Enforcers Roundtable*

American Bar Association Antitrust Law Section Virtual 68th Annual Spring Meeting
April 25, 2020 (via YouTube)

BRIAN HENRY: Good afternoon and welcome to the Section’s first-ever Virtual Spring Meeting. My co-moderator today is Adam Biegel, Co-Chair of the 2020 Spring Meeting.

We have cause for celebration—just a few hours ago we surpassed the 5,000 mark, that is, over 5,000 individuals—Section members and nonmembers—have taken part in Virtual Spring Meeting and have either listened to a podcast, watched a videocast, or attended a reception, and we’re sure that this Enforcers Roundtable will take that number even higher. Let’s get this program underway.

We have very special guests today, the leading lights of antitrust and consumer protection enforcement from major jurisdictions around the country and around the world. I want to thank all of them personally for joining in today, being such great sports in doing this traditional Spring Meeting program virtually. We would all have been sitting at the Marriott Marquis at this very moment in our business attire on a formal stage, but instead we are coming to you in casual clothing from many locations around the world.

* Edited for publication.
Our speakers today are: Sarah Oxenham Allen, the Senior Assistant Attorney General and Antitrust Unit Manager with the Office of the Attorney General in Richmond, Virginia. Sarah is speaking in her role at the National Association of Attorneys General (NAAG). Matthew Boswell, Commissioner of Competition, Competition Bureau of Canada, who is calling in from Quebec. The Honorable Makan Delrahim, Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice in Washington. The Honorable Joe Simons, the Chairman of the Federal Trade Commission in Washington. Margrethe Vestager, who actually has, I think, the best title of anyone: Executive Vice President of the European Commission for a Europe Fit for the Digital Age and Commissioner of Competition.

I am going to kick this program off by asking each panelist to offer introductory remarks and respond to the question: Considering the fact that the global pandemic has touched countless government agencies around the world, can you tell us more about how your agency is responding to the crisis and any related enforcement actions you’ve taken?

For our first round we are going to go in alphabetical order. Sarah, can you start us off?

SARAH OXENHAM ALLEN: Thanks, Brian.

First, I want to thank the ABA for inviting me and for putting on this amazing virtual meeting. It is pretty amazing that you pulled this together so quickly and have done a great job. Second, I need to issue the standard disclaimer I have, which is any opinions that I express here today are mine alone and do not necessarily reflect those of NAAG or any particular attorney general including my own attorney general, General Mark Herring of Virginia.

In terms of what the states are doing, as you can imagine, they have been inundated with consumer complaints about price gouging of essential products. Our consumer protection sections are working really hard to keep up with them and to follow up with the appropriate actions.

—SARAH OXENHAM ALLEN

The National Attorneys General Training & Research Institute (NAGTRI) operates a public website that is updated daily on different COVID-19-related actions that the AGs are taking, and you can find that at www.consumerresources.org. The information there is grouped by enforcement actions taken by the AGs, cease-and-desist letters that have been issued by the AGs, and multi-state advocacy efforts; or you can click on each state to see what actions a particular AG has taken. I would just like to highlight a few state actions.

Ohio Attorney General Yost brought an antitrust and consumer protection action against a man charged with hoarding and price gouging N95 face masks. He sold at least 42 packages of masks on his eBay store at markups of almost 1800 percent. The defendant quickly settled with Ohio and will refund more than $15,000 to consumers who purchased masks from him and reimburse Ohio $1,500 of its investigation costs. The defendant also surrendered 570 masks to the AG’s office, which has since donated them to the Cleveland Health System and to the healthcare professionals who gave the AG’s Office the tip about his actions.

Missouri AG Schmitt has also filed for a temporary restraining order and preliminary injunction against televangelist Jim Bakker and his Morningside Church Productions to stop advertising and selling its “Silver Solution” as a treatment for COVID-19. The drug is unapproved by the Food and Drug Administration. In addition, General Schmitt has issued several cease-and-desist letters to companies accused of price gouging.

Florida AG Moody has issued more than 40 subpoenas to third-party sellers on Amazon over allegations of price gouging essential commodities. Some of these companies are selling these products for more than 1600 percent over the pre-national-emergency price.

District of Columbia AG Racine has also sent cease-and-desist letters. Some have gone to
landlords because the District considers undue rent increases during this time to be a form of price gouging.

And several other AGs have issued cease-and-desist letters, scam warnings to consumers, and have signed on to several multistate advocacy letters to companies and the federal government, including 33 AGs who sent letters to sales platforms like Amazon, eBay, Craigslist, and Facebook. The AGs are urging these companies to take more proactive steps to identify and prevent price gouging, such as developing a pricing system that is triggered as soon as the system detects price hikes on certain products, even before a state of emergency is declared. The AGs are also urging these companies to develop portals or pages where consumers can report price-gouging incidents by third-party sellers on their platforms.

Finally, I want to point out a unique COVID-related remedy that Colorado Attorney General Weiser recently announced to settle bid-rigging charges with a builder. The company will pay $650,000 to the state but will also donate construction services of at least that amount, ideally to build a COVID-19-related structure.

Those are the highlights of what the states are doing right now.

BRIAN HENRY: Thanks, Sarah.

MATTHEW BOSWELL: Greetings to everybody from Quebec, Canada.

Let me also just start by congratulating you—Brian, Adam, the whole ABA leadership and ABA staff—for pivoting and putting on the Virtual Spring Meeting so quickly in these difficult circumstances. It is nice to have a semblance of normalcy when we are all dealing with a crazy world.

In terms of working from home, I and the whole Bureau team were able to transition really quickly. Nobody is coming into the office except for some managers. We are operating almost at full capacity and seamlessly. That has been great. I have been really impressed by the Bureau team picking up the ball and running with it.

In terms of what the Bureau has been doing to assist in the response, let me just talk about two things very quickly. The first is on the consumer protection side. We rapidly assembled a team dedicated to monitoring social media, monitoring complaints, and monitoring the marketplace for false or misleading, or just flat-out deceptive, fraudulent claims related to COVID-19 and products. They have been working quite quickly to identify these and to take action. We have had multiple different types of claims—claims related to natural products, to remedies, and to foods, all that supposedly help prevent COVID-19; false claims about masks, saying they’re actually N95 masks when they’re not; and claims about things like filters and air purifiers preventing COVID-19 in your home. These are dangerous false and misleading representations.

