ■

US FTC to challenge technology mergers that threaten non-price harms, even outside Big Tech context, official says

By Khushita Vasant

Published on April 6, 2022

The US Federal Trade Commission isn't afraid of challenging technology transactions that pose a threat of non-price harms, even outside the realm of Big Tech platforms, a senior agency official said today.

John Newman, deputy director of the FTC's Bureau of Competition, cited the agency's challenges of the unsuccessful mergers between Aerojet and Lockheed Martin and Illumina and Grail.

"The agency will challenge mergers that threaten non-price harms to innovation [and] quality, even outside the Big Tech context," Newman said at the ABA Antitrust Spring Meeting. Allegations of harm "weren't afterthoughts, but they were central to our theories of the cases."

"Second, we're not afraid to challenge non-horizontal mergers even outside the Big Tech context," Newman said.

"Somewhat relatedly, we recognize that non-horizontal mergers can cause harm in a variety of ways, not just through total input or output withholding," Newman said.

The FTC considers effects "holistically," whether that's in a Big Tech context or another high-tech context. "If harmful ripple effects are felt in the ecosystem, we care about that."

"It's worth remembering that wherever appropriate, we will apply lessons learned and expertise gained in high tech matters. Whether we're looking at the Big Tech context or high tech," Newman said. ■

Jefferson-Einstein merger judge allowed deal due to lack of evidence of harm to insurers

By Curtis Eichelberger

Published on April 7, 2022

US District Court Judge Gerald Pappert said his decision to allow Philadelphia-area hospitals Thomas Jefferson University and Albert Einstein Healthcare Network to merge over the objections of the US Federal Trade Commission rested on a lack of proof that the merger would harm consumers — not patients, but insurance companies.

"What they had to show was the insurers were not going to be able to avoid a price increase in those relevant markets. And that's where they came up short," the judge said at the ABA Antitrust Spring Meeting today in Washington, DC.

Pappert found that the FTC had failed to show that insurers would face higher prices as a result of the combination, saying instead that they would shift to hospitals outside the government's proposed geographic markets if faced with price hikes.

In March 2021, the FTC voted 4-0 to drop its appeal.

"That's really what it came down to and what the government needed was credible testimony from the insurers that said 'yeah, if these two guys come together, we are not going to avoid a price increase," the judge said.

Pappert said there were four major insurers in the Philadelphia area. One had no opinion on the matter, another didn't care, and only the biggest insurer, with more than 50 percent of the market, testified that it expected to have a more difficult negotiation over price.

"That in itself I would think was enough," Pappert said. But internal documents from the hospitals and insurers also contributed to the court's decision.

Pappert was guided by the Third Circuit's decision in Penn State Hershey Medical Center-PinnacleHealth System, reversing a lower court's decision to allow the merger to move forward.

The appeals court explained that the district court had erred by viewing patients, rather than insurers, as the real consumers in hospital cases.

"When you get the case, you think about all the antitrust doctrines like HHI and the hypothetical monopolist test and all these things which sound good in the abstract. Then you realize you have to dissect it."

In other highlights from the judges panel:

• The judges agreed that FTC and Department of Justice lawyers aren't given special status as antitrust experts when they enter a courtroom, no matter how many cases they've tried. The judges said private practice lawyers are equally talented and that agency »»

lawyers are assigned no additional level of credibility.

• Retired District Court Judge Vaughn Walker, who presided over Oracle-Peoplesoft, said although antitrust cases can be complicated, and discovery can be illuminating, "a tight schedule and getting the case to trial solves a host of problems, and where judges make mistakes is by taking a too-leisurely approach to some of these big cases."

• Walker added that markets can be so dynamic, especially technology markets, that a lot of the data on market shares and other measurables are "a point in time and may not be the point when the case is going forward. "It needs to be more prospective than retrospective and that needs to be the focus of the presentation," he said.

• Pappert said when he was at the FTC and the government found what it considered a "hot doc" — an internal company document that suggests executives know their merger will be anticompetitive — the company would argue that the document didn't mean what it said. Pappert said the government used to refer to these as the "crazed middle management response." But people are less careful in emails, he noted. They're treated differently than other documents, and the courts need to listen to the explanation objectively.

• Asked by the moderator how judges should feel when assigned to an antitrust case, which for some judges might only happen once every decade, Walker seemed to sum up the feeling of the panel: "You are lucky. Sit back and enjoy it. It will be a well-tried case. It's an important case. It's one of the privileges of being on the bench." ■

Pappert said there were four major insurers in the Philadelphia area. One had no opinion on the matter, another didn't care, and only the biggest insurer, with more than 50 percent of the market, testified that it expected to have a more difficult negotiation over price.

Merging parties shouldn't play state, federal antitrust enforcers against each other, US DOJ official cautions

By Khushita Vasant

Published on April 7, 2022

Merging parties shouldn't play state and federal antitrust enforcers against each other when they are subject to a multistate investigation that involves the federal government, a senior US Department of Justice official said today.

Many companies make presentations individually to the state or federal antitrust enforcers, Sarah Allen, counsel to the DOJ antitrust division's assistant attorney general, said at the ABA Antitrust Spring Meeting.

"That's fine. That's nice that you get the personal touch to the AG. It's good information … for the staff to have," she said. "What's counterproductive is when you try and make side deals with individual states when they're involved in a multistate" matter.

When states settle separately or the federal government settles separately from the states, it "really creates a messy situation where it creates distrust, and it also leads to divergent enforcement decisions," Allen said.

States have occasionally drafted Tunney Act comments objecting to a DOJ settlement in instances where the DOJ and the states were both investigating the same parties, she said.

The Tunney Act requires federal courts to review the DOJ's consent decree in civil antitrust cases to ensure a remedy proposed in the consent is in the public interest.

"And Tunney Act comments now … can be dragged out for a really long time. So, you know, just keep that in mind. Try not to play them off against each other. It's just that doesn't end well," she said. ■

US FTC Commissioner Slaughter says merger guidelines should move away from treating horizontal, vertical deals as distinct

By Curtis Eichelberger

Published on April 7, 2022

US Federal Trade Commission member Rebecca Slaughter said she would like the forthcoming merger guidelines to move away from treating horizontal and vertical mergers as distinct, and to better recognize market relationships that don't precisely fit either category.

Slaughter said at the ABA Antitrust Spring Meeting in Washington, DC, that she would also like the guidelines to place less emphasis on efficiencies, especially in vertical mergers.

"The more the guidelines can provide clarity, reliability and transparency, the more effective they will be … in communicating not just to the courts, but to market participants, how the agencies view different transactions," she said. "What I'd like to see them have is a strong deterrent effect," discouraging companies from moving forward with anticompetitive deals that should have been stopped in the boardroom.

However, former Assistant Attorney General Makan Delrahim, who participated on a panel with Slaughter, recommended caution in making large changes in the new guidelines — especially changes that aren't grounded in the antitrust statutes.

He said the courts need to have confidence in the guidelines and not see them as motivated by politics and other factors that aren't grounded in the law.

The discussion turned to the Herfindahl-Hirschman Index (HHI), a traditional measure of market concentration.

Fiona Scott Morton, an economics professor at Yale and former top economist at the Justice Department's antitrust division, said that what matters most in HHI calculations is the amount of change in concentration pre- and post-merger, rather than the overall level, and the HHI increase required to signal harm is "surprisingly low."

"We are picking numbers that are too favorable to [merging] parties. … Scholarly evidence on that is growing."

However, the presumption of harm associated with HHI increases isn't written into the law, Delrahim said, and his "biggest nightmare" as AAG was the prospect of companies challenging a deal all the way to the Supreme Court and having the justices address presumptions.

"There are no presumptions in the statute. You can write them as a matter of guidance or prosecutorial discretion," he said. "But what would we do if we didn't have Philadelphia National Bank presumptions? It »»

becomes a much more difficult case to bring. The right case, they could overturn Philadelphia National Bank and we're in a different world."

In United States v. Philadelphia National Bank, the Supreme Court established that mergers in which the combined company controlled at least 30 percent of the relevant market are presumptively unlawful.

Delrahim said the strongest new arguments in merger regulation will be born of new legislation. If the agencies get too adventurous, he said, they risk losing the deference they get in court.

Slaughter said she looks forward to reading the public comments being solicited on the guidelines and is seeking to avoid developing a strong view until they are in. She said Delrahim made a good point about the attitude of the courts, but if "we make all decisions on fear, we would do no enforcement at all."

She said the agencies have to remember that merger enforcement is a predictive exercise. Regulators can make mistakes, and their presumptions are necessarily rebuttable, she said.

"If a firm has something unique, they can explain it to the court," Slaughter said.

The commissioner said the FTC should care a lot about new entrants and investment in innovation. Regulators, she said, need to spend more time talking to venture capitalists and understanding the theories and strategies behind their investments.

She expressed concern about hurdles to entering digital markets.

"One thing that concerns me is that we have heard anecdotally and there has been some documentation that there is inhibited investment in digital spaces because of concern about [acquisition by a] monopolist as the only possible exit strategy. That's bad from a monopoly perspective and it's bad from the interest of investment in innovation," she said. ■

Fiona Scott Morton, an economics professor at Yale and former top economist at the Justice Department's antitrust division, said that what matters most in HHI calculations is the amount of change in concentration pre- and post-merger, rather than the overall level, and the HHI increase required to signal harm is "surprisingly low."

US FTC's Phillips wants broader range of input on commission's merger guidelines

US Federal Trade Commission member Noah Phillips expressed concern today that the agency isn't seeking views from a broad enough array of groups as it reviews merger guidelines.

"I am concerned that the requests for information rely on old cases and the agency isn't doing a good job of getting a broad range of views at hearings," he said during a speech.*

After he spoke, Phillips said several business groups told him they weren't contacted by the agency to give their views. He said that the reason merger guidelines issued in 2010 were so successful is that they were the result of bipartisan consensus.

The FTC and US Department of Justice are in the process of reviewing and updating their merger guidelines and have asked the public to weigh in.

Phillips, a Republican, criticized the agency's tendency to slow certain merger reviews in cases that are unlikely to be challenged. He said the practice doesn't result in more effective merger enforcement and amounts to a tax on mergers and acquisitions. These taxes tend to hurt smaller deals, which goes against one of the central tenets of progressives that big is bad, Phillips said.

The agency has suspended early terminations and issued warning letters to some merging companies telling them that despite the expiration of a statutory review period, their deals could still be contested by the government.

He also expressed concern that the FTC might be exceeding its authority if it tries to embark on rulemaking to make changes to certain areas of antitrust law, such as in labor markets.

"The ambition is infinite, the view of our authority is infinite. But it would be an unconstitutional delegation of authority," he said.

Phillips cited Supreme Court precedent from the New Deal era when the court in 1935 struck down the National Industrial Recovery Act as an unconstitutional delegation of lawmaking powers that are reserved for Congress. ■

An Open discussion with FTC Commissioner Noah J. Phillips, Crowell&Moring and Bates White, Washington, DC. April 7, 2022.

By Claude Marx

Published on April 7, 2022

US FTC pushing back on old standards for merger review, says Competition Bureau head

By Claude Marx

Published on April 8, 2022

It is not the US Federal Trade Commission's job to provide "white glove concierge service" to parties seeking merger approval, its Bureau of Competition Director Holly Vedova said today.

