In This Issue

Editor’s Note: If you didn’t watch the Enforcers Roundtable from the Antitrust Law Section 2020 Virtual Spring Meeting, you can read the edited version here. We also feature our annual one-on-one interviews with foreign enforcers, along with articles on price-gouging laws, nascent competitor acquisitions, and the DOJ’s Procurement Collusion Strike Force, and a book review.

Enforcers Roundtable
In a first-of-its kind live webcast as part of the 2020 Virtual Spring Meeting, Agency heads from the United States, Canada, and Europe, along with a representative of the National Association of Attorneys General, provide antitrust enforcement updates from their respective organizations. Topics discussed include actions and adjustments in response to the global COVID-19 pandemic, recent merger enforcement and initiatives, including regarding vertical mergers, data privacy, and policy discussion around fact-gathering and burdens of proof in antitrust enforcement.

Interview with Olivier Guersent, Director General for Competition, European Commission
Olivier Guersent, the head of DG Comp, discusses his path to the leadership of the EU’s competition agency, cartel and merger enforcement in Europe, the relationship between competition and other economic policies and digital policies.

Interview with Matthew Boswell, Canadian Commissioner of Competition
Matthew Boswell, Canada’s competition law chief, goes into more depth about his vision for the Competition Bureau, strengthening the agency’s enforcement capabilities, Canada’s high concentration levels, and plans for addressing digital markets.

The Price of Price-Gouging Laws
States of emergency declared in the wake of the COVID-19 pandemic have triggered the application of price-gouging laws in many U.S. states and at the federal level seeking to prohibit excessive prices for essential products during an emergency. Ann O’Brien and Brady Cummins review the varying legislative approaches to price gouging, discuss the case for prohibitions on price gouging as well as the potential for such laws to suppress supply, and offer suggestions for improving price-gouging legislation in the future.

Looking Ahead: Nascent Competitor Acquisition Challenges in the “TechLash” Era
Tracy Penfield and Molly Paliman discuss the increasing scrutiny of nascent competitor acquisitions, difficulties policing such deals under the current enforcement regime, and potential refinements to the U.S. antitrust agencies’ pursuit of such transactions.

Government Contractors Beware: Implications of the DOJ’s New Procurement Collusion Strike Force
With the COVID-19 pandemic and economic stimulus leading to more and more government contracting, the DOJ’s new Procurement Collusion Strike Force wants to prevent federal, state, and local government programs becoming a target for fraudsters and price fixers. Vic Domen, Gerald Stein, and Amanda Wait put the initiative in its historical context and offer government contractors best practices for antitrust compliance.

Book Review—Including Africa in the Global Competition Law System
David Gerber reviews Eleanor Fox and Mor Bakhoun’s new book, Making Markets Work for Africa, finding that it goes a long way toward filling a major void in the literature on competition law in the world.
Enforcers Roundtable

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

BRIAN R. 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, how is everything up in Canada?

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 AT&T/Time
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.

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 intervene 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 digital 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 potential 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 digitalization, 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 imbalances 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 undertook, 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 anticompetitive 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 market 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 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.
Interview with Olivier Guersent, Director General, Directorate General for Competition, European Commission

**Editor’s Note:** Olivier Guersent has been Director General of the European Union’s Competition Directorate since January, 2020. Previously, he held senior positions in the Directorate General for Financial Stability, Financial Services and Capital Markets Union, and within DG Comp, he was successively Deputy Head of Unit in charge of cartels, Head of Unit in charge of policy and coordination of cases, Head of Unit in charge of merger control, Acting Director “Transport, postal and other services” and, from 2009, Director responsible for the fight against cartels. He also served in the private offices of several Commissioners, including Competition Commissioners Karel Van Miert and Neelie Kroes. He graduated with distinction from the Institut d’Études Politiques de Bordeaux in 1983.

This interview was conducted for The Antitrust Source by Andreas Reindl, a partner in Van Bael and Bellis, on May 5, 2020.

**THE ANTITRUST SOURCE:** You are well known to the Brussels competition bar. But for the benefit of the readers of the Source who are not as familiar with you, could you please briefly explain your career path and what led you to your current position at DG Comp.

**OLIVIER GUERSENT:** I am French. I got my University degree from Institute of Political Sciences, in which you basically can study about everything but political sciences if you so wish. My major was in micro and macroeconomics, rather like kind of a business school if you had to find something similar in other systems. At the same time I was following courses in the law school because I wanted a counterbalance in a way, and we could do both at the same time because they had comparative programs.