Our teams moved quickly to send out warning letters, as I know our colleagues at the FTC have been doing; to get the claims taken down from websites; to get products with those false claims pulled from shelves. We have seen great success in this endeavor. Seventy-five percent of our warning letters have been responded to.

The second thing we have done really quickly is two weeks ago we issued guidance to the business community in Canada about competitor collaborations, indicating that we would exercise greater enforcement discretion for competitor collaborations that are specifically designed to get critical supplies and services to Canadians during this time. But we also said, “Look, don’t use this as a cover for other types of cartel conduct.” So we are trying to help, trying to remove any potential chill to collaborations that could assist in this situation.
Those are two things I want to flag and I am very proud of the Bureau having done.

BRIAN HENRY: Thanks, Matthew.

Makan, how are things in Washington?

MAKAN DELRAHIM: Fine, thanks. Thank you for inviting me and including me in this. I will just add my thanks and commendations to what Sarah and Matthew have already said about what the ABA has done to take the Spring Meeting to a virtual format, enabling the rest of us in the antitrust profession to continue to learn as we do through the regular ABA process.

Things have been interesting in Washington. In the Antitrust Division, we have been as busy as ever. I am incredibly proud of the attorneys, the economists, the paralegals, and the staff of the Division for adapting so effectively during these difficult times. It has been a challenge, especially with government security and government procurement processes, but everybody is settling into something of a “new normal.”

Certainly, productivity at some level necessarily goes down, partly because you can’t have the same interactions you have in the office. I have been going into the office almost every day, as have a few other folks in the front office. Barry Nigro is there every single day, along with a few of our colleagues, but everybody else is teleworking in these times.

How has it affected the Division and what has happened to us? Our merger reviews and criminal investigations have continued. We are going to have a major announcement next week on a criminal resolution that folks have been working on without missing a beat. On the merger front, we recently cleared Raytheon/UTC, and we continue to review the other transactions before us.

Like Canada, we and the Federal Trade Commission issued some COVID-19 specific guidance. We wanted to send a signal to the business community:

1. That we are taking this crisis into account. We will do what we can to help with any kind of collaboration that might be needed, and we will review, as quickly as we can, any business conduct that would be required. I have issued two business review letters already. While we are using our typical business review letter procedures, we have committed to providing a response within seven days.

2. That said, we are not going to tolerate anyone seeking to take advantage of the situation. We are part of a Department of Justice-wide COVID-19 hoarding and price-gouging task force, and we also have our own Antitrust Division procurement collusion strike force, which we announced last November. We have been active and aggressive on both fronts. In sum, our work has gone virtual, but it has continued unabated.

I mentioned two pandemic-related business review letters, of which I’m particularly proud. One dealt with Project Airbridge under the auspices of the Federal Emergency Management Agency (FEMA) and the Department of Health and Human Services (HHS). The other dealt with AmerisourceBergen and distribution from the National Strategic Stockpile. We were able to complete those business reviews within four days and six days, respectively. Typically, our business review letters take upwards of six to nine months or even longer. It took a Herculean effort and some of our most dedicated and brilliant staff working around the clock and throughout the weekends to get them done.

We have adapted, and I am confident that we’ll continue to do so. I expect we will see some long-term changes, and I know we will all learn some valuable lessons through this process.

BRIAN HENRY: Thanks, Makan.
Let’s shoot it across town over to Joe. Joe, how are things in your end of the world?

JOE SIMONS: Very good in McLean, Virginia, Brian.

Hello, everyone, and thank you for inviting me, and I too want to commend the Section for these great virtual efforts. I really miss the in-person interaction with the FTC staff. Not only are they bright and dedicated to our missions and hardworking, but they are really a lot of fun to be around. So I really miss being around them.

In terms of the impact on our work from the COVID-19 crisis, the presence of a health crisis is, unfortunately, viewed by some people—sometimes a lot of people—as an opportunity to take advantage of the public. This really makes our mission to protect consumers from anticompetitive and unfair and deceptive acts and practices even more important.

On the consumer protection front, we are prioritizing enforcement efforts to stop coronavirus scams as well as any attempts to take advantage of consumers’ related fears, such as financial distress. To that end, we sent over 40 warning letters similar to what Matt Boswell was saying earlier. These went either to companies making unsupported claims about their products’ ability to treat coronavirus or to VoIP service providers and companies that license telephone numbers that facilitate illegal telemarketing or robocalls, including coronavirus-related scam calls.

We have offered an email address, business.covid@ftc.gov, for businesses to seek guidance about compliance obligations on consumer protection issues during the crisis.

We also offer information to educate consumers about emerging coronavirus scams at www.ftc.gov/coronavirus.

On the competition front, we are, as Makan said, offering to give guidance to businesses through our advisory opinion process on a highly expedited basis—seven days.

On the premerger front, our premerger filings were done until very recently on a paper basis. We now have made the filing process electronic as a direct result of the pandemic, and the process appears to be working quite well.

BRIAN HENRY: Great. Thanks, Joe.

Let’s go across the pond. Margrethe, how is it looking in your end of the world, in Brussels?

MARGRETHE VESTAGER: It is very good to be with you. I think it is amazing what you have been pulling off to make this virtual, but I must say I really miss being with you in person. I think that is one of the things I’ve really learned is that yes, you can do a lot of things with technology but there is nothing like being with people.

I completely recognize what you all are saying. We have 95 percent of the Commission staff working from home, and that of course also includes all the DG Comp teams. It is amazing what they have been able to pull off. I really see that they can mirror what you have all been saying—their dedication while caring for kids, worrying about their relatives and friends in other countries, and being at home, having to struggle sometimes with not-the-most-stable connections.