She told the ABA Antitrust Spring Meeting that they're pushing back on the long-held belief that merger review is a customer service. She defended policy changes such as ending early terminations by saying that all too often speed comes at the expense of thoroughness. "We serve the public, not merging parties," Vedova said.

She added the agency is dealing with a record number of merger filings at a time that they're significantly understaffed. And they are actively looking for more lawyers, especially those who write well and can think creatively about approaches to litigation.

The FTC is encouraging lawyers who don't have antitrust experience to apply, she said.

She noted that during the past nine months, five mergers that the agency challenged were abandoned by the companies.

Vedova also said in non-merger cases the agency isn't in the business of accepting "weak and uncertain settlements," and isn't afraid to litigate. They prefer structural to behavioral remedies because the latter are often easier for companies to evade, she said. ■

US states considering labor issues in merger analysis, NAAG antitrust task force chair says

Multiple US states are considering new thinking on labor issues as they assess mergers, following in the footsteps of the two federal antitrust enforcement agencies, the chair of the National Association of Attorneys General multistate antitrust task force said today.

"Many states are really considering new thinking in how we look at mergers," Gwendolyn Cooley said at the ABA Antitrust Spring Meeting.

Cooley, also the assistant attorney general for antitrust in the Wisconsin AG's office, said states have been taking a comprehensive look at labor for some time now. She was responding to a question on antitrust enforcers taking an "animated interest" in labor issues internationally.

Job losses are an aspect of the market that the states are concerned about, Cooley said. State antitrust enforcers are considering whether job losses would be considered an efficiency or are in fact a harm when two parties merge. Not all states are of the same mind, Cooley added.

Cooley said she expects state AGs to submit comments on this "developing area of law" as part of an ongoing overhaul of vertical and horizontal merger guidelines initiated jointly by the US Department of Justice and Federal Trade Commission, Cooley said. The deadline for comment submissions is April 21.

At a separate conference earlier this week, Cooley shared other topics that could be included in the states' comments to the US antitrust agencies as they attempt to modernize the merger guidelines.

Jonathan Kanter, the DOJ's antitrust division chief, fielded the same question and said that labor issues are "foundational" to the agency's work.

The DOJ has many investigations underway on the criminal side, civil side and on the merger front where labor competition problems are being addressed, Kanter said.

"These are issues that are so fundamental. Competition benefits workers. Period. Full stop," Kanter said. "There's nothing more important that we are doing" than pursuing cases that help workers find better jobs and better pay.

"It is depriving through anticompetitive agreement, merger, or other conduct the ability of a worker to get better working conditions, and we are going to pursue that vigorously over and over and over again and it is foundational to the work of the government," he said. ■

By Khushita Vasant & Austin Peay

Published on April 8, 2022

US FTC Chair Khan says legislative priorities include extension of HSR waiting periods

US Federal Trade Commission Chair Lina Khan said she would like to see Congress extend the Hart-Scott-Rodino Act's 30-day waiting period.

When companies file paperwork with the FTC and US Department of Justice, the agencies have 30 days to review the deal and determine if they need to conduct a deeper investigation or if the companies can move toward closing.

The companies have a similar 30-day waiting period after certifying compliance with a second request for additional information. The agencies often negotiate a timing agreement to extend this deadline to 90 days, 120 days or even more.

Khan said when lawmakers initially wrote the law, the agencies were receiving 150 transactions a year, whereas they now get that number in two weeks.

"The investigative process has become much more document-heavy, onerous and complex, and the 30-day timeline is often not enough time for our staff to thoroughly investigate those deals," she said today at the ABA Antitrust Spring Meeting in Washington, DC.

Khan said other important areas of concern include developing legislation that would allow the FTC to get equitable monetary relief for consumers. The Supreme Court last year ruled 9-0 that the agency had improperly used Section 13(b) of the FTC Act to obtain financial restitution and disgorgement.

Khan said the decision prevented the government from collecting billions in relief, and that it's important to get it fixed.

It's no secret the courts have "narrowed the zone of viability," especially in the use of the application of the Sherman Act prohibiting monopolies, which has handcuffed enforcement in ways lawmakers increasingly seemed troubled by, Khan said.

She also noted that private enforcement has historically played an important role in enforcing the antitrust laws. Anything that could be done to make it easier for private plaintiffs to proceed is an area that could be worked on, Khan said.

Lastly, she said whistleblower protections could be expanded in the antitrust context, which would be a big deal in Section 2 cases where employees could help the government establish monopoly claims against an owner or company. ■

By Curtis Eichelberger

Published on April 8, 2022

NAAG antitrust task force chair advises merging parties to engage with states

By Austin Peay

Published on April 8, 2022

Lawyers involved in mergers must pay attention to which states are affected by a transaction and engage with them, the chair of the National Association of Attorneys General multistate antitrust task force warned today.

"We're not going anywhere, so ignoring us doesn't work anymore," Gwendolyn Cooley said at the ABA Antitrust Spring Meeting.

"So if you practice merger work you need to pay attention to which states are affected by your transaction, as the fines in some states for non-compliance are severe," she cautioned.

Joint federal and state cooperation has become a priority for the US antitrust agencies during the Biden administration, as President Joe Biden's executive order encourages a whole-of-government approach to competition enforcement.

During a panel in which she appeared with Jonathan Kanter, antitrust chief at the Department of Justice, and Lina Khan, chair of the Federal Trade Commission, Cooley advised that the best practice for deal lawyers is to contact the agent in the affected state and let them know about the transaction.

She emphasized the partnership that state enforcers have with their colleagues in the federal government, but reminded the conference audience that the states are separate sovereigns and when something affects their interest, the states will investigate or litigate where appropriate.

Some states, like Washington, Nevada, Oregon, Connecticut, and Massachusetts, have enacted laws that make the pre-merger notification process there more straightforward, particularly in healthcare related transactions, Cooley said, and more state legislatures are considering passing such statutes. ■

California antitrust enforcer pushes back on growing US FTC, DOJ distaste for behavioral remedies

US antitrust agencies have made clear in recent years their distaste for accepting behavioral remedies, which are often the only resolutions in anticompetitive vertical deals involving companies in a supply chain.

But Emilio Varanini, supervising deputy attorney general in the California attorney general's office, pushed back at a virtual conference* of antitrust enforcers today, claiming that such a stern approach could leave some harmful mergers unpoliced at all.

The federal government's argument has been that behavioral remedies don't permanently resolve potential harms and can require costly and time-consuming measures like the hiring of monitors. This position has been strengthened under US President Joe Biden's administration.

Just in the past year, the US Federal Trade Commission has refused to even discuss remedies in vertical deals such as Illumina-Grail, Lockheed-Aerojet and Nvidia-Arm.

Other panelists, including those from Japan and Israel, also shared a distaste for behavioral remedies in vertical transactions.

Olivier Guersent, the top official at the EU's enforcer, said monitoring behavioral remedies is a big drain on resources, and said his services prefer "quasi structural" behavioral remedies that are "self-executing."

Varanini pushed back against the skepticism.

"I think we have to be a bit careful," Varanini said. "If we decide that we are going to rule out behavioral remedies, and California has done a lot of work on really beefing those up including the use of a monitor … then we risk a number of mergers with anticompetitive effects basically being unremedied."

He also said that while the agencies might prefer structural fixes, "courts will look to whether or not there are less restrictive alternatives to a divestiture or to flat out barring the merger."

He added that state antitrust enforcers could serve as informed partners in addressing behavioral remedies that work.

Varanini also argued that when efficiencies are presented in mergers, they should be merger-specific, including the efficiency of the elimination of double marginalization, where each company charges a profit margin pre-merger. Post-merger, in theory, they should be able to reduce or eliminate one of those margins to gain additional market share, driving down prices for consumers.

"However, there have been a number of studies that state that you don't necessarily see these effects at all," Varanini said.

He used a healthcare example where it might be expected that hospitals and physicians' practices would use the same electronic system for medical records post-merger for greater efficiency. But in many cases, Varanini said, experience shows that they don't.

He said companies should have to prove their efficiencies arguments if they are going to recognize them at all. ■

Spring Enforcers Summit, US Federal Trade Commission and US Department of Justice, April 4, 2022.

By Curtis Eichelberger

Published on April 4, 2022

Coalition of US state AGs considers nascent competition, digital markets in merger guideline comments

A coalition of state attorneys general is considering submitting comments on potential and nascent competition and digital markets, along with a number of issues, to the Federal Trade Commission and the Department of Justice as they attempt to modernize the merger guidelines, the chair of the National Association of Attorneys General multistate antitrust task force said today.

Gwendolyn Cooley, assistant attorney general for antitrust with the Wisconsin Department of Justice and chair of the NAAG antitrust task force, said at a panel event* that mergers involving nascent competition have become nearly impossible to challenge despite the anticompetitive harm they enable.

"We're thinking about ways to make that more straightforward for enforcers, but also to make that transparent for the regulated community," Cooley said.

By Austin Peay

Published on April 4, 2022

The FTC and the DOJ are looking to update the merger guidelines and have sought comments from a wide range of participants, while "some have raised concerns that overly permissive merger enforcement has led to overconcentration in many sectors, hindered the country's economic dynamism and innovation, and potentially resulted in harm to consumers and competition itself," Cooley observed.

According to the chair, comments submitted by the state attorneys general will likely focus largely on areas where the current guidelines are found lacking or should be updated to reflect economic realities.

Cooley acknowledged that although the attorneys general might not speak with one voice on what they want to see next regarding legislative change, "there are some things that there are a lot of agreements on."

Other topics that may be addressed in the comments include presumptions, equity, special characteristic markets, non-price effects, failing and flailing firms, private equity acquisitions and divestitures, and remedies.

The updated guidelines should be general, Cooley said, because it's not possible to anticipate all potential deals. This includes digital markets, as many deals in the space go beyond the traditional binary agency approach of horizontal or vertical mergers.

But there are a number of economic assessments that enforcers can use to measure quality standards, especially in digital markets, Cooley said.

She added that one such tool also coincides with another key issue the state attorneys general are considering: attention estimate tests and attention markets. "So we can compare how much time I spend on Instagram versus something else," she said.

Cooley said the coalition of AGs is thinking a lot about these kinds of transactions and how to determine which are problematic.

Potential revisions to the merger guidelines "could better arm federal and state enforcers to halt anticompetitive mergers in their incipiency, as Congress intended," she said. ■

**Spring Enforcers Summit, US Federal Trade Commission and US Department of Justice, April 4, 2022.*

US FTC's Phillips warns of negative consequences from enforcement against venture capital firms

By Khushita Vasant & Austin Peay

Published on April 5, 2022

The Biden administration's pursuit of a policy change where antitrust and merger review laws are enforced against venture capital firms could have adverse consequences and hurt the country's startup ecosystem, US Federal Trade Commission member Noah Phillips warned today.

The Republican commissioner said one of the biggest changes he sees coming in how the Biden administration approaches antitrust is the idea that 132 years of judicial precedent can be replaced with regulations promulgated by a "bare majority" of FTC members.

Another big change is the government's approach to merger control where the antitrust agencies are "regrettably adopting" a hostility to mergers and acquisitions, he told a conference in Washington, DC.*

"I think that [merger] policy change already underway bears directly with very negative consequences on what we're talking about today," which is "the venture capital model and the startups that it supports," he said. The US leads the world in the number of startups by a "long shot" and venture capital investing is one way to measure innovation, Phillips said.