After I finished my studies, I worked for the French Competition Authority, where I was doing mostly cartel investigations and sometimes mergers.

In 1992 at the age of 30, France seconded me for two years to the Commission’s Merger Task Force. This was a very small team of people, mostly from Member States competition authorities, tasked to kick start merger enforcement in the early days of the 1989 Merger Regulation.

I met my wife. She is Dutch and she was working for the European Commission. I decided not to go back to France, took and passed the exams to become an EU civil servant, resigned from the French civil service, and joined the Commission.

I continued working in DG Competition in coordination functions. I briefly was the policy Assistant to the Director-General, and in 1996 I joined the private office of the competition Commissioner, Karel Van Miert, in my view one of the best Competition Commissioners ever. It was very inspiring to work with him for a young 30-something. I was doing liberalization policy and mergers. I enjoyed a lot doing the EU liberalization of telecoms, which was entirely done through competition policy instruments. Those were the days of the Boeing/McDonnell Douglas case and a number of other very interesting merger cases.
At the end of the mandate of Mr. Van Miert, Mr. Monti—who was to take over as Competition Commissioner—offered me to continue the same job in his private office. I was excited by the idea of working with Mario Monti but not by the prospect to do exactly the same job I had been doing for the previous four years. I wanted a new challenge. At that point, for actually the only time in my career, I considered going into private practice.

I decided not to, and I joined the private office of Michel Barnier, who is best known today as being the EU Chief Negotiator for Brexit, but in those days had just been appointed Commissioner for the first time. He had been several times a minister in France and was in charge of Structural Funds.

I stayed with him not very long—18 months—because DG Comp asked me back to help reinvigorate cartel enforcement. We had in 1996 introduced a leniency program, following the United States in 1992, if I remember correctly, but we were not so effective. So I was asked to rebuild what was then the Cartel Unit as deputy to a German colleague, Georg De Bronnet. We did that together. It was quite successful. We moved from zero decisions in 2000 to ten in 2001 and €1.8 billion in fines. In 2002 we continued down the same path.

This is when Philip Lowe became Director-General of Competition DG and appointed me as the head of the General Coordination Unit in DG Comp. It was a time of extraordinary transformation. I created the function of Scrutiny Officer, the so-called fresh pair of eyes to crosscheck the robustness of our cases. I did that job for two years.

In 2004, Mrs. Kroes became Competition Commissioner and she asked me to be the Deputy Head of her Private Office. Again, I did that for not very long because we had our third child in early 2007 and I had agreed with Mrs. Kroes that I would leave the cabinet at that moment.

I became Head of the Merger Unit in Transport, and did quite a lot of airline mergers in those days. Then I became Acting Director of the same directorate, Transport, and soon Director for Cartel Enforcement.

I was Director for Cartel Enforcement in 2010 when I became the Head of Cabinet, as we say in Brussels, the Head of the Private Office of Mr. Barnier, who was back as Commissioner for the second time. He was in charge of the Internal Market but also, more crucially, in 2010, of Financial Services. I then spent five years leading his private office, re-regulating finance in Europe following the G20 roadmap, while the financial crisis was developing into a Euro area crisis.

In 2014, as the mandate of Mr. Barnier was about to finish, I was appointed back to DG Comp as Deputy Director-General for Mergers. I was so happy to be back home! But then I made a really big mistake: on the Friday following my appointment at the weekly college meeting of Wednesday, I went off for a holiday for a week. When I came back, I had been moved back to Finance “in the interest of the service” because someone had decided that I was more needed there. So, I never took over as Deputy Director-General for Mergers and instead became Deputy Director-General—and one year later Director-General—for Financial Services. In that capacity, I represented the European Union in international fora, the Financial Stability Board and the Basel Committee in particular, preparing for G20 meetings, and essentially doing EU financial stability policy and regulation.

At that point, I had given up the idea to ever come back to competition policy. Johannes Laitenberger was in the job, doing very well. He and I are good friends, had been appointed Director General at about the same time, and I knew that for him as well, DG Comp was his dream job. So I was thinking: “Okay, well, fine, tough luck, I will never be Competition Director General.” And this is when my friend Johannes had the very, very good idea to be appointed as a judge in Luxembourg, freeing my dream job, which I had thought would never happen.
Then, I was fortunate that Commissioner Vestager trusted me to become her Director General and here I am again.

