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A Review of Fordham's Annual Conference on International Antitrust Law & Policy, and Antitrust Economics Workshop

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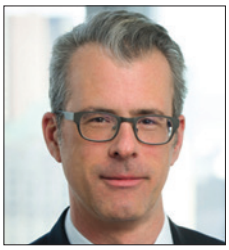

And **Kenneth Schwartz**

Fordham Law hosted its 51st Annual Conference on International Antitrust Law and Policy, and Antitrust Economics Workshop from Sept. 11 through Sept. 13, 2024. Conference panelists addressed a broad range of antitrust topics. This article highlights key themes from the event.

Review of Updated Merger Guidelines

In the panel entitled "U.S. Merger Guidelines: The Great Debate, 9 Months Out," participants shared observations and criticism about the 2023 Merger Guidelines and their impact to date. Two central themes of the discussion were the continued role of economics in merger enforcement and the role of the judiciary in construing the guidelines.

Eric Posner, a law professor and research chair at the University of Chicago who briefly worked on the guidelines during his previous stint at the DOJ, commended the agencies for repudiating the 2010 Merger Guidelines, which he felt leaned too heavily on economics and economic assumptions. In his view, such heavy reliance on economics led to underenforcement. Posner observed that the new guidelines provide agencies with more tools and fewer limits to enforce the law, and he was optimistic that the 2023 Merger Guidelines will encourage more efficient merger enforcement. Nathan Wilson, executive vice president of Compass Lexecon, disagreed, stressing that the use of economics is critical to avoid overenforcement

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and to permit procompetitive transactions to proceed. In Wilson's view, the uncertainty of certain novel concepts in the new merger guidelines chills benign or even procompetitive transactions and, in their enforcement zeal, the antitrust agencies' use of the new guidelines may hinder competition.

Bill Kovacic, a law professor at George Washington University, acknowledged the importance of the guidelines, but stressed the need to involve the judiciary. Supreme Court jurisprudence, he said, drives merger policy. The difficulty, he recognized, is the inherent delay: Merger guidelines today will be interpreted years down the road when the case law catches up. And very few merger antitrust cases have reached the Supreme Court in the last 20 years. Indeed, as Posner explained when asked about the large number of old Supreme Court cases cited in the new guidelines, those old cases remain binding precedent today.

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We also heard that the lack of recent Supreme Court precedents in the merger area has contributed to confusion about the meaning of "substantial lessening of competition" under Section 7 of the Clayton Act. The greater number of Supreme Court decisions construing the Sherman Act aided in the development of the consumer welfare standard underlying Section 1 and Section 2 analyses. By comparison, very few merger cases have made it to the Supreme Court since passage of the Hart-Scott-Rodino Act, largely because the agencies drop their challenges to transactions if the merging parties win in the district or appeals court, or the transaction parties walk away from the transaction if the agencies win. One panelist contended that if the court had continued to hear merger challenges at the same pace as it heard Sherman Act cases, guidance similar to the consumer welfare standard would have been established. But for now, and for the foreseeable future, the uncertainty surrounding United States merger enforcement is here to stay.

Reconsideration of the Rule of Reason

One panel was dedicated entirely to an assessment of the Sherman Act's rule of reason and whether that analysis should be reconceptualized today. The panelists unanimously agreed that the current state of the rule of reason is "a mess," with its application varying across, and even sometimes within, circuits. Courts differ as to when and how to apply the rule. Panelists observed that parties and courts are uncertain about which party bears the burden of proving what, and how to measure efficiencies and assess the but-for world. One panelist observed that this uncertainty likely drives settlement, which in turn hinders doctrinal development. And as Scott Hemphill, a law professor at New York University, added, courts often avoid answering uncertain, difficult questions posed by rule of reason jurisprudence.

This wide variability in the application of the rule of reason led another panelist to emphasize

the need to reconceptualize the implementation of the rule of reason and the examination of harms that enforcers seek to prevent. The panelists identified various suggestions to reconceptualize the rule of reason, including (i) asking courts to define and appropriately shift burdens of proof; (ii) requiring defendants to provide a real articulation of the rationale for their conduct to show a procompetitive justification that is not pretextual or ancillary; (iii) asking courts to clarify the use of balancing in the application of the rule of reason; and (iv) eliminating market definition as a necessary part of the rule of reason analysis.

Practitioners see the rise of Gen AI as an opportunity for Europe to catch up in the digital race with the U.S. and Asia.