"Maybe I'm wrong, but my view is that the American capitalist economic model has been a success" for consumers, workers, businesses, and for investors, who reap the benefits of putting their money into those businesses, he said.

"The approach to policy that some — not all — antitrust reformers are pushing, brings to mind the famous play by Jean-Paul Sartre 'No Exit'," Phillips said.

"Making it harder for founders and investors to exit by acquisition makes future investment in such ventures less likely as founders and investors will have less of a chance to reap the rewards," the minority commissioner said.

Phillips said there is a critical impact on VCs for whom acquisitions help power their returns, which in turn allows them to raise new funds to invest in more companies. "Slowing down this key driver of dynamism in our economy is not a good idea. Perhaps even more critical is the impact on the founders themselves. We want to make it more not less attractive to start new companies," Phillips said.

PROGRESSIVE ATTITUDE TO MERGERS

Phillips was critical of the progressive politics espoused by some US lawmakers that he said is reflected in federal agencies' approach to enforcement widely. "I don't think it's an accident that leaders at my agency,

leaders at other agencies, including the Securities and Exchange Commission, all exist within the broader orbit of Senator [Elizabeth] Warren."

He also criticized merger legislation recently introduced in the US Congress by progressive lawmakers and said such bills have ranged from an "outright ban" on all mergers in America to a more modest approach of, in effect, banning large or certain large tech companies from making acquisitions via merger.

"Progressives love to use the phrase 'market realities,' " Phillips said. "If you don't understand the realities that lead companies to merge, I fear that you're really blind to how American business is actually profitable."

Progressive proposals also don't just affect horizontal mergers, but also non-horizontal mergers, which on average the agencies found and scholars recognized are less likely to have competitive concerns, he said.

He acknowledged that competitive concerns can still arise from non-horizontal mergers, "but they create less issues on average over time than horizontal ones."

Phillip's cited the FTC's recent 4-0 challenge to Nvidia's vertical acquisition of British chip designer Arm as evidence that he gets it, but noted after the companies abandoned their deal, a report came out that said Arm plans to fire 900 people.

He said while he thinks the FTC did a good thing in protecting competition in challenging Nvidia-Arm, "that doesn't necessarily mean that we're retaining more jobs."

"The antitrust enforcers should care about how what we do impacts market conditions, and we should care about chilling investment in innovation," Phillips said.

The government "doesn't always get things right," he cautioned. ■

**Competition Enforcement & Start-up Acquisitions: What is the Right Balance? Organized by the Computer and Communications Industry Association on April 5, 2022.*

> *"Maybe I'm wrong, but my view is that the American capitalist economic model has been a success" for consumers, workers, businesses, and for investors, who reap the benefits of putting their money into those businesses, Phillips said.*

US Privacy & IP Trends

DC wants redesign for Android location-tracking, attorney general says

By Mike Swift

Published on April 6, 2022

The District of Columbia's goal in its location privacy suit against Google is a redesign of Android permission settings to eliminate "dark patterns" design that makes it more difficult for consumers to block Google's tracking of their physical movements, the district's attorney general said today.

Along with the attorneys general of Texas, Indiana and Washington state, DC sued Google in January, alleging the Mountain View, California, company violated state and local consumer protection laws by failing to fully and accurately disclose how Android phones collect location data to target advertising.

The Google suit "is really about the dark patterns design around some of the hardware, and you see this stuff in the software as well, that basically overrules, persistently, a consumer's choice around something as important as whether they want the device they're on to track where they are physically going," Attorney General Karl Racine told an ABA Antitrust Spring Meeting event.

Location data is a "core" privacy issue, said Racine, who noted in the Google case — and in state attorneys' »»

general shared focus on children's privacy issues — that Republican and Democratic attorneys general are united in confronting the privacy practices of companies such as Meta Platforms, TikTok and Snap.

A key problem with Google's location data settings, Racine said, is the persistence of location tracking requests for Android users that ultimately overwhelm consumers and cause them to consent to tracking. Location tracking decisions "should be much more simple, and frankly, the decision should be final," the attorney general told MLex on the sidelines of the conference.

Location data is a key privacy issue, and "is incredibly important," Racine said during an earlier panel discussion, because it reveals "where we're going every day, who we're meeting with, where we're going to pray, and where our sexual interests and other interests might lie." It's also key to making ads more relevant, and therefore more valuable, he said.

Because DC's AG office is able to keep the proceeds of litigation cases it wins or settles up to $23 million a year, the district has the resources to hire "the best privacy experts in the country and indeed the world" for the Google case and other privacy cases, Racine said. "Google's got excellent lawyers, and we enjoy of course going up against the best. And we think the issues are going to be quite well-framed for a court to decide."

Racine, a Democrat, said that while his Republican counterparts like Texas Attorney General Ken Paxton and Nebraska Attorney General Doug Peterson have different views on many social and political issues, on children's privacy issues, the states are in lockstep. "When Ken calls to want to talk about privacy, or Doug Peterson wants to talk about privacy as related to kids, we're all in. There is a lot of activity underway around really educating the state AGs about how we can better protect our kids" on social media platforms, he said.

In recent months, a large number of state attorneys general have written to Meta Platforms, TikTok, Snap and other companies about the states' concerns that personal data collection, algorithms and other aspects of business models that aim to hold the attention of children and teens could trigger mental health problems, online bullying and other problems for young people.

"I'm not saying they're trying to hurt kids," Racine said, but he added "my advice to those companies, be it Facebook, be it TikTok, be it Snap, is really right now is the time to come on in and be a part of the solution with the state AGs." ■

Location data is a "core" privacy issue, said Racine, who noted in the Google case — and in state attorneys' general shared focus on children's privacy issues — that Republican and Democratic attorneys general are united in confronting the privacy practices of companies such as Meta Platforms, TikTok and Snap.

US DOJ aims for balance on IP, antitrust as it faces criticisms on new SEP policy statement

The US Department of Justice wants to balance the interests of stakeholders at the intersection of intellectual property and antitrust, a senior agency official said in response to protests that a draft policy statement on patent licensing is skewed.

Its guidelines recognize that both antitrust law and intellectual property laws promote innovation, and "when participants in the standards ecosystem act opportunistically … and in bad faith, that conduct really harms consumers and hurts consumers and you know, that's a concern," said Jennifer Dixton, special counsel for policy and intellectual property at the DOJ. "So let me return to this idea of balance. The antitrust division really wants to have balance in this area," she said.

Dixton was responding to comments by Kristen Osenga of the University of Richmond that that a new draft policy statement concerning SEPs to promote good-faith licensing negotiations is tilted in favor of patent users as it prohibited patentholders from seeking injunctions. The draft also addresses the scope of remedies available to patentholders that have agreed to license their SEPs on fair, reasonable and non-discriminatory, or Frand, terms.

They spoke at an ABA Antitrust Spring Meeting panel on "Approaches to the Antitrust-Intellectual Property Interface Under the Biden Administration."

The draft SEP statement tries to promote good-faith behavior in obtaining a license while allowing products to enter the marketplace efficiently and allowing for compensation to patentholders at the same time, Dixton said. "I've heard criticism and some comments that [the draft statement] prohibits injunctions. It doesn't do that. It indicates really when good-faith negotiations fail, then the exercise of commitment will certainly come into play," the DOJ official said.

She said previous versions of the policy statement in 2013 and 2019 have been used by advocates in the sector to argue for their side of the debate. "I think it's very important for practitioners to look very carefully at the policy statements made by the government to actually read what the policy statements say and not listen to characterizations about those statements and be very careful when you look at those statements," she said.

The agency is reviewing responses from a December call for views on the draft. The 160 comments submitted show a "pretty even" split in opinions over topics such as the need for injunctions and whether the statement is "balanced" for both SEP holders and users, Dixton said. ■

By Khushita Vasant

Published on April 6, 2022

For Apple and everyone else, antitrust and privacy worlds are converging, lawyers say

Photo by Vựa Táo/Unsplash

By Mike Swift

Published on April 7, 2022

When Apple CEO Tim Cook speaks to the International Association of Privacy Professionals next week, it's a good bet he'll mention something widely viewed as an antitrust issue: "Sideloading," the term Apple uses for regulatory mandates to allow apps downloaded from sources other than its App Store on its iOS devices.

Apple's successful deployment of privacy and security as procompetitive defenses in its antitrust trial against Epic Games last year, specifically Apple's requirement that iOS devices can only run apps downloaded from the App Store, was a US judicial first, a group of lawyers said at an ABA Antitrust Spring Meeting event today. But it is unlikely to be the last milestone in the continuing convergence of antitrust and data protection issues, in the US and elsewhere, they said.

"We're at an inflection point in privacy and antitrust. We're moving from theory into practice," said Gregory Luib, a former US Federal Trade Commission lawyer and attorney advisor to former Commissioner Maureen Ohlhausen. »»

The Apple v. Epic trial in 2021, Luib said, was the first time in a US antitrust trial where a company successfully used privacy and data security as a defense for alleged anticompetitive conduct. While the order by US District Judge Yvonne Gonzalez Rogers has been appealed by Epic to the US Court of Appeals for the Ninth Circuit, "I think it probably will be upheld," Luib said.

"What the courts so far have not allowed is just referring to some other societal value or good you want to promote while you're restricting competition," Luib said. "If you just say, 'We want to improve privacy,' that's not enough." There must be a specific and tangible procompetitive effect of the conduct, he said.

Cook is due to speak to the world's largest gathering of privacy professionals, the IAPP's Global Privacy Summit, on Tuesday in Washington, DC. For months, Apple has been arguing that if European and US lawmakers and regulators force the iPhone-maker to permit sideloading to spur competition in the app market, consumers' online privacy and safety will suffer.

In a background press briefing today before Cook's appearance at IAPP, an Apple representative spoke extensively on the company's view of the dangers of sideloading, while highlighting the privacy features of its Safari browser and iMessage services. Citing studies that suggest Google's Android operating system is more prone to malicious software than iOS, Apple said its users would be hurt if they were forced to leave an environment where all apps are vetted by Apple.

At today's event, Dominique Shelton Leipzig, a lawyer with the firm Mayer Brown, said the FTC under new Chair Lina Khan is focused on breaking down silos between data protection and competition regulation.

"I just don't think the FTC is going to go through a merger of a data company and completely ignore privacy," Shelton Leipzig said. "They are having a consumer protection, non-siloed conversation at the FTC, and it's inconceivable they would go through an antitrust review and not touch on privacy." ■

"What the courts so far have not allowed is just referring to some other societal value or good you want to promote while you're restricting competition," Luib said. "If you just say, 'We want to improve privacy,' that's not enough." There must be a specific and tangible procompetitive effect of the conduct, he said.

US privacy laws should include protection for vulnerable populations, say advocates

Privacy laws should better protect the data of vulnerable populations such as poor people, homeless children and prisoners, privacy experts from the US said today.

"This is a very ugly intersection, and we need to observe it and understand that a lot of the privacy laws in the United States completely miss people who are living in poverty, and this is inappropriate," Pam Dixon, founder of NGO World Privacy Forum, said today at the ABA Antitrust Spring Meeting.