ANTITRUST SOURCE: Thank you. A very impressive career path.

OLIVIER GUERSENT: A bit of luck is necessary for any career path. I have been quite lucky.

ANTITRUST SOURCE: But also a lot of your own doing to get where you are.

OLIVIER GUERSENT: You need to give yourself the chance to have a chance.

ANTITRUST SOURCE: You have recently joined DG Comp as its Director General. What are the major goals you have defined for yourself? Where do you want to have an impact on the direction in which DG Comp is going, and where do you see DG Comp in three or five years from now?

OLIVIER GUERSENT: I think there are several ways to answer that question. Organizationally, it is a very big house. It is about a thousand people overall. Clearly, there is a management challenge. I think that historically the strength of DG Comp has been to be a relatively flat organization. An organization in which when you have a new problem to solve in a case, you pool the brains around a table and you have a good brainstorming, a good discussion. Everybody weighs the same, the Director-General along with others. Facts and reasoning is what matters. When (occasionally), the Director-General is on the wrong track, there is always somebody around the table to say, “Olivier, I’m sorry, but I disagree with you,” and we review the facts again and we re-exchange arguments until we have mapped the options to our collective satisfaction.

This is my DNA. This is the DG Comp culture in which I have been raised as a young civil servant. It is also a very effective way to work, avoiding many, many mistakes that are common in pyramidal organizations. When a number of competent people work hard to research facts and case law, build smart reasoning, the boss needs to be able to win the battle of the reasoning if he wants to change the proposed course of action. Organizations in which the boss simply imposes his or her views without justifications are so demotivating and disempowering. That is not an effective way of working for me.

Once we have collectively mapped the options, identified the pros and cons of each of them, eliminated the non-suitable options, we usually agree on the option to recommend. If not, the Director General has a casting vote.

I like this way of working where you “uncover the cards” as I say. Everything is transparent, all the information is available to everybody and ultimately to the Commissioner.

This puts the people in charge of deciding—currently Ms. Vestager—in the best position to make the best decision. If she is where she is, it is because she has something we do not have, a judgment, a political sense, a way to encompass all the variables. But in order for her to be able to really give her best we need to put her in the best position, and I think this way of working is the way to put her in the best position to make the right decisions.

Yet, in the DG Comp I joined in 1992, with 200 or 250 people, it was relatively easy to have such a flat organization. In the DG Comp of today, four times bigger, it is a lot more challenging.

Keeping that spirit alive, keeping that organization flat, and resisting the temptation to go into iterative bureaucratic loops and long hierarchical processes, I see that as my main management challenge and a key ingredient of a successful DG COMP.
The challenge is not only organizational and there are of course also many policy challenges because also the world of today is not the world of ten years ago when I left DG Comp. Digital was important ten years ago; it is paramount now, just to take one example. We need to adapt to digitization, which I just mentioned, but also to the new industrial policy that the Commission has just defined under the leadership of Ms. Vestager, to the Green Deal and the de-carbonization of the economy, and many other things. How do we factor all that in competition enforcement priorities is a question for all antitrust authorities in the world and it is certainly a question that we face at DG Competition.

ANTITRUST SOURCE: If there is a change in the very senior management of an organization, there is always a question where the new person will stand for continuity or for change. Where do you see yourself compared to your predecessors? Is there a new direction that you bring with you?

OLIVIER GUERSENT: No. DG Comp is a very sharp tool, it works very well, and I am grateful to the long list of my predecessors for having progressively formed, maintained, and bettered DG-Comp and make it what it is today. I will simply do my best to try to do the same so that the organization remains fit for purpose. Maybe it is worth recalling at that point that I am only the COO in this organization. I have a CEO, Margrethe Vestager. I propose, we discuss, we usually agree, but in the end of the day, the decisions are hers.

This said, there were hardly ever huge revolutions in DG Comp. I think that in the modern history of our organization, the biggest one was when Mario Monti and Philip Lowe quite drastically changed its structure in 2002/2003. I was the Head of General Policy and Coordination in the DG at the time, so I was closely involved. The principles that inspired his reform and the management model—a so-called matrix organization-type model—are still proper today.

Matrix organizations are very sensitive to small frictions that can block the system quite easily. In short, it outperforms any silo organization when it works well, but it is a less robust system that can be easily destabilized. The Director-General’s job is to minimize these frictions and ensure that the matrix organization produces its best. Keeping the organization flat and empowering, as I mentioned before, is a big part of this.