One of the things that may be special for us is that we have to deal with how to support companies. That is also one of the things that we do. We want to see as many businesses as possible be able to weather this storm while at the same time maintaining a single market. A month ago we put out what is called a Temporary Framework for State-Aid Rules that deals with things that are connected or related to COVID-19. They allow for a wide range and types of support—liquidity support to keep a business intact, public investment and research on things like vaccines or ventilators—and they allow us to do this very fast. We put it out on the 19th of March and so far
we have been approving 110 state-aid measures in 26 Member States with an estimated budget of €1.8 trillion, mostly but not only through this Framework.

Of course there are limits as to what aid can be given because otherwise we would have no single market, we would have no level playing field, and competition of course is still a matter of the heart. So, for instance, loans with a value of more than €800,000 can only cover 90 percent of the loan, the guarantees that are given, so that lenders still have “skin in the game,” that they cannot be completely off the hook. The rules we plan to introduce quite soon will also allow for governments to recapitalize businesses if they have that kind of difficulty, but that would also include incentives to pay back aid as quickly as possible. We will introduce a ban on dividends and share buybacks as well as a ban on harming competition by using that aid to buy other companies.

As for our merger work, our rules have not changed, and this crisis certainly should not be a shield to allow for mergers that would hurt consumers and hold back the recovery. It has really put the light on the need for investment to be done fairly. Europe is of course open for business, but it should not mean that we leave European companies open for takeovers by others who do not have to play by the same rules.

So far as our case work is concerned, we have been able to keep things as close to normal as possible by switching to digital ways, as Joe also mentioned. But in complex merger cases we also need information, for instance, from customers and competitors who may be busy just surviving and they do not have much time to provide information for us. This is why we are asking businesses to consider, when they want to file a merger, to talk with us in advance so that we can work out the best possible timing together. But of course, if they have good reasons to notify now, they can still do that and then we will do everything we can to deal with the merger as quickly and as thoroughly as we do in normal times.

In the last six weeks we have concluded 38 merger cases. We have seven in-depth investigations ongoing. We have had to stop the clock in a couple of them because the businesses have had trouble responding to information requests.

Lastly, just a few words on the antitrust work. Here I completely mirror what you have been saying.

We have been supportive where there is a public interest in companies coming together to avoid shortages of essential products, such as medicines. Our rules—and I hear that it is the same with you—allow that cooperation as long as it doesn’t spill over into illegal collusion or other abuses of the situation. We are always ready to talk with companies to help them work out solutions that are in line with those rules.

We also recognize that right now, when it is so important to move fast, a more formal type of guidance may be helpful. So we have a Temporary Framework that explains how to do this when it is COVID-19 related, but we have also given out written guidance, as an example in the form of a comfort letter to drug companies relating to a plan to combine data to cooperate and increase their production and supply of vital intensive-care medicines in hospitals. We find that this actually worked quite well.

In all of this—and I know that you share this view—we still need competition. It is in the interest of our single market, of consumers, and especially of the many, many people who may not be sure where their next paycheck is coming from. So we want indeed to maintain competition. History shows us what a mistake it would be to suspend competition laws. The National Industry Recovery Act, which partially suspended the U.S. antitrust rules after the Great Depression and allowed industries to agree to limit price competition and restrict production, now seems to be an important factor in slowing the recovery from the Depression and we do not want that unfortunate
history to repeat itself because we really need a bounce back so that people can get their next paycheck.

BRIAN HENRY: Great. Thank you.

One more question on COVID-19. I am sure some of our viewers are wondering: We have a global crisis here. How has COVID-19 impacted the cooperation between your agencies? Makan, can we start with you?

MAKAN DELRAHIM: Thanks, Brian.

We have strong relationships with all of our enforcer partners across the globe, and even in normal times, we typically communicate by phone or videoconference. The one thing that we miss is the personal interaction we have at gatherings like OECD meetings, or what would have been the International Competition Network (ICN) annual conference in a few weeks, or occasional bilateral meetings we have with our partners.

The cooperation continues. We worked with our friends in the United Kingdom on our recent Sabre/Farelogix investigation and litigation, and we worked closely with the European Commission on some recent transactions in the financial services industry. We continue to work well together.

We also have learned from our friends in other agencies. We have discussed and shared our experiences jointly with the FTC on business review letters. Many fellow enforcers have expressed interest in learning more about what we are doing with the procurement collusion strike force, and those communications are ongoing.

I think we are all in this together and we have been sharing our experiences so that we can all benefit from them.

BRIAN HENRY: Matthew, any perspective from Canada?

MATTHEW BOSWELL: I echo what Makan said. At the ICN level we have been doing a great job of sharing amongst the member agencies different approaches to policies in response to the COVID-19 crisis. On a bilateral basis Canada is speaking with agencies around the world frequently about their approaches, their thinking on topics, including of course agencies represented here today.

We have been in close contact with the FTC on deceptive marketing practices that of course go across our shared border—sometimes originate here, sometimes originate in the United States—and we are working together to try to tackle those problems.

I would say at a high level that, as terrible as it is, the crisis has underscored the strong relationships and actually made them stronger as we rely on each other to get through this and do the best possible job we can in the public interest.

BRIAN HENRY: Sarah?

SARAH OXENHAM ALLEN: First, I want to thank the FTC and DOJ for their efforts to reach out and coordinate with the states during this unprecedented time. Makan has contacted the states personally, as have some of his front-office staff, and the entire NAAG Antitrust Task Force recently had a call with FTC Bureau of Competition Director Ian Conner and our states’ liaison Karen Berg about the FTC’s recent efforts and how the states can best assist them in antitrust.

In antitrust, the states are basically following the lead of the federal agencies on how to address this crisis right now. We feel that is the best approach to take rather than trying to forge our own path on this.
BRIAN HENRY: Thanks, Sarah.

Given the time and the number of topics we want to cover during this program, I am now going to hand the program over to Adam. He will start with a series of questions around merger control.

ADAM BIEGEL: Thank you, Brian. I do want to thank you, as well as my Co-Chair Brian Grube, our Vice Chair Kellie Kemp, and all of the ABA leadership and staff for helping make this all possible; and also a special thank-you to all the enforcers for being willing to take time out of your busy schedules to help us with this. As Brian said, we did want to have some discussion about some traditional competition/consumer protection topics.