Privacy laws have to apply to all people, she said. "It's a terrible oversight in the privacy community."

She cited the California Privacy Rights Act. "The [authority] is busy writing regulations, but they are not studying the effectiveness of that privacy regulation. They're talking about the sensitive data again. But what I want to know is, where is the analysis of how this legislation impacts people who are living below the poverty line?" Dixon said.

Dixon cited a study that found "a profound disparity between schools that had money and schools that didn't" in their implementation of the Family Educational Rights and Privacy Act, or FERPA. That disparity made it effectively almost impossible for poor kids to effectuate their FERPA rights.

Nicol Turner Lee of the Brookings Institution, on the same panel, raised concerns over the privacy rights of people who are subject to government surveillance, pointing to a data breach at the prison phone provider Securus Technologies. "That cybersecurity breach has social implications for people who are in jail," she said. "We have to have prescriptive guardrails and use cases where the surveillance technologies continue to exploit and over-criminalize communities of color in ways that we can do something about it."

Dixon and Lee said privacy protection for vulnerable people is more important than the current focus on the overuse of data analysis in commercial scenarios.

"What people do in terms of the market surveillance … and their decision to do click bait … are problems, but the ability to have infractions that rests upon your further detainment in a prison … or your inability to get a mortgage, your ability to go to a quality school, that's a problematic issue," Lee said.

"I don't care about behavioral advertising," Dixon said. "It's not where the serious harms are not right now. I want to talk about kids who don't get privacy because they're poor." ■

By Xu Yuan

Published on April 8, 2022

Consumer chief says US FTC will continue to seek 'forward-leaning' business changes in data protection, tech cases

The US Federal Trade Commission will continue to pursue new types of injunctive relief like those in the recent data protection cases against CafePress and Weight Watchers, in which the agency required deletion of ill-gotten data or algorithms built on that data, the agency's consumer protection chief said today.

Speaking at the ABA Antitrust Spring Meeting in Washington, DC, Sam Levine, director of the FTC's Bureau of Consumer Protection, said that while "it is urgent and critical that Congress restore our 13(b) authority in full" to get financial disgorgement for fraud, privacy and other consumer protection violations, "we are not sitting on our hands" in seeking injunctive relief.

The FTC's recent settlements with CafePress and the former Weight Watchers, in which the companies agreed to delete data, algorithms or both, are two examples that Levine cited. In the CafePress settlement, the FTC also required the company to minimize the amount of data it collects, and in a first, required that the company enable multi-factor authentication to protect users' security.

The FTC's goal will be to continue to seek those kinds of "forward-leaning injunctive remedies that not only address the symptoms of harm, but address the causes," Levine said.

And if the FTC can't obtain those kinds of changes to business practices through settlements, "we are not afraid to take even the largest companies to court if we believe it's necessary," Levine said.

The consumer protection chief said that in data protection issues, he and FTC Bureau of Competition Director Holly Vedova and FTC Office of Policy and Planning Director Elizabeth Wilkins agree that regulators cannot continue to rely on the "notice and choice" regime as a basis for consumer privacy protection because it puts too much burden on consumers.

"It doesn't really work," Levine said. "I don't think it's fair or reasonable, given the flurry of digital services all of us rely on," to expect consumers to read highly technical privacy policies and opt out, because it "puts the entire burden on a consumer to protect themselves and will not meet this moment."

A key problem, Levine said, is that there aren't enough competitors to provide many digital services. "If there are only two players in a given market, consumers don't have a real choice," he said. Meanwhile, the "highly sophisticated" deployment of "dark patterns" makes the exercise of free choices even tougher for consumers, he said.

"The burden can't all be on consumers to read and assimilate all the information in these disclosures," Levine said. ■

By Mike Swift

Published on April 8, 2022

US DOJ aiming to understand competing interests in SEP licensing marketplace

By Khushita Vasant

Published on April 8, 2022

The US Department of Justice wants to learn the views of all stakeholders in the marketplace for standard-essential patent licensing as it focuses on striking a balance between competing interests, a senior official said today.

The DOJ is focusing on two keys items as it moves forward — the harm to competition and finding balance for all stakeholders, Jeffrey Wider, economics director of enforcement at the DOJ's antitrust division, said at the ABA Antitrust Spring Meeting.

The industry needs to work together as partners —"that's the way we should be thinking," Wider said.

Holders and users of standard-essential patents, or SEPs, should respectively have the "right incentives" to innovate and to adopt the technology, he said. "We have to think about getting compensation right for everybody."

Responding to a broader question on whether the DOJ under the Biden administration has sufficient tools and the vision to tackle competitive threats, especially from China and its courts issuing anti-suit injunctions »»

to block patent litigation in non-Chinese jurisdictions, the DOJ official said "We are learning here frankly. We want to understand how the balance [of] all of these competing incentives and concerns that are in the marketplace" plays out.

This is why the agency called for public comment following a new draft policy statement addressing the scope of remedies available to patent holders that have agreed to license their SEPs on fair, reasonable and non-discriminatory, or Frand, terms.

The call for comments followed an executive order on competition signed by President Joe Biden that encouraged a revision of the position.

The December draft statement generally counsels against SEP holders obtaining an injunction if their SEP has been infringed and endorses monetary damages as an "adequate" remedy. But today, Wilder clarified that the division's view since a previous policy statement issued in 2013 has been that there are instances where injunctive relief "can make sense."

Holders and users of standard-essential patents, or SEPs, should respectively have the "right incentives" to innovate and to adopt the technology, Wider said. "We have to think about getting compensation right for everybody."

Injunctive relief can have a "profound" impact on how licensing negotiations play out. The DOJ's 2021 policy statement is a "draft," Wilder emphasized, as the DOJ hears ideas from all stakeholders and continues its work. He didn't provide a timeline on when the draft statement would be made final.

He pointed, however, to a seminal 2006 ruling by the Supreme Court in eBay Inc. v. MercExchange as "an important law that will continue to govern" on the subject of injunctions.

Under eBay, a plaintiff seeking a permanent injunction must satisfy a four-factor test showing that it has suffered an irreparable injury, that remedies available at law — such as monetary damages — are inadequate to compensate for that injury, that a remedy in equity is warranted after having considered the balance of hardships between the plaintiff and defendant, and that the public interest wouldn't be disserved by a permanent injunction. ■

Patent licensing disputes need to have clear competition angle to elicit US DOJ interest, official says

By Khushita Vasant

Published on April 8, 2022

The US Department of Justice needs to see a clear angle of anticompetitive abuse in patent licensing disputes if officials are to take an interest in delving deeper into the fight, a senior official said.

A key takeaway from the DOJ's participation in many stakeholder meetings involving standard-essential patents, or SEPs, is that the disputes between patent holders and users weren't merely disagreements over licensing terms, Jeffrey Wider, economics director of enforcement at the DOJ's antitrust division, said at the ABA Antitrust Spring Meeting.

"I have been in many meetings with stakeholders in this industry and I will tell you the meeting where we feel it made sense is when parties explain to us, [and] made clear it wasn't just a licensing dispute that we were wading into — a commercial licensing dispute — but rather something that was a genuine harm to competition," the DOJ official said.

Wilder said the DOJ's involvement "doesn't resolve a dispute between innovator A and implementer B."

"That's a lot of work for us to get involved in, to fix all those problems. Rather, it addresses some problem that's endemic to the entire licensing marketplace and usually for us to really care there has to be again a competition angle," the DOJ official said.

Wilder was speaking on a panel discussing the lack of "consensus" on the antitrust analysis of SEPs in the US. While the panel didn't focus on it, the background to the discussion was the sour relationship between the DOJ and its sister agency, the Federal Trade Commission, under former President Donald Trump. In an unprecedented move, the DOJ had opposed the FTC in a US federal court over the latter's antitrust lawsuit against Qualcomm.

Wilder said it's key to bear in mind that the genesis of all concerns over SEP licensing is "collective action" that can generate antitrust harms. Firms can undertake conduct that can undercut the competitive process and cause harm to competition, he said.

The DOJ wants to learn the views of all stakeholders in the SEP marketplace as it focuses on striking a balance between competing interests, Wilder said. ■

International Perspectives

Merger review powers need more attention from lawmakers, German regulator says

More mergers are coming before regulators following changes to notification rules, but lawmakers need to look into the powers to intervene, the president of Germany's competition watchdog said.

Andreas Mundt said legislators had focused on making "sophisticated regulation" regarding the power of Big Tech platforms, but "far more attention" is needed on the substantive rules for analyzing markets and taking action in areas such as the digital sector.

Acquisitions by the likes of Facebook and Google in recent years have shone a spotlight on the ability of merger enforcers to scrutinize M&A activity.

Some of the deals involve startups that are so small the transaction doesn't meet the thresholds for notification to a regulator. Both Germany and Austria are outliers in Europe in having both a threshold related to turnover and one related to transaction value.

While this has allowed authorities to get visibility into more transactions, the rules for the subsequent analysis have remained the same.

"To catch such a merger is one thing, but you must also be able to assess it. This is a key question for the future," Mundt told the ABA Antitrust Spring Meeting in Washington, DC. "Merger control in the future deserves far more attention, not only by us but also by legislators."

"It is a bit of a contradiction that the legislators around the world threw themselves into the most sophisticated regulation of abuse control," Mundt said, referring to the recent agreement to regulate tech monopolies in Europe through the Digital Markets Act.

"But abuse control only comes in when it is too late. The question is: What about mergers? Especially in the digital economy."

Mundt said that judges in Europe had "raised the bar" for regulators to prove a merger harmed competition. And, in Germany, his agency recently suffered a court defeat over prohibiting a merger that saw the reduction of competitors in one part of the furniture industry from four to three.

"It would be a good idea to look at merger control especially in extremely high-concentrated markets like in the digital economy," he said.

The Bundeskartellamt recently scrutinized Meta's purchase of Kustomer, but officials concluded that "it would be extremely problematic to prohibit" the deal, Mundt said. ■

By Lewis Crofts

Published on April 6, 2022

Cartel whistleblower numbers remain strong in Austria, agency head says

By Lewis Crofts

Published on April 6, 2022

The amount of cartel whistleblowers coming forward in Austria is a "bit off the general trend" in Europe because of the "good cooperation" with criminal enforcers, said Natalie Harsdorf-Borsch, acting head of the country's competition agency.

A long-term drop-off is continuing in Germany, the president of the Bundeskartellamt said, calling for a fresh look at whistleblower rules to halt the trend.

Speaking at an ABA Antitrust Spring Meeting event, Harsdorf-Borsch said her agency is pursuing "huge bid-rigging cases" and had already bagged over 100 million euros of fines.

"Our leniency applications have not been going down," she said. "One of the reasons is the good collaboration between the competition enforcement track and the criminal enforcement track."

She said bid-rigging will continue to be a focus, with other cases pending.

Andreas Mundt, president of the Bundeskartellamt, noted a fall in applications in Germany, which saw 59 applications in 2016 and "nowadays around 10."

He said the introduction of new EU legislation in 2016 hast opened up the possibilities for the victims of cartels to sue for damages.

"We must do something for leniency," he said, floating the possibility of giving whistleblowers immunity from private damage claims.

Mundt said a solution is likely needed "at European level" and national agencies can't do it alone.