So, I do not see myself trying to revolutionize competition policy or the way DG Comp works. I do not think it is needed. Rather like my predecessors, I will try to adapt the machine to changing realities and changing priorities as well, so that it remains one of the best in the world.

ANTITRUST SOURCE: You have already mentioned cartels, and how you were at DG-Comp when cartel enforcement was taking off. During that time, leniency became a highly effective tool that led to many more cases. But in the last couple of years we have seen fewer cases, and fewer leniency applications.

In your view, do we see fewer cartel cases because there are fewer cartels, because cartel participants have become smarter, or because private litigation deters leniency applications? And that leads to the broader question, whether in your view competition authorities have relied too much on leniency applications. What are the ways forward to, as you say, “reinvigorate” cartel enforcement?

OLIVIER GUERSENT: It is clear, and I think it has always been clear, that if one relies exclusively on leniency, one day or the other the flow will slow down and maybe stop, simply because the incentive to report will go down to zero. This said, of course, a leniency regime that effectively balances the incentives and the disincentives to report is essential.
Still, at least for global cartels, it is a global game. We all are also reliant and dependent on the policies of our key partners, in our case chiefly the United States. This is because nobody in his right mind would confess an international cartel in Washington and not report it in Brussels. That would simply be stupid: another cartelist would report immediately to the EU. Therefore, we are all in the same boat for that purpose, and the interaction between the various regimes is key.

Of course, private enforcement is also an important factor because it increases deterrence greatly. It may also increase the disincentive to report, in particular where cartelists do not think they have credible chances to be detected by the own investigations of the competition authorities.

I do think therefore that stepping up the ability of competition authorities in general, DG Comp in particular, to be effective in generating ex officio cartel cases is very important. In the world of today where indeed cartelists are more sophisticated, but also the economy is more complicated, that probably involves, inter alia, quite a lot of investment in IT, which we are doing and which we plan to do further.

Again, that is no revolution. This process was launched by my predecessors and was very much carried by Johannes Laitenberger. I simply and happily follow his example in that respect.

ANTITRUST SOURCE: Let’s move to mergers and use this opportunity to think more broadly about a general question concerning the merger review regime in Europe.

If you look at the statistics—the number of notifications, how many notifications qualify for simplified review, how many notified transaction go to Phase II, and how many transactions are challenged or prohibited—there could be a sense of great continuity. But among many practitioners, there is definitely the sense that things have changed in the last years. The amount of information that the Commission requires has vastly increased. For any transaction that is not a clear-cut no-issue case, review periods have become significantly longer than the Merger Regulation envisages. Even in cases that are not highly complex, it can easily take a year from the first contact with the Commission until a decision is issued. The beautiful timeline that the EU Merger Regulation has laid out—and that everyone appreciates—merely exists on paper.

In your view, is the review process laid out in the EU Merger Regulation still timely, or is it time to start considering more broadly whether the process should be adapted to reflect more realities in the way mergers are reviewed today?

OLIVIER GUERSENT: I am not sure I completely agree with you. First, we currently have an unusual number of cases where the clock is stopped, but we are also living in a bit of an unusual time. We stop the clock when the parties cannot answer within the deadlines a Request for Information by the Commission. I am not so sure, therefore that it is incumbent on the Commission really.

Usually, the beauty of the Merger Regulation is that there is an alignment of incentives. We have to come to a determination within a certain deadline and the merging companies have a huge incentive to help us to make that happen.

Unlike in cartels or antitrust, in which defense lawyers have every incentives to slow the investigation, the same lawyers in merger cases are real sprinters! The whole merger review system is built on this equilibrium. I do not think that this has really changed, and if you look at the raw figures, I do not see a pattern here.

Second observation. Maybe because we under-enforced—which is a question always in the back of my mind—on average, the degree of concentration of markets today is much higher than 20 years ago. That simply suggests that in the past, the average case was simpler, and therefore easier, the number of big, complicated cases in very concentrated markets was lower. I remem-
ber one of the cases I had been doing in the 1990s was when the Big Eight in auditing became the Big Six—and they are the big how-many now? Three I guess, and that is only one example among many, many others.

This, I think, is a factor that is to be taken into consideration.