Turning to merger control, I have a question for Commissioner Vestager. Competition authorities in the Benelux Union—a politico/economic and formal international intergovernmental cooperation entity between Belgium, the Netherlands, and Luxemburg, and other stakeholders—had suggested a move to transaction-value-based thresholds to address problems of “killer acquisitions,” acquisitions of nascent competitors before they can establish a meaningful competitive presence in the marketplace. And you have spoken, Commissioner Vestager, just as recently as yesterday, about the importance of acting early to prevent tech companies from achieving a tipping point to obtain dominance online. Can you tell us a little bit more about what these new tools in the toolkit might be that the European Commission may be considering in the area of merger enforcement, perhaps including transaction-value-based thresholds, and, if so, what factors are guiding those considerations?

MARGRETHE VESTAGER: I can indeed, but let me do it in two steps and focus on the merger issues first. I will be more than happy to talk with you about some of our considerations about new tools.

When it comes to mergers, we are not done with our internal reflections yet. We see a lot of smaller companies being bought not necessarily to be killed—sometimes to be integrated with the buyer. We also see companies that are being created and some would hope that they will be acquired very often for quite large sums. So we are in an evaluation process to see if we have an enforcement gap.

One of the reasons why we find that we have to be careful is of course that it is a significant challenge to predict the evolution of the target absent the merger. We are talking about smaller companies, so you do not really know what will happen. And the counterfactual gets to be tricky because these are young companies, they are in their development stage; they are active in different markets than the acquirer, very often complementary. So for us we are also trying to figure out how to analyze, how to get the full sense of the effect of whether absent the merger a target will develop from being maybe a fringe player to an effective competitor to the acquirer.

I think it is not an easy question to answer even with the widest use of our tools at our disposal—information requests of market participants, internal documents, econometric quantitative tools. I think it is very important that we are respectful and very careful when we change that because we want to see the right mergers; we don’t want to see thousands and thousands of mergers that just are making red tape increase I don’t know how much.

So far, we have been quite good at relying on referrals because we have very close cooperation with the national competition authorities in Europe, and that has helped us quite a lot.

ADAM BIEGEL: The Federal Trade Commission and the Justice Department recently released their long-anticipated draft of the Vertical Merger Guidelines update. Chairman Simons, can you tell us a little bit about some of the cases that the agencies were considering—including
Warner, CVS/Aetna, and others—as they drafted and were influenced by when working on the Vertical Merger Guidelines; and perhaps also tell us about some of the timing for the final issuance of those Guidelines in light of the second public hearing having to be postponed because of COVID-19?

JOE SIMONS: Sure. Thanks, Adam.

One thing that I learned from the AT&T/Time Warner case is that some people actually were suggesting that vertical mergers were essentially per se legal. For me, that factor really militated very strongly in favor of issuing new Guidelines to make clear that that is not the case.

When I was the Bureau Director a long time ago, we brought two or three vertical merger cases in a two-year span, so I definitely believe in vigorous vertical merger enforcement. But we only challenge when the merger is likely to reduce competition. And although vertical mergers may reduce competition less often than horizontal mergers on average, anticompetitive vertical mergers are not unicorns, and we need to be vigilant in that area.

And then in terms of whether these cases in the last year or two have significantly impacted the Vertical Merger Guidelines, at least from my standpoint, I think that the last Guidelines came out in 1984, an awfully long time ago. There was a seminal article published by Steve Salop and Tom Krattenmaker in the Yale Law Review in 1986, which laid out an enormous amount of what is in these Guidelines today. Of course, there have been additional developments over time, but I think what has happened is the agencies have been following the guidance from the academic literature for quite a while, and I don’t really think that the cases that have come in the last two years or so really involved any kind of a sea change in terms of how we look at it.

Again, for me, the biggest thing was I realized that some people were under the impression that vertical mergers are almost per se legal, and that is just not the case.

ADAM BIEGEL: I want to turn to AAG Delrahim. Recent cases, like the combinations of Sprint/T-Mobile and Novelis/Aleris, have broken new ground for the DOJ. In Sprint/T-Mobile on the challenges of having dual federal-state enforcement and amicus advocacy, and in the Novelis matter on the novelty of using streamlined arbitration on dispositive issues like mergers. Can you tell us a little bit more about some of the lessons learned and anticipated challenges in these areas?

MAKAN DELRAHIM: Sure. Thanks, Adam.

As antitrust attorneys, we talk a lot about efficiencies—efficiencies in markets, efficiencies of transactions—and I thought it was time for us, at least at the Antitrust Division, to turn that lens and look at efficiencies of our own processes as well.

You mentioned a couple of transactions where I think we were able to turn some efficiencies to benefit American consumers, and I’ll discuss those in a moment. About a year and a half ago, we implemented merger reforms aimed at increasing the efficiency and transparency of our process. Our goal was to streamline the merger review process so that the merging parties would know where we stand within six months of filing. I’m happy to report that we have consistently met that goal. Of course, not every transaction fits that mold, and all transactions are not terminated or closed after that period, but the parties will know where we stand within that period, as long as they expeditiously cooperate and communicate with us.

Those two cases, Sprint/T-Mobile and Novelis/Aleris, were unique situations from which we are continuing to study and learn. Novelis was the first-ever arbitration of a merger case. We worked through that. I think it would be hard to deny that part of that was animated by some of the judi-
cial decisions recently, particularly AT&T/Time Warner, where there was a misguided understanding of what economics is and how it should be applied in the antitrust cases.

In the Novelis case, we were down to one disputed issue between the Division and the merging parties, which was market definition. We thought it was a case that could lend itself to arbitration. Not a lot of transactions are situations that are hinged on the outcome of one issue with everything falling one way or the other after that. In that particular situation, we were able to come to a mutual agreement on Kevin Arquit as the arbitrator. We were able to agree on limits, e.g., to do away with post-trial briefing, to have a finite number of days of the trial, to have a decision within ten days or so—and the arbitrator actually beat that time—and to explain it within a five-page limit, which he did.

The results—I expect even the parties would agree—were that it provided certainty for the transaction and for the process. We had no idea if we were going to win or lose. We knew we had good evidence, both documentary and economics, but ultimately it hinged on the documentary evidence, and the analysis was spot-on by Kevin.