"We must make the system as attractive as we can to foster leniency applications," Mundt said.

The European Commission has indicated that it's aware of the trend and is reviewing possible measures to ensure whistleblowing remains attractive. ■

Cost-of-living pressures will be 'game-changer' for competition agencies, Mundt says

By Lewis Crofts

Published on April 6, 2022

Inflation and rising living costs will trigger a "rethink" for competition enforcers about how they can help citizens and prove that the economy is working for them, Andreas Mundt said. The president of Germany's antitrust agency said the looming crisis will raise huge questions for regulators and their role in the economy.

Inflation and rising living costs for citizens will trigger a "rethink" for competition enforcers about how they can help citizens and prove that the economy is working for them, Andreas Mundt said.

The president of Germany's antitrust agency said the looming crisis will raise huge questions for regulators and their role in the economy.

"The big issue for us is going to be inflation," Mundt told an ABA Antitrust Spring Meeting panel.

"What is happening now will probably stay. There will be high prices and people will not be able to afford their lives. And there will be the question: Who can do something?"

Mundt went on: "This will trigger a debate, at least in Europe, about competition and how well off people are with competition, and what can competition agencies do in this respect to make people be better off."

While regulators have been dealing with petrol prices for decades, broader economic turbulence and inflation would pose bigger questions and test a traditional reluctance to regulate prices, Mundt said.

Monitoring markets and advising the government on potential interventions may not be sufficient to address those challenges, he said. "We really have to prove that we in our free world, in our free competition world, that it works and that people are better off in a world where you have a free-market economy."

"This is a game-changer. We really need to rethink our tasks and how we approach things," he said.

Speaking on the same panel, Natalie Harsdorf-Borsch, acting head of Austria's competition authority, noted that her agency is part of a government group on tackling inflation in the country. ■

Portugal is probing collusion linked to Covid-19 pandemic, says antitrust enforcer

By Nicholas Hirst

Published on April 6, 2022

Portuguese antitrust enforcers are probing companies suspected of taking advantage of the Covid-19 pandemic to create cartels, according to the head of country's competition authority.

"We are unfortunately seeing evidence of cartels in the context of the pandemic," said Margarida Matos Rosa, speaking at the ABA Antitrust Spring Meeting. She said investigations are still at an early stage.

The Portuguese competition authority carried out 10 dawn raids in the two years from March 2020 — some of which probe situations linked to the pandemic.

Matos Rosa said she saw "potential" for pandemic-linked cartels in the huge growth of e-commerce; in relation to no-poach and agreements over wages; and around public tenders.

The head of the Portuguese competition authority said the crisis has shown the need for competition authorities to provide "as much legal certainty as possible" as to what kind of crisis-related cooperation was permissible to ensure "business continuity." Otherwise companies might be "frozen by fear" of being prosecuted.

But the "public sector also needs guidance," she continued. It is important to ensure the economy can "rebound stronger, more resilient, more innovative and without unnecessary barriers."

Her authority has highlighted certain principles to policymakers, such as ensuring public support doesn't distort competition and that public tenders are competitive and efficient. ■

Canada to discuss specific changes in next step in review of competition law, official says

By Xu Yuan

Published on April 6, 2022

Canada will have more comprehensive discussions on potential changes to its competition law as a next step following recommendations submitted by the Competition Bureau, a senior official said.

The Competition Bureau in February recommended policy changes to the government in a review of the country's Competition Act. The Minister of Innovation, Science and Economic Development also announced the government is looking at potential changes.

"The next step after these signal changes will be a more comprehensive modernization of the Competition Act, or discussion around what those changes should be, and potentially discussion in consideration of a broader set of topics and proposed changes," Jeanne Pratt, senior deputy commissioner with the mergers and monopolistic practices branch of the Competition Bureau, said today at the ABA Antitrust Spring Meeting.

"This kind of discussion hasn't happened in Canada since the last significant amendments to our [Competition] Act in 2009," Pratt said. "If you think about the changes that have occurred since that time, we're very much looking forward to the debates that will occur and determining the path ahead for competition law in Canada."

The agency has come up with suggested changes intended to align it with other jurisdictions, especially the US, the official said.

Pratt highlighted a few recommendations related to merger reviews, such as getting rid of efficiency exceptions and extending the limitation period, so that the agency can look into more mergers that are not subject to mandatory notification.

"I will note, however, that this is unlikely to affect the certainty of outcome in a vast majority of notifiable transactions in Canada, where we will continue to use advance ruling certificates, no-action letters or consent agreements … to provide certainty and predictability," Pratt said.

The bureau is also asking for powers to compel information for market studies, so that it can give more informed, evidence-based recommendations to the government. It is also recommending that the law "explicitly provide for criminal prosecution for harmful buy-side conspiracies, including wage-fixing and non-poach agreements." ■

Canada's competition regulator to put new resources into digital economy enforcement

Canada's competition agency is making significant investments in enforcement related to the digital economy and in improvements to overall enforcement capabilities such as through the use of injunctions, a senior official said.

Jeanne Pratt, senior deputy commissioner with the mergers and monopolistic practices branch of Canada's Competition Bureau, said today at an ABA Antitrust Spring Meeting event that the agency has received extra funding in 2021, including a one-time C$96 million ($77 million) over five years and an additional C$27.5 million to its base budget.

"This is a significant ongoing increase that represents about 50 percent more going into competition law enforcement and promotion in Canada than in the recent past," she said.

Pratt said the agency is using the money partly to improve its enforcement tools related to the digital economy, and said the bureau has established a digital enforcement and intelligence branch. "The branch will allow us to enhance our technology and analytical capabilities. And we're investing in proactive intelligence tools, expanding our intelligence work to all areas of the bureau's work, both enforcement and merger."

To enhance enforcement capacity, the agency plans to hire more investigators, economists, and litigators. It also plans for "investing more in internal experts and external experts so that we are well resourced for intelligence-led, proactive enforcement using all the tools at our disposal," the deputy commissioner said.

"We do also anticipate that this will include using injunctions more frequently, and we're seeing this already in mergers," Pratt said. As an example, she cited a recent merger case in the domestic oil and gas industry.

Where the agency concludes the legal and evidentiary threshold is met, "we will not hesitate to seek an injunction and if necessary, an interim order to stop closing and a hearing of that injunction application."

The regulator is also looking to use the new resources to promote a culture of competition. "We are enhancing our capacity to advocate for pro-competitive regulatory and policy changes at all levels of government in Canada," Pratt said. ■

By Xu Yuan

Published on April 6, 2022

US DOJ assisting Chilean competition authority in merger, cartel cases

The US Department of Justice has been assisting the Chilean competition authority in certain merger and cartel cases, Ricardo Riesco, the head of Chile's competition agency, said today.

Riesco, the national economic prosecutor from the Fiscalía Nacional Económica, or FNE, told the ABA Antitrust Spring Meeting that the DOJ and the FBI recently helped his agency access cartel evidence that was locked by a password in a thumb drive acquired in a raid by FNE, and that the evidence was crucial for a Chilean investigation in the transportation market.

"The last case we brought in the transportation industry, one of the most important pieces of evidence was in a pen drive and we couldn't access [information on] it without the password, but the DOJ and the FBI helped us with that," he said.

"I believe the level of sophistication and of success in the prosecution of cartels [by FNE] during the last decade is in part due to the assistance of the DOJ," he said.

In October, FNE accused the three major firms operating in Chile's market for the transportation of valuables — Brink's, Loomis and Prosegur — of colluding and fixing prices in 2017 and 2018. Six executives linked to them were also accused. The case was sent to the Chilean competition tribunal, known as Tribunal de Defensa de la Libre Competencia (TDLC), for a final decision.

DAWN RAIDS

FNE said in March the DOJ and the FBI are helping the agency strengthen its knowledge of dawn raids, which have proven to be a fundamental tool for prosecuting collusion cases.

Riesco also said the DOJ is helping FNE defend to the TDLC a recent decision blocking a health-insurance merger. "Now, the DOJ is also helping us in a merger in the health insurance industry. We just blocked a merger, and we are discussing this before the competition tribunal, and we are getting the help of the DOJ to successfully defend our decision," he said. "International collaboration is essential."

In February, FNE blocked Nexus Chile SpA's planned acquisition of Isapre Colmena Salud on the grounds that the transaction would "substantially reduce competition" in the Chilean health insurance market, leading to higher costs and worse medical coverage for consumers. The parties appealed the decision to the TDLC, which is analyzing the case.

DIGITAL MARKETS

Regarding prosecution of antitrust in digital markets, Riesco said FNE is looking into what other agencies are doing to define its own rules.

In the meantime, FNE is learning from "bigger authorities," especially the DOJ, the FTC, the European Commission and Brazil's CADE, he said. "If it is a transnational business, a transnational company, it doesn't make sense that each jurisdiction has its own set of rules. It is difficult for us as a small agency to have our own rules. We are studying what to do," he said. ■

By Ana Paula Candil & Lewis Crofts

Published on April 6, 2022

Inflation will pressure competition authorities to act, say Belgian, French enforcers

By Nicholas Hirst

Published on April 6, 2022

Rising inflation in Europe will lead to calls for competition authorities to intensify their scrutiny of the economy, according to enforcers from France and Belgium.

"As prices go up, the pressure will go up," Jacques Steenbergen, who leads the Belgian competition authority, said at the ABA Antitrust Spring Meeting today. That pressure could come from politicians or from the public.

In response, the competition authority would need to act, but without over-promising, he continued.

Henri Piffaut, a vice-president at the French competition authority, said the "big issue " is to manage expectations. "We are not able to solve all problems that arise on earth," he said.

He added that the current jump in inflation isn't linked to competition issues.

Inflation has been on the rise in Europe after central banks propped up economies in response to the Covid-19 pandemic. Energy prices also soared over the last months.

The comments echo a warning made earlier today by Andreas Mundt, who heads up the German competition authority

Competition authorities in at least Germany, Austria and Italy have indicated they are scrutinizing petrol prices, including to determine whether they will fall in line with international prices. ■

Dutch antitrust enforcer is hunting for sustainability test case to take to top EU court

By Nicholas Hirst

Published on April 6, 2022

The Dutch competition authority is willing to bring an antitrust case on sustainability to the EU courts to clarify how the law treats companies collaborating to reduce harm to the environment, according to its head.

"We are looking for cases to bring to the EU courts," said Martijn Snoep at the ABA Antitrust Spring Meeting.

The Dutch authority believes that EU antitrust enforcers could be more permissive when scrutinizing sustainability deals between companies.

"We are convinced the courts will side with us," said Snoep.

The two authorities agree that pro-sustainability benefits can factor into the competition analysis and those benefits can be quantified. But they differ on how much of those benefits need to flow to the companies' direct consumers.

In draft guidelines, the European Commission has suggested that any price increases need to be fully compensated by benefits, whereas the Dutch think that the benefits need only be a "fair share" of the extra costs.

"Ultimately, it's for the courts to decide what a fair share is," he said.

The obvious way for the question to land at the EU courts is the preliminary reference procedure.

That allows a national court to refer legal questions to the EU's top jurisdiction. ■

‘Self-enforcing’ DMA provisions will trigger litigation, Mundt says

By Lewis Crofts

Published on April 6, 2022

A landmark law targeting the likes of Amazon, Apple, Google and Meta poses a challenge over obligations that are designed to be clear-cut and enforce themselves, Germany’s top antitrust enforcer said.