Third—since you are doing an interview for the ABA—I think we “Americanized,” so to speak. I remember laughing in the 1990s when the DOJ had to rent a building to store the boxes of documents they had requested. Like many things, it has crossed the Atlantic with a few years of delay. The only difference is that you just have to add a hard drive today. This has obviously something to do with the sophistication of the investigation.

I have been part of the adventure that led to the creation of the Chief Economist position. I still think that this is one of the best things we have ever done. Our analyses today are a lot more sophisticated than they were 15 or 20 years ago.

All this comes at a price, and the price is more data, more sophisticated models, more expertise needed, and in the end of the day: more costly procedures. But, in a way, this is what the private practitioner community has long been asking for, consistently willing to have, if not a higher standard of proof, at least a more burdensome one, with decisions more grounded in a solid and robust analysis of data with solid and robust economic theories. We have moved quite a long way toward that type of standard and we all pay a price for this.

Because this means that in the same time limits as we had 30 years ago, at the beginning of the Merger Regulation—because they have not changed much; a bit, but not much—we now have to squeeze a much higher degree of sophistication of analysis with a lot more data to analyze.

Believe me, in terms of comparison of means, I still would prefer to be on the side of private practice than on the side of the authorities. Merging parties can and do line up a consultancy of economists, God knows how many lawyers, numerous lobbyists, while DG Comp usually lines up a team of three, four, five people, and that’s it. These colleagues are working day, night and weekends for the time of the merger investigation.

My last remark on this is that if a merger case lasts for a year as you say, that suggests that the pre-notification has been lasting long. You know what? The parties have always the choice to decide when they are ready to notify, so they could have notified earlier as soon as they thought their notification was complete.

To wrap up, I quite disagree with the view expressed in your question. I am not so sure that I would change anything and certainly not—if this is what you suggested—anything to lengthen the deadlines in order to take account of this increased complexity. I do not intend either to promote a come-back to more legal presumptions, and I still think that we are quicker than many others in the world to review the same transactions. Merging parties still have a good deal.

**ANTITRUST SOURCE:** Let’s stay with mergers to move to questions about competition law and policy in the wider policy context in Europe. *Siemens/Alstom* (Case M.8677) provides an easy entry to this issue, as this decision received a lot of attention, not only among competition law specialists, but especially outside the competition world.

*Siemens/Alstom* was decided before you joined DG Comp, so you were not directly involved in the case. Still, what is your view of the outcome of this case? Did the Commission make a mistake by not considering the global industrial policy context and miss the opportunity to create a major rival in Europe to Chinese competitors?
OLIVIER GUERSENT: For me this is a bright-line case. I think this case was bound to lead to a prohibition from the moment the parties were unwilling to offer suitable remedies. As you said, I have no vested interest. I was not involved. I have read the Statement of Objections (SO) and the decision, and on that basis, I would have made exactly the same decisions.

The industrial policy/competition policy debate is a bit of a Loch Ness Monster—I mean it comes back every 20 years. I remember when I was a young case handler at the beginning of the 1990s, it was a very fashionable controversy in Europe. There were a number of conferences on competition policy versus industrial policy. Then it calmed down for some years and now it is back again.

I never believed there is an opposition between the two. If the straight way to having global champions would be to have domestic monopolies, the world would be dominated as we speak by the mighty Soviet industry. And guess what? It is not.

If that were true, the best way to win the 100-meter race at the Olympics would probably be not to meet any competitor for the previous four years. And guess what? That does not work.

Competitiveness—which is, I suppose, the objective of an industrial policy—is deeply grounded in effective competition. Without effective competition firms are not incentivized to cut costs or to innovate. We see this on a daily basis. This is the founding principle of the industrial strategy presented in March by Ms. Vestager and Mr. Breton.

Therefore, there is no opposition between competition and industrial policy. An industrial policy based on trying to avoid competition would be bound to fail.

What I hear in Europe is something different. I hear: “There is no level playing field. We impose on ourselves tough competition standards—the Americans and a number of others as well—but some others in the world do not. So why should we accept that they play on a level playing field in our jurisdictions?”

I understand that argument. Maybe it has some value—that is not for me to say—but the cure for this is not in competition policy. If you decide you do not want to allow firms, from jurisdictions in which competition is not free for your firms, to play in your single market, that is fine for me. Yet, I would not agree that distorting competition rules and applying different standards depending on the origin of the firm in individual cases is any solution to this. First of all, that would be illegal, secondly that would not solve any problem. It boils down to something quite simple: no double standard. Competition policy can be tougher or it can be less strict—it’s a matter of defining the legal standards and the enforcement policy. All possible policy choices are fine for me. What is not possible is to be stricter for foreigners and softer for your domestic companies.