We all learned through that process. We probably could have made that process even more efficient. We could have taken a third of that process out of the system. We learned what we can agree to with merging parties and other ways we can make the process more efficient. We have discussed our learnings internally. If we were in normal times, we probably would put on a panel about the experience: what did we learn; how could we improve; and how could we use it as a model for the future.

Sprint/T-Mobile was an interesting process. Obviously, I was pleased with the outcome. We were able to see a major transaction through that has big implications—especially in the COVID-19 era when there is massive consumer demand for mobile connectivity.

It was a long investigation, but we were able to negotiate a successful resolution. About 25 states were involved in the investigation, including those that settled with us and those that challenged the transaction in a New York-based federal court. It went through two district court procedures and then multiple local state utility commissions towards the end.

We learned a lot about the efficiencies and inefficiencies of our multi-enforcer system. We looked at it, numerous state attorneys general looked at it, and so did the Federal Communications Commission. Some of the inefficiencies were created by Congress. We have a great dual system of government and private enforcement in the United States, which is good. But we should also try to make the process efficient wherever possible.

There are things we could really learn from the European Union—how the European Commission and the national authorities work with each other, when they work cooperatively; when the centralized agency like Margrethe’s preempts the national ones and cooperates with them; when they abstain from reviewing and let the national authorities investigate. I think there is much we can learn about that. But that isn’t the system we have at the moment.

I was pleased with the filing we made in the New York-based federal court to advocate for an efficient resolution. That filing fully respected and recognized the states’ role in a merger. It stressed, however, that it would not be in the public interest to have a conflicting remedy imposed through that process. That outcome would throw the certainty of any transaction away when you have to have 52-plus whacks at the piñata in a transaction.

—Makan Delrahim

ADAM BIEGEL: The next question is for AAG Allen. Recently, state attorneys general have stepped up to address national and global mergers that they perceive as harmful to their constituents or overlooked subsets of their constituents. As we mentioned, there was the coalition of state attorneys general that challenged the combination of Sprint and T-Mobile, which Virginia was part of.
Can you speak to some of the specific challenges faced by state AGs as they seek to protect constituents from potential anticompetitive effects from national and global combinations?

**SARAH OXENHAM ALLEN:** Sure. Thanks, Adam.

One of the things this pandemic has shown us is how very connected we all are nationally and globally and that it is very difficult, if not impossible, to contain behavior, either personal behavior or corporate behavior, within a state’s boundaries. So now might be a good time to emphasize the strength we bring when there is federal/state coordination.

However, our AGs have a duty to the citizens of our states to challenge anticompetitive harm to consumers in our local or regional markets, and sometimes the only reasonable or efficient fix to that behavior is a national injunction.

In *T-Mobile/Sprint*, the litigating states met the presumption of illegality by showing high concentrations post-merger in several local markets. The judge agreed with the states and, in my personal opinion, he did not sufficiently address how the parties overcame that presumption in these local markets.

But separate from practical considerations of how to effectively challenge local market mergers apart from national mergers is the fact that a system of multiple antitrust enforcers is precisely the system that Congress set up. I would commend to you the recent remarks of Colorado AG Weiser before the Loyola Antitrust Colloquium—which was unfortunately canceled but his remarks were still released—where he noted that the 1976 Hart-Scott-Rodino Antitrust Improvements Act gave the states *parens patriae* authority to enforce federal antitrust law on behalf of our citizens—not just state antitrust law, but also federal antitrust law. General Weiser placed this within the context of other cooperative federalism regulatory regimes that Congress set up during the 1970s, including the Clean Air Act in environmental law as the primary example. In these regimes the federal government sets the floor or the baseline requirements for enforcement actions, but states are allowed to develop and enforce additional standards.

In 1990 the Supreme Court explicitly recognized the congressional intent of multiple enforcers in *California v. American Stores*, stating that “the ability of states to enforce federal law was in no sense an afterthought but was an integral part of the congressional plan for protecting competition.” The *American Stores* case is particularly apt here because it is a merger challenge that California brought after the FTC had negotiated a settlement containing divestitures that would allow the merger to proceed.

And in the *Microsoft* case several states that were litigating with DOJ were dissatisfied when DOJ settled after the D.C. Circuit remanded the case on remedies. These states continued the litigation, and the D.C. Circuit recognized the states’ authority to pursue a different view from the federal government.

Even when working together, the states quite often negotiate additional relief from the federal government or negotiate separate settlements in order to receive enforcement and notification rights to the obligations imposed on the parties by the settlement. There are several examples of this even within the last year, including Colorado’s additional relief in the *UnitedHealth/DaVita* merger that the FTC settled and the states’ additional settlement decrees in DOJ’s *Nexstar/Tribune* merger settlement and the *Live Nation* consent decree modification.

Since *Broadcast Music v. CBS* in 1979, the Supreme Court has recognized that a settlement, even one with a federal agency, does not immunize a defendant from liability. A settlement obtained by the FTC or DOJ does not bind the states, but more importantly, it does not bind the courts. Courts are the final decision maker for the legality of a merger, as Judge Marrero himself...
said in the T-Mobile/Sprint opinion, where he noted that he was not bound by the conclusions of the FCC or DOJ. He rightfully gave them deference for their subject-matter expertise, but he based his decision on his independent analysis of the adequacy of their settlements rather than on any notion that they represent the national public interest more so than any state.

When the states bring an enforcement action, it is presumptively in the public interest, just as when the federal agencies do. States are important enforcers of both state and federal antitrust laws. We fill in the gaps of national enforcement when the federal agencies lack resources or have not fully developed an area of law, as with our Suboxone “product hop” litigation or the no-poach settlements by the Washington AG’s office. We are important identifiers of competitive issues within our jurisdictions and we may be better positioned or incentivized to consider issues that are not routinely raised in merger challenges, such as potential harm in labor input markets or reductions in services to underserved communities if consolidation occurs.

We also bring follow-on civil antitrust cases when DOJ is pursuing criminal cartel enforcement. This is particularly important in the pharmaceutical area where states are large purchasers of drugs and are uniquely harmed by anticompetitive behavior that raises prices or reduces choice in pharmaceutical drugs to our state purchasers.