Questions over what kinds of behavior fall afoul of a ban on “self-preferencing” could trigger litigation, Andreas Mundt said.

Last month, legislators in Brussels reached a deal on the Digital Markets Act — a new law designed to open up online business by forcing companies such as Facebook and Apple to abide by a list of 18 prohibitions and obligations.

This list is structured as self-enforcing, giving clear-line rules to platforms about what is illegal. In turn, this new approach avoids the need for lengthy antitrust probes where lawyers fight over what conduct is harmful to consumers and what is beneficial.

Mundt, president of the German competition authority, praised the DMA as a “huge step forward” that brings “a lot of clarity” to digital markets.

But he said he has doubts over the “self-enforcing” nature of the law. He said he can imagine a stand-off between a tech platform and the European Commission over what constitutes compliance.

“In some areas, it’s pretty clear. It’s easy to make a judgment if someone is compliant,” Mundt said, referring to rules on allowing interoperability between platforms.

“But when it comes to self-preferencing: what is it?” he told the ABA Antitrust Spring Meeting in Washington, DC.

EU antitrust investigations have taken companies such as Google and Facebook to task for using their platforms to give their own services an advantage over others. Such cases are ongoing or still before the courts.

Mundt questioned whether the aim of self-enforcement would be fulfilled.

“We will see litigation also with regard to the enforcement of the DMA; we will see legal uncertainty also with regard to enforcement of DMA.”

For Mundt, this means it’s important that national authorities retain the ability to pursue cases under their own laws in their own countries. ■

Antitrust compliance programs must address 'specific risks,' Cofece's acting president says

An effective antitrust compliance program must be designed based on 'specific risks' of a company in order to solve 'specific problems' and must involve continuous training, said Brenda Hernández Ramírez, the acting president of the Mexican competition authority.

"Its necessary to design a compliance program based on the specific risk of the company," Hernández Ramírez of the Federal Economic Competition Commission, or Cofece, said at an ABA Antitrust Spring Meeting panel event today. "Sometimes a company could just follow orders and maybe that's not the best way to solve their own specific problems in compliance."

She also discussed the need for companies to have a "continuous and tailored" training on compliance. "It's important to continue growing the culture, in general in the markets, for compliance."

Hernández Ramírez cited a forum developed with the Ministry of Public Administration as an example, saying that even when the results of such exercises are unofficial, they can be useful in implementing compliance programs.

By Austin Peay & Ana Paula Candil

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LATIN AMERICA COMPLIANCE

In Latin America, compliance programs became particularly important after the Brazilian federal police and prosecutors, in an investigtaion known as Operation Car Wash, uncovered a huge money-laundering scheme involving politicians and executives from state-controlled oil giant Petróleo Brasileiro, or Petrobras. The investigations spilled over Brazil's borders into its Latin American neighbors.

In recent years, Latin American countries including Colombia and Costa Rica joined the OECD, which requires adherence to the OECD Anti-Bribery Convention.

Hernández Ramírez said that in addition to developing a culture of compliance, companies must provide the human and financial resources necessary to ensure that compliance is ongoing. And when a company is actually being investigated by the authorities, it should cooperate and avoid further legal risks, she said.

SEVERE RISKS

Grave antitrust violations carry severe risks, said Ricardo Riesco, another panel participant and the national economic prosecutor for Chile's Fiscalía Nacional Económica, or FNE.

Depending on the jurisdiction, Riesco said, a violating company can be dissolved. "It may cease to exist."

He said that in other countries, companies can be subject to substantial fines, can be blocked from contracting with the state and can be obligated to pay damages, and individuals can be subject to criminal penalties. "People don't want to work nowadays for companies that have breached the law; suppliers don't want to provide goods and services to companies that have breached the law," Riesco said.

Panel moderator Eduardo Pérez Motta said that for some companies, "the loss of image and recognition from society can sometimes be even more important than the amount of the sanction." ■

Mexico wants digital market to evolve in best conditions possible, investigation official says

Mexico's antitrust regulator wants to make sure the digital market evolves in the best possible way in the country, while recognizing the country's competition conditions differ from those in other jurisdictions that are also looking into the subject.

Mexico's antitrust regulator wants to make sure the digital market evolves in the best possible way in the country, while recognizing the country's competition conditions differ from those in other jurisdictions that are also looking into the subject.

José Manuel Haro Zepeda, head of the Investigative Authority at the Federal Economic Competition Commission, or Cofece, said the regulator has a couple of investigations involving the digital market. Without sharing details, he said one concerns digital advertising and related services, and another involves barriers to competition for essential facilities in the retail market pertaining to digital platforms.

"We are really keen and we are analyzing this market because we want to be sure the evolution of this market is going to be as [good] as possible for the consumers," the official said at the ABA Antitrust Spring Meeting. He said the regulator is studying issues including new types of market entry barriers, structural characteristics, and whether there are practices that lessen market competition.

Noting that multiple countries are looking into the digital market, Zepeda said Mexico's approach is affected by the fact that competition conditions in the country are different due to varied market circumstances, where not everyone uses a credit card or the Internet. Even though the pandemic has accelerated the use of digital platforms, the country is still many steps behind others, he said.

"In this way, we want to make sure the digital market is going to evolve in the best conditions possible," he said.

Zepeda was appointed to the job in September 2021. He said he aims to focus on sectors that affect poor families the most in his new role.

He said the regulator is analyzing sectors including food and beverage, transport and logistics, financial, construction, real estate, energy, health, digital markets and public procurement, among which he said food and health are the most important sectors that could harm consumers, especially families that are very poor. ■

By Xu Yuan

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EU defeat in Illumina-Grail merger probe could trigger law change, Guersent says

By Lewis Crofts

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A court battle over whether Illumina's acquisition of cancer-detection company Grail should be reviewed by the European Commission could lead to changes in merger law if the judgment goes against the EU regulator, Olivier Guersent said.

The commission's top competition official said that judges could rule before the summer break on whether the regulator had jurisdiction over the deal.

In April, Illumina lodged an appeal at the EU's lower-tier General Court contesting the commission's power to review its transaction.

The deal doesn't meet the usual turnover thresholds to be notified at the Brussels-based regulator. But France's competition authority made use of a new policy that allowed it to call on the European Commission to scrutinize the deal.

Illumina is challenging that move, and its appeal is the first opportunity for judges to review the commission's new interpretation of a clause in merger law — known as Article 22 — to encourage national authorities to send cases to Brussels even when they fall below notification thresholds.

"Should we not win this case then we should probably think about modifying the regulation," Guersent told the ABA Antitrust Spring Meeting in Washington, DC.

He said the change could enable enforcers to get "a grasp on these cases below threshold in a way that is reasonably business-friendly."

Guersent said that reducing thresholds to zero would risk a "flood" of notifications and was "probably not the right answer" given the small number of deals at issue.

The case is being reviewed at the EU courts under an accelerated procedure that should lead to a judgment more quickly than usual.

The director-general of DG Competition said he hopes to have a judgment "before the summer." ■

Competition authorities must remain 'relevant' in times of economic shock, says CMA member

By Lewis Crofts

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Citizens are facing profound cost-of-living challenges due to Covid-19 and the war in Ukraine, and competition authorities must ensure they remain "relevant" in their work, Martin Coleman said.

The senior member of the Competition and Markets Authority said the choice of cases and the way they are pursued should address these "big challenges."

"The financial crisis, the pandemic and now the war in Ukraine have created significant shocks to the economy, to the way businesses work and the way people inter-relate with business," Coleman said at the ABA Antitrust Spring Meeting in Washington, DC.

"We must be sure as a competition authority that we remain relevant: the language we use, the way we work, the issues we address, the priorities we set, the remedies we develop, can reflect the big challenges that are going on," he said.

Regulators in Germany, Belgium and France have all noted the impact of inflation and market disturbances on citizens in recent days, and stressed authorities must consider how they can help.

Coleman, who chairs an inquiry panel at the CMA, said the cost-of-living concerns meant regulators should be vigilant to "make sure that businesses don't take unfair advantage of the situation." ■

Mexico, Ecuador competition officials say they have preserved autonomy amid political turmoil

The Mexican and Ecuadorian competition authorities have been able to preserve their autonomy in carrying out investigations even amid recent political turmoil affecting their countries, officials from the agencies said today.

Speaking at the ABA Antitrust Spring Meeting today, Danilo Sylva Pazmino, superintendent of Ecuador`s Market Power Control Superintendence, or SCPM, said that because of the country's Constitution and "secondary laws," his agency has been able to work independently despite turmoil in the executive and legislative branches of government.

Sylva said, however, that SCPM is having "serious problems" hiring staff to handle cartel investigations because Ecuador President Guillermo Lasso didn't approve additional budget. Significant public resources have been spent on infrastructure and medicines during the pandemic, Sylva said.

"In theory, under our Constitution, we have a very important model of separation, of independence, but in practice we depend on the executive power and at the moment we are having serious problems to hire new staff to work on our collusion cases," Sylva said. "We have a president who took office 10 months ago and is already being threatened by the legislative power to lose his own position."

Sylva said that although Lasso didn't help the agency hire more staff, the president has "absolute respect" for SCPM's autonomy.

Jose Manuel Haro Zepeda, the head of the Investigative Authority of Mexico's Federal Economic Competition Commission, or Cofece, said his agency has been pressured by the executive branch but has nonetheless preserved its autonomy.

Asked about pressure from the media, he said "the pressure is not coming from the media but from the president."

"That's the real source of pressure in Mexico. But at the end we are a constitutional autonomous authority in Mexico, and we are still working as usual. We are trying to protect consumers as we can and with the resources we have. At the end, I guess the institution is very prepared for these challenges."

Haro didn't describe the pressure from Mexico President Andrés Manuel López Obrador. Media reports, however, indicate that the president, known as AMLO, has questioned the role of independent public agencies such as Cofece and has refused to select candidates for three commissioner positions on Cofece's Plenary, which has been operating below its capacity since 2020.

In February, Cofece urged the Federal Senate and the executive branch to appoint new members to its Plenary so the agency can achieve a quorum and vote on cases involving barriers to entry in the market for payment systems through debit and credit cards.

Cofece is operating with only four commissioners and needs at least five for votes on cases involving barriers to entry. ■

By Ana Paula Candil & Xu Yuan

Published on April 7, 2022

Newer antitrust agencies shouldn't 'copy and paste' from advanced jurisdictions, African official says

Newer antitrust regulators need help from more experienced counterparts but shouldn't replicate laws from advanced jurisdictions without considering their specific situation, an antitrust official from Africa said.

"It's … very important as younger agencies, [when asking] for capacity building [and] technical support, to take into account the unique situations in those countries and avoid the copy and paste," Willard Mwemba, director and chief executive of the Competition Commission in Common Market for Eastern and Southern Africa, said at the ABA Antitrust Spring Meeting today. Comesa is an economic region with 21 member states.

Mwemba gave an example of newer agencies bringing in consultants from advanced jurisdictions for help, but the consultants "unfortunately end up copying and pasting their laws as they are in their jurisdictions."

"As they are helping you, they don't contextualize. So they end up copying and working the law as it exists in Europe. And that is the narrative we are trying to change," Mwemba said.