ANTITRUST SOURCE: One fall-out from Siemens/Alstom was the German-French initiative to consider changes to the merger regime which should allow for greater consideration of European policies during the merger review process. Some Member States have voiced support, while many others have opposed it.

OLIVIER GUERSENT: Maybe it is relevant to remember that the Merger Regulation needs unanimity to be changed. What I have seen is a letter from four Member States calling for changes in one direction and a letter from 16 others calling for no changes or changes in the other direction. I conclude from this simple observation that this might not the right debate to have in Europe right now.

ANTITRUST SOURCE: The question on the relationship between competition law and EU policies reaches of course beyond mergers, and I know that this is a topic you have been thinking about
a lot. You have mentioned before that your consider competition law as part of a wider set of EU policies. As EU competition policy exists within broader EU European policy goals, there could be instances when competition law should consider other policies in its cases. How do you see the relationship between the policy goals pursued by DG Comp and wider policy goals of the EU?

OLIVIER GUERSENT: Let me answer your question a bit indirectly. For an economist, competition is a continuum of overlapping relations of substitutability—in a way it is a succession of shades of grey.

Of course, the lawyer jumps in and his job basically is to help decide: “Within these shades of grey where will I set the limit between the grey that we will call ‘white’ and the grey that we will call ‘black’?” You need to do this for legal certainty reasons; you need to do this to make decisions. But that is always a simplification because the reality is the continuum.

And where do you put that limit? Is there only one point at which you can set the limit between the grey you call white and the grey you call black? I do not think so. There is always a choice to make between defendable options. A competition investigation is an attempt to objectivize everything that can be, and for the rest to exercise a judgment. For many reasons, different persons, in different cultural environment, with different values and legal standards, can validly make different judgments. Whether and how the decision maker has internalized or not a number of policy goals, which therefore implicitly reflect in the decision, may also play a role.

If I take the old Boeing/McDonnell Douglas case 20 years ago, you may remember—same market worldwide, same companies, same set of facts—the U.S. authorities had no problem with the merger and we had problems with the merger. I do not think any of us was doing a bad job. It is simply that within the interval of defendable choices, we had a slightly different judgment. There is nothing wrong with this. It is actually almost unavoidable, as always when it is a question of judgment. To some extent it is inherent in any judicial or quasi-judicial system. The “truth” of one court may not be the one of the other courts. Is one wrong and the other one right? Not necessarily. Different judges may legitimately make different judgments. Probably this is even truer in merger control where you try to assess the future with imperfect tools.

Of course, these choices and value judgement are made within the strict limits that the legal standards and the economic analysis allow you. So it is not like you had an infinity of choices. Still, within these limits you have a number of choices and decisions to make. That might be the reason why in some global cases where the markets were worldwide, like in my example, different competition authorities around the world, all fully respectable, reached different conclusions in the past. The value judgment they made, although within the range of reasonable choices given the evidence, was different. This is why enforcers should cooperate with each other when they deal with the same cases.

ANTITRUST SOURCE: To discuss this in a concrete context, I know that you consider the European Green Deal as an important policy.

OLIVIER GUERSENT: Yes.

ANTITRUST SOURCE: How can competition law enforcement more effectively consider Europe’s environmental goals? Are there instances where it should adjust consumer welfare-based standards in competition law cases?

OLIVIER GUERSENT: I count out state aids because that is a European idiosyncrasy, but I think with
antitrust you can do a lot. The balancing act that is in Article 101 (1) and (3)—something we do not use that much anymore—but I think when you talk about big negative or positive externalities, like in the Green Deal, for me this is very relevant. I believe that we will have a debate about how to take into account out of market efficiencies.

Ms. Vestager referred to this issue in a landmark speech she gave just before the COVID-19 outbreak in Bruges. She also mentioned the possibility to give guidance, which we have seldom used in the past 15 years. We think we could use it more for issues like the Green Deal, including Article 10 decisions in some cases.

As you see, there is a wide range of things we could do. The various instruments do not, however, offer the same degree of flexibility. Clearly the margins are more limited with mergers. The merger test in Article 2 of the Merger Regulation allows little for factoring in positive externalities in the form of out-of-market efficiency gains.