However, I will end as I began, to say that consumers are better off when the federal agencies and the states agree and work together, and fortunately that is almost always the case.

BRIAN HENRY: Now we are going to address some questions relating to enforcement, some really interesting questions.

Commissioner Vestager, the topic is burden shifting. You have suggested that dominant firms in the digital economy may become subject to a tougher standard when questioned by enforcement authorities. In particular, the burden actually may be on the dominant firm to show clear efficiency gains rather than on the Commission to show harm to consumers.

What are some of the dynamics and expected practical impacts in the digital economy that warrant such a significant shift in the burden? How has COVID-19 affected your thinking on these issues, if at all, and has it affected the timing of possible implementation?

MARGRETHE VESTAGER: Thank you very much.

Just to state the obvious, we are of course not envisaging any attempt to sidestep our duties under the current framework to prove our cases. That goes without saying. I think it is a very important debate and we have to be very careful about it to avoid misunderstandings and, of course, also to reduce any kind of overreaction.

Of course we will prove our cases, but the possibility to rely on rebuttable presumptions is already part of the legal framework and endorsed by the case law to the extent that presumptions are based on solid previous experience. I think that is important.

Think of the test of exclusivity rebates. It follows that there is no reason of principle to stand in the way of testing new rebuttable presumptions, ones based on consistent experience, when we can safely assume that from a given conduct anticompetitive effects are likely to follow. But even when, under current rules, presumptions cannot be used, we have to find ways to enforce the Treaty competition provisions in the most effective manner. And besides, it is our sacred duty and it applies at all times.

We have a debate about the standard of proof, and we need to have it. I think that if we can safely assume that we have discarded our burden of proof; it is basically about the standard. This is not trivial though. Many digital markets may be prone to tipping, but at the point in time when
the relevant anticompetitive conduct takes place the tipping might not yet have occurred or only
the first tipping trends may be discernible.

If the bar for the requisite standard of proof with respect to anticompetitive conduct is set too
high, it may result in under-enforcement to the detriment of consumers. That is why it is important
for competition authorities to be able to intervene once they establish with sufficient probability that
the conduct at issue will likely lead to harm, for example, through foreclosure. The point is that
competition authorities should not have to wait until actual detrimental effects on the market can
be shown—for example, until companies have exited the market—but they should be able to inter-
vene once there is a clear market trend that can be established which is likely to lead to negative
effects on competition. Such interventions can safeguard effective competition in digital markets,
and that has been promoted by our European courts, notably with respect to fast-moving and dig-
ital markets.

To conclude, while a reversal of the burden of proof would most likely imply changes in the law,
early intervention, which will necessarily have to come with a more prospective analysis of poten-
tial effects, might indeed be warranted to prevent tipping in digital markets. So it is to find the right
balance between accuracy and administrability without—and this I will underline—compromising
the right of defense.

But it is important to be mindful of the risk of abuse of the right of defense to delay, maybe even
derail, an investigation, thus reducing or preventing the effectiveness of competition enforcement.
So we have to strike the right balance. And striking the right balance is also when we sort of call
on the sister of competition law enforcement in a case-by-case way, which is regulation. We have
had a lot of considerations—and I think it is a global debate because I have been seeing the
reports coming from colleagues who I really do respect—to look at what happens in an era of dig-
itization, how effectively to enforce competition law, how to make sure that we have competitive
markets. I have two observations.

First, we would explore the possibility of an ex-ante regulation listing clear-cut prohibitions and
obligations for those who may be called digital gatekeepers. This would tackle commercial imbal-
ances for business actors. We have taken the first step already in what we call the Platforms-to-
Business Relations, which gives the businesses that rely on a platform a set of sort of digital
rights—how am I ranked; why am I ranked; what to do if all of a sudden I am not ranked anymore?
This was a step to say that these are the obligations that you have if you are a digital gatekeeper.

Second, we would also explore a new competition tool. With our enforcement experience and
that of other competition authorities that we learn from, as well as the reflection process we under-
took, I think there is an identification of a number of structural problems that existing rules cannot
tackle—it could be monopolization strategies by companies that are not dominant; or it could be
parallel leveraging strategies by dominant companies in multiple adjacent markets. These are
structural issues, and a new competition tool could allow us to intervene with respect to anti-com-
petitive behavior by powerful-but not necessarily dominant players in tipping markets. This could
help us to prevent the creation of future market players with entrenched or dominant gatekeeper
positions.

I think the combination of the two, to say, “If you become a digital gatekeeper, you have these
obligations, there are these things that you cannot do,” while at the same time having a tool to be
able to work structurally in the marketplace to keep it open, may sound more radical than it is. You
probably know the Competition and Markets Authority of the United Kingdom have such a mar-
tet tool. I think that it is quite impressive what they have achieved and how well they use that tool.

I think that combination—rigorous enforcement, working with rebuttable presumptions, having
a regulatory tool to say, “If you are a gatekeeper, these are your obligations, these things you can-
not do”; and having a tool that would allow you to work on the market structure to prevent the market from tipping—because when we have tipping in the market, then we see that we get into a situation where it can be very difficult for consumers to have the full benefit of choice and innovation at affordable prices.

That will be some of the work that we will be pushing ahead in the coming months.

**BRIAN HENRY:** Commissioner Boswell, the Competition Bureau recently released its four-year strategic vision, which emphasized a proactive approach towards fostering innovation and competition in the digital economy. Last year the Bureau also asked the business community to volunteer information regarding strategies certain firms may use to hinder competition in digital markets. Are there certain aspects of the digital economy that necessitate a proactive approach, and can you describe some of the tools that are at your disposal to arm that approach?

**MATTHEW BOSWELL:** As you pointed out, last September 2019 we issued a callout to market participants in Canada for information on potentially anticompetitive conduct in the digital economy. We had a discussion paper and we indicated that we were focusing on four main areas: online search, social media, display advertising, and online marketplaces. This was, as you say, a proactive approach, and it is consistent with our vision and shift as an organization to be much more proactive in all aspects of our work and to use all the tools that we have, and this is certainly one of them.