He praised a program in collaboration with the US Department of Justice, under which the US regulator, upon requests for help with capacity building programs, would first seek to understand a country's situation, systems, laws and economy before tailoring a program for them. "I think that is very helpful," he said.

He said certain capacity-building programs can be "completely out of context" in a different country, giving an example of predatory pricing, which could be a serious concern in advanced jurisdictions but not necessarily a big issue in other places where the market is big and entry is easy. ■

By Xu Yuan

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Japan's antitrust regulator 'reluctant' to expand into coverage of non-competition issues, official says

By Xu Yuan

Published on April 7, 2022

The Japanese antitrust regulator is reluctant to follow calls for it to expand so that it can look into a broader range of issues such as distribution and the labor market, an official said.

Commissioner Reiko Aoki from the Japan Fair Trade Commission (JFTC) said at the ABA Antitrust Spring Meeting today that the regulator is facing outside pressure to expand. "We are very reluctant because we are aware that certain things are not competition issues [and] they are distribution issues. [To] try to hold the line is the first goal for us in the foreseeable future," she said.

Aoki said the new prime minister in Japan has devised a concept for a new kind of capitalism that includes more attention to distribution. "He and other politicians pay more attention to what the JFTC can do about things, including the labor market," the official said.

The JFTC therefore has "unwillingly" been faced with debates that are going on similarly in other parts of the world about what competition can do and should not do, Aoki said, noting that the global debate has been helpful for the JFTC. ■

Public interest consideration should be narrow in antitrust cases, Africa, Japan officials say

By Xu Yuan

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Governments should narrowly define the boundaries for applying public-interest arguments in making antitrust decisions, such as in merger reviews, to avoid abuse of public interest, antitrust officials from Africa and Japan said.

"The conversation that we should be having is what should be the boundaries of public interests, [and] what should be the common principles that we agree on [when applying public-interest arguments]," Willard Mwemba, director and chief executive of the Competition Commission in Common Market for Eastern and Southern Africa (Comesa), said at the ABA Antitrust Spring Meeting today.

Mwemba said countries differ when applying public-interest considerations, such as labor issues, in antitrust decisions. For example, while the supranational competition law for COMESA does not consider public interests, laws in its member states do, he said.

Mwemba said the regional competition authority is actively advocating and sponsoring amendments of national laws to ensure convergence, and hopes that public-interest principles can be "refined and narrowed down" in the process.

To allow public interest to influence decisions such as in merger reviews could lead to the result that large companies with powerful lobbying capacities "start using government and ministers to influence the outcome of competition authority in transactions because it's so … broad," he warned.

"I agree … that public interest can be abused," Commissioner Reiko Aoki from the Japan Fair Trade Commission said. She pointed out that consumers are often left out of discussions on public interest. "Actually competition authorities are for the consumers and perhaps we should be stressing the great public interest, which is the consumers that we are really looking after." ■

UK children's privacy code shifting debate, UK regulator says

An increased focus on children's privacy protection is a trend across Europe, a UK regulator said today, even as the UK's recently enacted children's privacy code has boosted engagement with tech platforms and "changed the debate" on kids' data protection.

Since the UK Information Commissioner's Children's Code became effective in September "we've had a lot of companies approach us and say, 'What are we supposed to be doing?' We have had a lot of engagement," Claudia Berg, the ICO's general counsel, said at the ABA Antitrust Spring Meeting today. "We do feel it's a shift of the debate. That is at least something."

Similar legislation following the UK code's model has been proposed in the US, but Jessica Rich, the former director of the US Federal Trade Commission's Bureau of Consumer Protection, said she thinks the guidelines are too "gooey" to be easily enforced.

"As a former enforcer, it's pretty unenforceable. There's a reference to a duty of care. It's very confusing. It's very soft," Rich said. "I think it was very well intentioned, and it's good to have core principles, but I think it would be very hard to enforce and have stick."

"I think that's a fair point," Berg answered, but said she believed nevertheless that the code has changed the debate on kids' privacy.

"We can talk about data flows and ad-tech all these sorts of [technical] things but I think we all have a job to do to make sure the digital world is a safe space for our children, and it's really not at the moment," Berg said.

The code — widely credited for recent changes in privacy policies by the largest social media platforms — contains 15 principles, including on default settings, geolocation, parental controls and profiling. The ICO argued previously that if companies don't comply, they are probably breaking the UK versions of the EU's General Data Protection Regulation or e-Privacy Directive on confidentiality of online communications.

In November, the ICO said it has written to 40 companies operating in social media, gaming and streaming services to "gather evidence" and "determine their standards of conformance individually and as sectors" with the Children's Code, formally known as the Age-Appropriate Design Code.

While Rich issued that critique of the UK code, she also said the US has lost its influence over global privacy issues because of its chronic and continuing failure to pass a national privacy law.

"The US has lower credibility and influence on privacy than ever across the world. It's really been diminished, as data use and privacy has become such a global issue," she said. "Those are just a few of the terrible consequences of not having a privacy law." ■

By Mike Swift

Published on April 7, 2022

Trust issues hamper leniency, private sector cooperation, Malaysia's antitrust chief says

By Jet Damazo-Santos

Published on April 7, 2022

Trust issues are hampering the Malaysian antitrust regulator's ability to attract leniency applications and encourage companies to share information with them, according to the country's competition chief.

Iskandar Ismail, chief executive of the Malaysia Competition Commission, or MyCC, raised the issue of trust during the ABA Antitrust Spring Meeting today while discussing the regulator's low number of leniency applications and efforts to work better with the private sector.

"We have leniency in the law, we have issued guidelines, but I think it's not attractive enough for many players. And the other issue is the trust issue," he said.

Since the MyCC was established in 2011, he said the commission has only received four applications. None of them was successful.

In terms of working more closely with the private sector, including when it comes to economic research to better understand the competition landscape, he likewise said it's a big challenge due to trust issues.

"We've been trying to reach out to them, but they are quite reluctant," Ismail said. "Why is this competition agency approaching us? Did we do something wrong? They're very skeptical, [it's] the trust issue again. They say, where did we go wrong now?"

The MyCC has been addressing this issue through its advocacy efforts, with over half of more than 300 events it has done over the past decade aimed at the private sector.

"I [tell them], be more open to us. If you want us to understand you, you have to share your knowledge or share your insight, give us inputs or suggestions, rather than us chasing you all the time," he said. "You know, there's two things to that, when it comes to chasing you: Either you are being investigated, or we are interested in you. I think some of them get the message."

Aside from advocacy efforts, the MyCC aims to make its leniency program more attractive through a planned amendment of its competition laws. The upcoming amendment will also aim to give the regulator more powers to obtain data from private entities for use in economic research.

Ismail pointed out that the US leniency regime also received lukewarm reception at the start, and only became effective after a legal amendment.

"So, I hope that will happen to us also, because we are tired, it's like searching in the dark," he said. ■

International divergence on Cargotec-Konecranes merger doesn't undermine cooperation, enforcers say

By Nicholas Hirst, Austin Peay & Khushita Vasant

Published on April 8, 2022

US and EU merger chiefs sought today to strike a united front in their approach to international remedies, minimizing differences that led to the collapse of a merger between Cargotec and Konecranes.

Jonathan Kanter, the assistant attorney general in the Department of Justice's antitrust division, however, called out the companies for "regulatory arm-twisting" or trying to play agencies against each other.

"We are better together [and] I think the Cargotec-Konecranes merger is a reflection of that, because we reached similar substantive outcomes, because efforts to engage in regulatory arbitrage didn't work, even if we reach a different conclusion," he said.

The merger between the western world's two largest suppliers of container-handling equipment collapsed last month in the face of opposition from UK and US merger regulators, despite the deal being approved by the EU on the basis of the same remedy offer.

Kanter reiterated a message from January that remedies in merger cases are "highly disfavored" by the DOJ, and that "divestiture remedies will be a rare exception rather than the norm."

EU competition boss Margrethe Vestager underlined that the feedback in Europe on the remedy proposals was positive. "The scope of discretion on our side becomes more and more limited because the problem seems to be resolved," she said. "That's why we ended up in a situation where we approved the merger with the remedy package."

She said that the CMA was fiercer on remedy proposals. "Long story short: Close cooperation, diverse outcomes," she said. "I don't believe that has deteriorated the trust between us."

The level of trust and respect among competition law enforcers is extraordinarily high, Kanter said. "Perhaps, even if we reach a different conclusion from time to time [on other mergers] that [cooperation] will continue and is unlikely to disrupt our work," he said. ■

Protecting employees is secondary to other antitrust priorities, CADE president says

By Ana Paula Candil

Published on April 8, 2022

The Brazilian competition authority must protect consumers and competition in the labor market, but it is not the agency's role to protect employees, its president Alexandre Cordeiro said today.

Cordeiro shared his views on his agency's role in reaching beyond the consumer welfare standard in antitrust investigations.

"At the end of the day, the idea is not to protect workers, it is to protect consumers. We have the Ministry of Labor and federal prosecutors to do that in Brazil," Cordeiro, of the Administrative Council for Economic Defense, or CADE, said today at the ABA Antitrust Spring Meeting in Washington, DC.

Cordeiro has publicly advocated for CADE continuing to provide an "orthodox" analysis of its cases, instead of expanding its analysis to include issues such as sustainability, tax law or labor law.

Cordeiro has expressed concern that expanding CADE's role could damage the agency's ability to prosecute anticompetitive conduct.

"If you protect consumers and [additionally] protect workers, that's fine, but protecting workers doesn't necessarily have to be the main goal of antitrust authorities," Cordeiro said.

In 2021, CADE started its first investigation into the labor market. The case involves three dozen companies, including Brazilian subsidiaries of Abbott, Acelity LP, Baxter, Bayer and Siemens Healthcare — as well as 108 individuals linked to them — that allegedly engaged in wage-fixing labor agreements in the healthcare market.

Cordeiro said the leniency agreement signed in the case is the same type of agreement the agency traditionally uses in antitrust probes. ■

EU seeks clarity on 'standard of proof' in Intel court appeal

By Lewis Crofts

Published on April 8, 2022

Intel's fight with the European Commission will be subject to a further appeal because the regulator is seeking clarity on "a number of points of law" such as the "standard of proof," Margrethe Vestager said. The EU's top antitrust enforcer said she thought carefully about continuing the long-running fight.

Intel's fight with the European Commission will be subject to a further appeal because the regulator is seeking clarity on "a number of points of law" such as the "standard of proof," Margrethe Vestager said.

The EU's top antitrust enforcer said she thought carefully about continuing the long-running fight.

On Jan. 26, EU judges handed down their third ruling on a 2009 fine against Intel for abusing its market power.

That decision imposed a record fine of 1.06 billion euros at the time, but it has since been up and down the bloc's court system with judges finding fault with how investigators ran the economic modeling.

In the latest judgment, a lower court ruled that the European Commission made several mistakes in an "as efficient competitor" test, which studies the costs and prices of the dominant company.

Judges said that investigators hadn't proved the abuse to the requisite standard, and they poked holes in the calculations made in the test.

Speaking in Washington, Vestager told reporters that her "first consideration" was whether to "let it rest" after a lengthy court battle.