ANTITRUST SOURCE: Let’s turn to digital issues, another area that generates major policy debates in Europe. Much of the European policy debate reflects a narrative where the large U.S. digital platforms are characterized as the villains of the digital economy, where regulators and enforcers are urged to step in and support the European digital economy.

In the context of this debate, do you see a role for DG Comp to help create the European rivals to the existing large platforms that clearly have been highly successful and have with their products attracted millions of consumers, including in Europe?

OLIVIER GUERSENT: I do not think this is the power of competition policy to help create a large European platform. For that to happen we need to have the right ecosystem, the right tax system, the right engineers, the right capital markets, etc. What I mean is that there are many reasons why the Silicon Valley is the Silicon Valley, and very few, I suspect, have to do with the way U.S. antitrust is designed or enforced. Why would it be different in Europe?

Conversely, I think one of the characteristics of the digital economy is that these are often tipping markets in which once firms have acquired market power, powerful network effects deploy very, very quickly and stifle competition. This is not only an issue for Europe but this is an issue for all of us in the antitrust community.

On the one hand, these network effects deploy very quickly and very powerfully. On the other hand, the sophistication of these markets, the amount of data to analyze to come to conclusions, and the fierce opposition we find from you guys in private practice, make it so that it is long and difficult to prove a case to the required standard. The real issue for me is the effectiveness of antitrust enforcement in these markets, and this is a difficult issue.

ANTITRUST SOURCE: The European policy relies very much on a strategy using competition law and regulation in this sector.

OLIVIER GUERSENT: Yes.

ANTITRUST SOURCE: How do you see the interface between these two instruments?

OLIVIER GUERSENT: I think it is extremely important that the two work together.

I had a real-life experience in the field of financial services, as you know, in payments, when I was on the other side doing financial regulation, we worked hand-in-hand with DG Competition
regarding the card markets. That is because it is nearly impossible in utilities or utility-like markets, such as payments, with strong network effects, to regulate the market on a sustained basis through competition instruments only. It is important therefore that it works hand-in-hand with regulatory tools.

It also works the other way around. Regulatory tools frame the way competition is organized in these types of markets, leading to kind of a dialectic relationship, an iterative feedback loop, with competition law instruments.

This is true for digital, but also more generally for all network industries: for railways, for airlines, for most of the financial services for example.

ANTITRUST SOURCE: One last question on the digital industry, this one going back to mergers. Some have expressed concerns that the large digital platforms use a strategy whereby they acquire nascent rivals in order to hinder future competition. These concerns have been expressed under the catch-all name “killer acquisitions.”

What is DG Competition’s reaction to this? For now, DG Competition does not have the power to look at many of these acquisitions because they tend to be rather small transactions. Do you think that this is a real issue?

OLIVIER GUERSENT: It is a real issue. We definitely should develop our thinking about what we can do to take care of it, but it is a bit too early to discuss this publicly. We will have to come back to this a bit later.

ANTITRUST SOURCE: So that I understand you correctly, you believe that there could be justified concerns that need to be addressed.

OLIVIER GUERSENT: Yes.

ANTITRUST SOURCE: Let us now focus on some institutional questions in competition law. Brexit at some point is going to happen.

OLIVIER GUERSENT: I think so.

ANTITRUST SOURCE: That means the European Competition Network will lose one of its strongest members, the Competition and Markets Authority. How do you see the future relationship with the U.K. CMA in a post-Brexit world?

OLIVIER GUERSENT: I do not see much. There is a bit of fog over the Channel at the moment. In my view, it is quite highly dependent on the negotiations that Mr. Barnier is conducting for the EU. It is very difficult to tell now. The minimum is that we will have the same relationship that we have with all our other colleagues in the International Competition Network, which is quite okay. Depending on the outcome of the negotiation, we will have maybe more than that. Perhaps the same relationship that we have with our American friends with whom we have a specific agreement, and perhaps even more. But for the time being it is very difficult to say.

ANTITRUST SOURCE: Thank you for your time.
Interview with Matthew Boswell, Commissioner of Competition, Competition Bureau of Canada

Editor’s Note: Matthew Boswell was appointed Commissioner of Competition on March 5, 2019, for a five-year term. He first joined the Competition Bureau in January 2011, and served in various senior management positions throughout the organization, leading merger reviews and directing major investigations targeting criminal cartels, abuse of dominance and deceptive marketing practices. Before joining the Bureau, Mr. Boswell worked in a private practice in Toronto, served as Assistant Crown Attorney with the Ministry of the Attorney General of Ontario, and was a Senior Litigation Counsel at the Ontario Securities Commission, where he primarily prosecuted securities fraud and related matters.