As a result of the callout and over the months that have passed since then, our officers and our case teams have met with multiple stakeholders—large, small, industry associations—and have heard from them what is actually going on, how certain things are impacting their business and their ability to compete. We learned that this proactive approach was really beneficial for enforcement intelligence gathering. We also discovered that many of the smaller tech companies that we encountered were very much focused on their business and they would develop work-arounds for issues that were put in front of them, problems that were giving them resistance. Even if it was anticompetitive conduct or potentially anticompetitive conduct, they just wanted to get on with their business. And, in fact, some of these firms were simply not aware of competition law provisions that could come into play, abuse of dominance being the primary one.

Our proactive approach has resulted in more market intelligence that we can pursue, a heightened awareness certainly with these small tech firms of competition laws that could be of assistance to them. It also helps internally here to focus the discussion for the Bureau and improve our teams’ abilities to ask informed questions about very technical aspects of the digital economy. They better understand the intricacies now and it feeds into our enforcement approach.

We are examining all of the information we obtained as a result of the callout. As I say, it is informing ongoing investigations. It is also going to assist us in case selection as we move forward.

In terms of the impact of COVID-19, the questions and concerns that we had—and this builds on comments made by Commissioner Vestager just now about the digital economy pre-COVID-19—continue and are still very much worthy of scrutiny, and perhaps even more so given the dramatic and accelerated movement to digital purchasing as one example.

We will continue using this proactive approach in other sectors of the economy. We will continue using it in the digital economy. We have seen great value in it. It expands our interaction with the business community at all levels across the country. It raises awareness, as I said, and it provides incredible intelligence for our very important enforcement work in this extremely important
area of competition law enforcement in Canada and around the world. I view it as a very positive development and it shows how, when we get out there more and when we use different tools, it enhances our ability to protect consumers and promote competition.

BRIAN HENRY: AAG Delrahim, in the fall of last year the DOJ launched the Procurement Collusion Strike Force. How has that initiative fared so far and what should we expect next year?

MAKAN DELRAHIM: Thanks, Brian. As you mentioned, last November along with a number of our partner agencies, including the investigative agencies—like the Federal Bureau of Investigation, the Department of Defense Inspector General’s Office, and other IGs—and 13 U.S. Attorneys, I announced the creation of the Strike Force. It is an interagency partnership. The Strike Force is based on the concept that there are a lot of procurement dollars going out at the federal, state, and local levels, some of which are susceptible to bid rigging. We wanted to look specifically at taxpayer-funded projects at the federal, state, and local levels for bid rigging and related violations. It has been an incredible success. One of the biggest challenges is controlling the growth to other interested partners. We have had over 50 inquiries at different levels of the government. They want our advice across the board—not only to investigate potential allegations of bid rigging, but also to help them design procurement systems and to train them to avoid collusion by spotting its warning signs in advance.

We designed the Strike Force to conduct initial outreach at each level and to then prosecute any potential crimes that would come, but most importantly to deter anticompetitive conduct that otherwise might occur in the procurement process. We have already conducted about 30 different outreaches. We have had to adjust, with COVID-19, and we are now doing virtual trainings. We held one, I believe, yesterday, and we have one scheduled for next week that features data scientists, to familiarize procurement officials with antitrust concepts and train them to recognize bid-rigging red flags. We had anticipated that somewhere between 75–100 would attend. We had over 500 registered, and already an additional 500 state and local agency officials and procurement officials registered for next week. It has been a great success.

One challenge is resources, of course. Our model is working with U.S. Attorneys’ offices, local FBI offices, the Postal Inspector Generals, and a multiple of other Inspector Generals’ offices around the country. Doing so has been a full-force multiplier, but nonetheless has required significant resources from the criminal sections within the Division.

We have already opened up a handful of grand juries on those matters as local agencies and contracting officials learn about the types of activities they should be on the lookout for and then they ping us. We developed both an agency and a citizens’ complaint center through our website, which has been quite active. We anticipate more and more cases. You will start seeing them. It has been an important focus for us. I mentioned we have in total about 100 grand juries currently, and about a third of them involve government procurement issues.

BRIAN HENRY: Chairman Simons, in the technology sector, what are the guiding principles for how the Technology and Enforcement Division (TED) is going to investigate relevant conduct? Has COVID-19 impacted the timing of this in any way?

JOE SIMONS: Although the pandemic has placed a dramatic strain on our country, and particularly certain hotspots which include, in particular, where the FTC has offices, I have been incredibly impressed by how quickly our staff has adapted to the change in circumstances. They have not
missed a beat in continuing to push forward on our investigations, and the pandemic has certainly not stopped our Technology Enforcement Division in pressing forward with its investigations, nor has it changed the way we think about our enforcement mission.

In general, we view things like exclusive dealing, various contracting and licensing restrictions, deceptions, and acquisitions, among other things, as all being on a spectrum of exclusionary practices that could potentially allow a firm to anticompetitively achieve or maintain monopoly power. In that sense we think the Microsoft case serves as a very good paradigm for analyzing Section 2 conduct.

One recent FTC Section 2 case involved our challenge to Illumina’s proposed acquisition of PacBio. Both companies develop next-generation gene sequencing technologies. In the complaint, we alleged that Illumina violated both Section 2 and Section 7 by seeking to acquire its nascent competitor PacBio. We found Illumina was a monopolist with a 90 percent share, and it saw PacBio as a looming competitive threat to challenge its monopoly position.

The theory that we applied there fit squarely within the Microsoft pattern. In particular, Microsoft employed a whole set of exclusionary practices that foreclosed nascent competitive threats and harmed the competitive process. Illumina’s acquisition represented an extreme version of that kind of conduct: rather than using exclusive deals and licensing restrictions to hobble nascent competitors, Illumina proposed to take its nascent rival out of the market completely by buying it.

Our approach on these monopolization cases that TED is looking at is to a large degree following the D.C. Circuit’s approach in Microsoft.

ADAM BIEGEL: Thank you, Chairman Simons. We are going to turn now to some consumer protection topics. Commissioner Boswell, the first question is for you. How do the Bureau’s analysis of Big Data and competition law affect its understanding of the use of data in deceptive marketing practices?