But she said it was important that the Court of Justice had its say on the "standard of proof," since the conclusion would likely be important for the future.

The commission's original decision, in 2009, hinged on a set of rebate agreements between Intel and computer makers, including Dell, HP and Lenovo. The deals meant rival AMD struggled to get its chips into laptops, as it couldn't match Intel's pricing strategy, the commission concluded. ■

Microsoft cloud allegations are being 'actively' probed by EU, Vestager says

By Nicholas Hirst

Published on April 8, 2022

EU antitrust enforcers are "actively following up" on a complaint about Microsoft made by cloud providers, including OVH, according to the bloc's competition boss.

"Once you have your business with one cloud provider, it becomes increasingly difficult to move your business," said Margrethe Vestager, at a press conference in Washington, describing the allegations. "There is a sense of foreclosure."

She said her team had shared the allegations with Microsoft. They have also quizzed market players for their views, MLex understands.

Vestager said Europe should have a "multi-vendor" market.

Last month, it emerged that OVH, a French provider of cloud servers, and two other companies who don't wish to go public with their complaints, accused Microsoft of using its monopoly position in workplace productivity software to harm competition in the market for cloud computing services.

Among various concerns, they say Microsoft is making it difficult to buy and use Windows and Office on clouds that compete with its own Azure platform.

The European Commission has proposed legislation that would make it easier for Europeans to move their data from one service provider to another. ■

Meta's approved takeover of Kustomer makes case for merger reform, Mundt says

Lawmakers should consider reforming Germany's merger review test to make it easier for enforcers to intervene against deals like Meta's acquisition of Kustomer, the head of the country's competition authority said.

"What we see in mergers is it is very difficult to bring our cases [successfully] through the courts," said Andreas Mundt.* "I wonder why the legislator is not thinking about reducing the … complexity of merger control."

He said his agency lacked "sufficient tools" to block problematic mergers in the digital sector and cited his agency's recent approval of Meta's acquisition of Kustomer as an example where the Bundeskartellamt didn't have "sufficient evidence" to meet the merger rules' "very high" standard of proof. That is because recent court judgments make it "very difficult" to oppose mergers that fall short of creating a dominant position, he said, citing an EU court verdict annulling a commission veto against a telecom merger, and a German judgment annulling remedies in a retail merger.**

Options included reducing the threshold for enforcers to show that a merger would have a "significant impact on effective competition" and shifting some of the burden of proof to the merging companies — in particular in the digital sector.

Another option included creating "per se tools to a very limited extent" — suggesting red lines that would automatically disqualify a merger — since "agencies around the world suffer from "insufficient resources."

"This is why I think we should do our utmost, also the legislature maybe, to reduce the complexity of merger cases," he concluded.

Mundt noted that lawmakers had already intervened to reduce the complexity of antitrust cases, a reference to a German reform of the country's competition laws to make it easier to pursue cases against digital platforms.

The Bundeskartellamt approved Meta's acquisition of customer relationship management software supplier Kustomer in February unconditionally.

The European Commission had already secured remedies that applied across Europe, but the Bundeskartellamt examined a theory of harm that it said had not been covered by the commission, notably the reinforcing of Meta's powerful ecosystem. ■

By Nicholas Hirst

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**Spring Enforcers Summit, US Federal Trade Commission and US Department of Justice, April 4, 2022.*

*** EU General Court CK Telecoms UK Investments Ltd v European Commission T-399/16 and XXXLutz at the Düsseldorf Higher Regional Court, case reference VI-Kart 2/21 (V).*

Complex divestments bring 'no upside,' UK's Coscelli says after Cargotec-Konecranes block

Antitrust authorities gain little benefit from accepting highly complex divestment remedies to address concerns about problematic mergers, the chief executive of the UK regulator has said, explaining the watchdog's decision to reject remedies offered by Cargotec and Konecranes.

Andrea Coscelli said antitrust authorities must guard the welfare of consumers and not take on an unreasonable amount of risk.

Speaking at a conference* today, Coscelli shed light on the Competition and Markets Authority's approach to remedies that played into its recent block of Cargotec-Konecranes.

The merger of two Finnish container-handling equipment companies collapsed last week after facing opposition in the UK, US and Australia.

By Victoria Ibitoye

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The CMA found it would harm competition in the supply of a wide range of container handling equipment products and rejected a remedy offered by the companies to divest Konecranes' lift truck business and Kalmar automation systems because it was too risky and complex, and whoever bought them would not be able to compete as strongly.

The remedy was also rejected by the US Department of Justice which said in a statement it did not accept "patchwork settlements that do not replace the competition that is lost by a merger."

The remedy was however accepted by the European Commission which has since defended its approach.

Coscelli said the CMA has "moved the bar" for accepting structural divestment remedies because, after assessing past cases, it has increasingly found that complex remedies are difficult to execute.

"Lots of things can happen and, at the end of the day, we're all very clear in our guidance that the remedies need to recreate 100 percent of what you lose. And 100 percent of what you lose is a lot," he explained.

"Structural remedies … should be easy, simple, clear-cut, ideally not really being at the core of the transaction," he said. "Obviously there are cases where there are geographical dimensions to the case; it might be that with divestment in a particular region or a particular area of the country, you fix the problem."

"There might be issues where there is an issue with a single product line and the merger is about eight, 10 product lines — fine, we are happy with that" he said. "But certainly, and I think Cargotec was a good example, cases where the remedies go to the very heart of the transaction, they are highly complex, they are highly risky, honestly there is no upside for an agency in accepting that."

Coscelli added that competition regulators "need to be guardians of the welfare of consumers" and "it is just not right that we take on this amount of risk because if things fail, consumers pay, shareholders win and that's just not our role to do that." ■

**Spring Enforcers Summit, US Federal Trade Commission and US Department of Justice, April 4, 2022.*

Big Tech algorithms the focus of two coming papers from UK's digital regulators, Coscelli says

By Victoria Ibitoye

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A forum of the UK's competition, privacy, communications and financial regulators will soon publish two joint papers on the algorithms used by Big Tech companies, the chief executive of the Competition and Markets Authority has said.

Andrea Coscelli told a conference* today that the authorities each have varying concerns about the software-driven automated processes now commonly used by digital companies.

"We're working at the moment on a piece of work on algorithms with the other three partners … All of us are worried about the algorithms used by the big tech companies with slightly different angles … financial services, privacy, online safety and competition. And again we think it's very helpful to us and to the community at large that we are as joined up as possible," he said.

The UK's Digital Regulation Cooperation Forum, or DRCF, brings together the CMA, the Information Commissioner's Office, Ofcom and the Financial Conduct Authority. It was set up to make open dialogue and cooperation easier between authorities as the CMA published the findings of its digital advertising market study, flagging concerns about the market power of Google and Facebook.

The CMA has previously expressed concerns about the opacity of algorithms and the need for more competition oversight to prevent the manipulation of consumers and self-preferencing, among other issue. ■

**Spring Enforcers Summit, US Federal Trade Commission and US Department of Justice, April 4, 2022.*

Cartelists' private homes are a target for EU cartel investigators, Jaspers says

EU antitrust investigators recently raided the home of the employee of a company suspected of competition breaches and are likely to make more such visits, according to a senior official from the bloc.

Maria Jaspers said the inspections were conducted in parallel to those carried out at the business, and the commission did not advertise its visit so as to protect the privacy of the individual.

Jaspers, the head of the EU's department targeting cartels, noted that during the pandemic, there has been a shift in working arrangements and more people are working from home.

"That means that relevant evidence, relevant individuals, insertable hardware is now more likely to be kept in domestic premises, which also means that electronic data can easily be deleted," said Jaspers, in a conference keynote speech.*

"To respond to this shifting trend and shifting nature in the working arrangement and to secure the evidence that we need, it is certainly likely we will make more use of this power."

The last known time the commission searched the homes of employees was when investigating a cartel between producers of North Sea shrimp more than a decade ago, and before that a cartel in the gas-insulated switchgear market.

WHISTLEBLOWERS

Jaspers outlined the commission's various efforts to increase cartel detection and said investments in drumming up leads were "starting to bear fruit."

The commission's whistleblower tool, introduced a few years ago, had produced more commission probes, as well as investigations at the national level.

A 24 million euro sanction by the Spanish competition authority against steelmakers benefited from a whistleblower tip passed on by the commission, she said.

Jaspers said employees appear increasingly ready to blow the whistle and are able to recognize a possible breach thanks to internal compliance training.

The trend "opens up another front in the leniency-risk-benefit analysis that companies need to make" when deciding whether to file for leniency.

Tips are further developed by the commission's internal "intelligence" unit, she continued. Recently, it mapped potentially collusive activities carried out on social media, allowing the commission to conduct dawn raids.

Jaspers also said the commission was looking at ways of making its immunity and leniency program for cooperating cartelists more attractive. That includes "potentially protecting the leniency applicant more than the current rules allow us to do," she said. One option is to shelter the applicant from follow-on damages claims.

But she noted that the issue raises a "number of complicated legal, policy and fairness questions." ■

GCR Live: Cartels 2022, Washington, DC, April 5, 2022.

By Nicholas Hirst

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US interest in impact of mergers on jobs takes competition enforcers into 'danger zone,' says Germany's Mundt

By Nicholas Hirst

Published on April 8, 2022

US competition enforcers' interest in the effect mergers could have on jobs is striking, according to the head of Germany's competition authority.

Taking jobs into account "is exactly the danger zone, that is a political question," Andreas Mundt said at an event.*

He noted in Germany, the government can overrule the German merger authority to protect jobs.

Last year, Lina Khan, who chairs the US Federal Trade Commission, described the impact of mergers on labor markets as a possible "blind spot" in the agency's analysis.

Mundt said there certainly could be cartels in labor markets. He pointed to a US example of employers setting wages of nurses at a fixed rate as clearly being an employers cartel.

But Mundt said labor market issues were not a focus of German antitrust enforcers.

"It's the unions that are very strong [and] this prevents these kind of agreements in Europe, at least in Germany," he said. "That's why these labor market issues are not an issue for us."

He could imagine German enforcers pursuing no-poach agreements between employers committing not to hire each others' employees, but they had yet to receive complaints on the issue. ■

**Keynote, Breakfast reception, Chiomenti, Cuatrecasas, Gide and Gleiss Lutz, Washington, DC, April 8, 2022.*

European leniency programs must consider reform, Germany's Mundt says

By Nicholas Hirst

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Cartel-busters need to consider options to revive flagging leniency programs, according to the head of Germany's competition authority. But he said that changes have to be coordinated at the European level.

"We need to think if we can do something, [but] the national lawmaker has very little room for manoeuvre," Andreas Mundt told an event.* Any initiative to protect whistleblowers from cartel damages claims would need to be led by the EU, which already has a law on damages claims.

He said such an initiative is in the interests of victims: "The success of cartel enforcement is very closely linked to the success of leniency programs. … If there is no enforcement, the cartel goes on."

Leniency applications also provide key evidence that is otherwise difficult to match.

"If you really want to make a cartel case court-proof, then you need someone from the inside," he said.

German leniency applications have dropped from 60 to around 10, according to Mundt, who did not specify the time period he was referring to. ■

**Keynote, Breakfast reception, Chiomenti, Cuatrecasas, Gide and Gleiss Lutz, Washington, DC, April 8, 2022.*

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