International Antitrust Enforcement Economics

The "Agency Economists Roundtable" featured chief economists from the DOJ, the FTC, the UK's Competition and Markets Authority, the EC and the Competition Commission of South Africa, who discussed different economic approaches to antitrust enforcement across the globe. Perhaps not surprisingly, the agency economists all agreed on the need for more aggressive enforcement in digital markets, for considering broader theories of harm, and for proactively understanding industry issues and trends.

Each economist discussed how the digital sector is a massive focus of the agencies. Jenny Haydock, deputy chief economic adviser of the CMA, explained that the EU's Digital Markets Act will allow the CMA to be much more proactive in its antitrust enforcement efforts in digital markets. Nathan Miller, chief economist of the DOJ's Antitrust Division, said that his team is relying more heavily on direct evidence in firms' documents, rather than relying as much on market definition alone. Ted Rosenbaum, deputy director of the FTC's Bureau of Economics, told the audience that, instead of assessing a transaction or conduct in a single market, the FTC assesses the manner in which large digital companies play their products off each other in multiple markets. And Hans Zenger, head of the EC's chief economist team similarly expounded on the EC's concern about dominant firms acquiring complements to expand their monopolies into new industries.

The panelists agreed that antitrust enforcement around the world has been more aggressive in recent years, focusing on conduct as well as mergers and acquisitions. In this regard, James Hodge from the Competition Commission of South Africa explained that, unlike in the past, his agency has recently used antitrust laws to go after patent holders and price gougers. As a whole, the economists explained that, in this era of aggressive antitrust enforcement, they have learned to lean into uncertainty, a vastly different approach than the hesitancy that uncertainty often generated within agencies in the past.

The panelists also discussed their approach to market studies and industry analysis. In South Africa, such studies are more often ex-ante, predicting future trends in the

industries, while in the U.S. and EC, such studies are usually ex-post, analyzing past developments in industries to prepare for future investigation or regulation of those industries. In either case, the panelists all agreed that economics will remain critical in antitrust enforcement going forward.

Cartels

The "Global Criminal Enforcement" panel offered an interactive discussion among private and government attorneys on international cartel enforcement. Emma Burnham, director of criminal enforcement for the Antitrust Division, told the audience that one-third of the agency's current criminal antitrust investigations have an international component, which differs drastically from a decade ago, when the DOJ focused primarily on domestic price-fixing cases. Burnham explained that, while the DOJ still investigates domestic price-fixing, its mandate has expanded to prioritize prosecuting individual executives involved in international cartels, partly in response to increased instability in the global economy and threats to national security.

Natalie Harsdorf-Borsch, director general for competition of the Austrian Competition Authority, explained that agency priorities in Europe are still very much focused on cartel enforcement. She said that, in the past few years during the COVID pandemic, there was a downturn in cartel enforcement in some European jurisdictions, with fewer dawn raids. Austria, she explained, was the outlier, continuing to conduct dawn raids throughout the pandemic. Today, however, pursuit of classic cartels remains a priority for European enforcement agencies. In this regard, the EC recently carried out dawn raids in the fragrance, synthetic turf, energy drink, food delivery, and fashion sectors. Harsdorf-Borsch further explained that in Austria the agency can go public with a dawn raid if there is an overarching public interest to do so, and nothing stops companies from going public themselves when they are raided.

A couple of private practitioners in the U.S. noted that dawn raids outside the country often drive civil litigation domestically. When dawn raids occur in Europe, private class actions are almost immediately filed in the U.S. without waiting for grand jury indictments or other intervening processes. Current litigation in the fragrance industry was highlighted as a prime example. But, as Burnham of the Antitrust Division pointed out, this dynamic sometimes creates tension for the DOJ. While she acknowledged that the class action mechanism is important and the DOJ will often defer restitution in the criminal case to the civil litigation, at the same time, the DOJ must protect the integrity of the criminal process when a criminal investigation is ongoing. Public disclosure of a dawn raid in Europe and the follow-on private litigation can complicate a pending DOJ criminal investigation.

On the issue of international cooperation among agencies, Harsdorf-Borsch described the creation in 2020 of a cross-border cartel working group to discuss best enforcement practices across the EC, Chile, South Africa, the U.S., and Australia. She also mentioned a recent case in which authorities in Austria, Germany, and the U.S. cooperated to effectively

combat a sugar cartel in Austria. In the same vein, Burnham highlighted the 2026 tri-lateral World Cup initiative, which is a commitment among the DOJ and its counterparts in Mexico and Canada to share information and conduct joint outreach activities to deter, detect, and prosecute collusive schemes related to the provision of goods and services in connection with the 2026 FIFA World Cup.