MATTHEW BOSWELL: Thanks, Adam. In 2017 the Bureau released a discussion paper on Big Data and innovation implications for competition policy in Canada and once again invited public comments, and we engaged with domestic and international stakeholders. Coming out of that we produced a subsequent document that set out the key themes and some of our learnings as a result of looking into this for competition policy and consumer protection issues. The subsequent paper addresses Big Data in all four areas of our enforcement work.

But in terms of deceptive marketing practices, obviously we discovered that there could be significant positives with the use of Big Data to deliver value to consumers, enabling targeted advertising based on their interests, which provides them with relevant, timely, useful information reducing their search costs, allowing them to make informed decisions. But, like anything, there is another side to the coin and there is significant potential for false and misleading representations, deceptive practices, through the use of Big Data.

First, before you even get to how the data is used, false or misleading representations are being made about how the data is collected. Representations about what information you are going to collect are often made to promote the supply of a product or service because data is significantly valued in the current digital economy. We are actively pursuing enforcement actions against those types of false or misleading representations about the collection of data. There is a crossover here, of course, with privacy law, but we believe our provisions in terms of false or misleading representations capture this, and we will bring cases in this area.

The second half of the equation in terms of Big Data or data generally is the use of data to create deceptive marketing. Perhaps the best example is creating false or misleading data through
practices such as “astroturfing” (creating representations that masquerade as authentic experiences and opinions of impartial consumers), which we are seeing around the world and is a big problem, something that we have taken action on already here in Canada against a large Canadian corporation where reviews were being posted, ratings were being posted, without disclosing material connections to the actual app that was being reviewed and rated.

This creates data, very positive reviews, which people rely on. And, as we have more and more online buyers—and it was projected there would be 2 billion online buyers in the world this year; I think the number of online buyers is probably going to go up dramatically given the COVID-19 crisis—people are seeing false and misleading data that then leads them to make purchases. So, as I say, we have enforced in that area and we will continue to enforce in that area.

Another use of data to advance false or misleading marketing schemes is where you are making representations about prices in the marketplace compared to what your price is. This is something that we tackled with Amazon; we had a consent agreement with Amazon about some of their representations about pricing. We will continue to pay attention to that.

So there are lots of issues on the consumer protection side in terms of data and false or misleading representations.

ADAM BIEGEL: The next question is for Chairman Simons. Data protection and privacy concerns are often top of mind with regard to consumer protection. Are there any lessons to learn from the global precedents, such as the European Union’s General Data Protection Regulation (GDPR) or the California Consumer Privacy Act (CCPA) with regard to creating a comprehensive data protection regime?

JOE SIMONS: Sure, Adam. Thanks for the question. Yes, what is going on in Europe and in California and other states has clearly sparked significant interest in federal privacy legislation here, and it is still under active consideration by the Congress. In my view, such legislation requires very significant societal and cultural value judgments that should be decided by elected officials, not appointed ones, so it really is appropriate in my view that Congress take charge on this issue.

But having said that, the threat of large fines in GDPR and CCPA seems to have focused the industry’s attention on privacy and compliance, which is a good thing, and we have recommended to Congress that any federal privacy legislation be enforced with civil penalties as well. In addition, in GDPR there is a focus on organizational accountability for privacy—hiring data protection officers, conducting risk assessments, documenting risk, et cetera—and this focus on creating accountability within companies, particularly large ones that collect a lot of data, is what we have done in our orders. We have strengthened substantive requirements requiring greater board- or senior-level participation in privacy issues and improved independent oversight generally.

Another thing that we can take from GDPR is that if our Congress adopts something remotely close to the GDPR, we at the FTC will require a large increase in resources, at least on par with those of the major data protection authorities in Europe. They have far greater privacy resources than the FTC.

The only thing I will say that is not directly related to your question is we had a big day at the FTC today. The court issued the order in Facebook making it final. We are really thrilled about that.

ADAM BIEGEL: We are going to turn back to Virginia for one final question, for AAG Allen. To build on what Chairman Simons was saying, do you see other states seeing benefits from or expanding upon CCPA and the things we have seen coming from California in terms of privacy?
SARAH OXENHAM ALLEN: California is in the process of finalizing the regulations that will clarify and implement the privacy protections in the CCPA and they can begin bringing enforcement actions under the Act on July 1 of this year. Although many state legislatures either considered or are in the process of considering proposed privacy legislation in their states, only two other states—Nevada and Maine—currently have actually passed a consumer data privacy statute.

All states should end up benefiting somewhat from California’s Privacy Act because it only applies to larger businesses that are the most likely businesses to have a national footprint. These companies, I would assume, would find it inefficient to adopt different privacy practices for each state, so it makes sense to comply with California’s mandates on a national basis.

However, the longer it takes before Congress passes a national privacy statute, the more likely it becomes that companies will have to deal with up to 56 disparate privacy protection requirements for all 50 states, the District of Columbia, and the five U.S. territories.

However, the Uniform Law Commission (ULC) is attempting to develop a consensus privacy statute that the rest of the states can accept. In trying to resolve the conflict between an opt-in standard like in the GDPR or an opt-out standard like in the CCPA, the ULC has suggested a two-tiered system where consumers can opt out for less sensitive personal information, such as information about things they bought, websites they visited, or the probabilistic inferences that that companies’ algorithms develop about a consumer’s likes or tendencies. A consumer must explicitly opt in to the sharing of sensitive personal data, which would reveal racial or ethnic origin, religion, medical data, or any data for a person under age 13.

State AGs would be the primary enforcers of these state privacy statutes, but two controversial areas have yet to be resolved. One is the ability of private citizens to enforce the statute, which the CCPA does not have at all and the GDPR only provides a limited private right of action. The second concerns safe harbors for businesses that are complying with established industry codes of conduct.

If the ULC comes to consensus and recommends a model statute, that may be the best course for consumers and businesses in the wake of Congress’s failure to provide a national privacy protection act.

—SARAH OXENHAM ALLEN

ADAM BIEGEL: Thank you.

BRIAN HENRY: This will conclude our 2020 Virtual Spring Meeting Enforcers Roundtable. Thanks to our great panelists for joining us virtually. This was a fascinating program.