Platforms

In a panel entitled "The Economics of Platforms—Key Issues," panelists discussed the economic and regulatory analysis of mergers in markets involving multi-sided platforms. Alexandre Cordeiro Macedo, president of Brazil's Administrative Council for Economic Defense (CADE), started the discussion by emphasizing that traditional merger analysis changes significantly when multiple sides of a platform must be considered. In his view, economists and regulators must therefore adapt and innovate new methods for analyzing mergers in markets involving platforms. Ioannis Lianos, a law professor at the University College London, observed that the increased complexity of antitrust law as applied to platforms may warrant a reframing of the merger analysis, which Lianos contended should include more complex economic analysis and possibly computational social science to investigate and draw conclusions about consumer behavior in such markets. He said that concepts of network effects, feedback loops, tipping points and ecosystems—concepts that apply to multi-sided platforms—do not fit squarely within the bounds of traditional economic merger analysis. Moreover, he asserted, while antitrust analysis seeks to promote competition between platforms, it must also incorporate an understanding of the cooperation that is necessary for multi-sided platforms to thrive today.

We also heard that, although the typical concern with vertical integration in the technology sector is the lock-in effect, private practitioners defending alleged anticompetitive platforms have seen that many incentives exist not to lock customers in. In practice, consumer preference and consumer decision-making reduce the likelihood that vertically integrated companies will engage in conduct designed to lock their customers in to their own products and services. Companies see more value in the consumer using a portion of their offerings than in the risk that dissatisfied customers will leave the company altogether if they are required to use 100% of the company's products. Lianos disagreed, and questioned whether consumers actually leave in these situations. Because merger enforcement is preventative, Lianos said that regulators need to consider what likely will happen in the future, which is difficult to predict. Cordeiro synthesized the discussion and observed that both views are meritorious, which perhaps requires regulators to apply behavioral economics on a case-by-case basis to effectively optimize the regulation of vertical mergers.

Artificial Intelligence

Panelists who participated in the "Generative AI—Hold Your Horses?" panel expressed concern about overregulation of the Generative Artificial Intelligence (Gen AI) space.

One panelist reflected on the two main theories of harm that enforcers have

articulated about Gen AI: (i) control of key inputs, including chips, cloud computing, data, and skilled expertise; and (ii) market power in adjacent markets that could harm competition in the AI market, or vice versa. In addressing the first theory, the panelist explained that any control of key inputs is likely to be fleeting, as significant disruption and entry in the market—the emergence and success of ChatGPT, for instance—can disrupt so-called big tech incumbents who have seemingly insurmountable data advantages. As to the second theory, which regulators often address by requiring interoperability among products, we heard that there are tradeoffs to compulsory or forced interoperability, including that it could actually solidify a market around incumbent market participants. Where antitrust scrutiny is deemed appropriate, despite the large number of players in the Gen AI space, panelists noted that traditional theories of harm may need to adapt to markets characterized by dynamic competition. For example, entrants are starting to win through innovation leapfrogging, rather than pricing strategies. Indeed, it was suggested that perhaps R&D spend over time may be a better indicator of market power than market share, at least where the spend is for true innovation, which promotes competition, rather than the creation of entry barriers, which harms competition.

We also heard from panelists who highlighted the large number of Gen AI models in the market and the belief that the spread of new models will not slow down any time soon. Regulators were urged to avoid overregulation, which some feared would otherwise stifle competition. Indeed, many new companies, including some in Europe, are entering the field. Practitioners see the rise of Gen AI as an opportunity for Europe to catch up in the digital race with the U.S. and Asia, which have dominated to date. Thus, panelists emphasized that regulators should keep this dynamic in mind when considering potential enforcement actions.

Finally, some panelists warned that although it is unlikely that one company would have dominance in the Gen AI market, big tech firms could install a Gen AI product into their must-have products or services. Three potentially relevant guidelines from the 2023 Merger Guidelines were highlighted that, under an after-market theory, could be applied to transactions involving Gen AI: Guideline 4, related to the elimination of a potential entrant in a concentrated market; Guideline 5, focused on raising rivals' costs; and Guideline 6, related to entrenchment or extension of a dominant position.

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