This interview was conducted for the Source on April 21, 2020, by Joseph Krauss, a partner at Hogan Lovells US LLP and an editor of the Source.

THE ANTITRUST SOURCE: Matt, first, thank you so much for making yourself available in these difficult times. You were appointed the Commissioner of Competition in March 2019. At that time, what were the key priorities that you hoped to accomplish during your five-year term?

MATTHEW BOSWELL: I think the priorities then—and that was after I had been the interim Commissioner for nine or ten months, I think—are still the priorities that exist today, and that are set out in our four-year strategic vision that came out in February, just before this coronavirus pandemic began to impact the world.

At a high level, the vision—and it’s a vision that was arrived at by a lot of internal consultation with people at all levels in the Bureau as well as looking at the external environment and looking at our history—is really to become a world-leading competition agency that is at the forefront of the digital economy and champions a culture of competition for Canada. This is something that I and the senior executive team at the Bureau have been talking about at length since I took over as the interim Commissioner.

In order to accomplish that, we decided that it was important to focus in on three key items. In the past, at the Bureau we have had multiple priorities in any given year, and we were of the view that we had to really focus our efforts and stay very much on-track in terms of our core work, which is to enforce the laws under our remit; to promote competition in Canada through advocacy and outreach; and to invest in our people, to invest in their training, in the tools they have access to, to invest in their ability to use different techniques to advance their work.

The training aspect is something that had fallen by the wayside a bit at the Bureau over the years because of our budgetary constraints, so it’s something we are putting a lot of emphasis on. It’s particularly important given the data-driven digital economy that our teams have to work in to advance important enforcement cases, to advance well thought-out, evidence-based advocacy and promotion of the law.

That is, at a high level, the strategic vision for the organization, where at the end of the day, when my term is over in 2024, we can look back and say that we made significant progress—I
don’t think it’s realistic that we’ll accomplish everything we’re setting out to accomplish, but significant progress—to make the Bureau into a world-leading competition agency in terms of the digital economy and to advance the culture of competition in Canada, something that many commentators have pointed out has been absent in Canada.

That’s where we stand. I think it’s important, obviously, to point out that the current situation throws a bit of a curveball into the straight-line march toward realizing this vision on our priorities. That said, we have transitioned at the Bureau quite well, I would say, to working remotely. Our entire team in our headquarters and in our regional offices is all working remotely now. We are able to move forward with different types of enforcement cases and merger review. Of course, there are several challenges that come with the new reality, but I’m very proud of how we have been able to seamlessly transition to working from home so that we can keep driving toward achieving the vision and our priorities.

ANTITRUST SOURCE: Have you taken any concrete steps towards realizing those priorities and vision that you could share with us? Are there specific things that you’ve done on any of those three major items that you mentioned?

MATTHEW BOSWELL: One of the official headings in our strategic vision is “Protecting Canadians Through Enforcement Action.” That means:

- Taking more cases—taking cases that aren’t necessarily 100 percent winners but they’re responsible cases;
- Advancing the law in Canada—we have done that in the last year in terms of bringing some cases forward; and
- Bringing timely action.

One of the things that I think is very important in terms of enforcement in Canada is looking at all the tools in our toolbox and using things like injunctions on a more frequent basis. In our case, on the deceptive marketing side, we recently had a temporary consent agreement, which is effectively an injunction, against an online seller of airline tickets. We were able to do this relatively quickly. In the mergers area we have had some interim hold-separate orders before ultimate consent agreements.

So we are taking action. It’s not something where you can turn on a dime overnight. It’s a culture within the Bureau to say: “Okay, let’s move more quickly. Maybe we don’t have the perfect case, but let’s get it in front of a court to try to prevent the harm in the interim.” That’s certainly one aspect.

In terms of digital, we are doing an incredible amount in the Bureau’s digital economy focus. Last summer we hired a Chief Digital Enforcement Officer to look at multiple aspects of the way we enforce the law in the digital economy, to look for new tools that we can use, to look for the appropriate training that we can provide to our teams, and to bring in a more diverse background of people to assist us in investigating digital economy cases so we have people who truly understand what’s going on under the surface in the digital economy. A very important issue, and a significant challenge, for competition agencies around the world is to have the right mix of talent on these investigations.

In terms of digital, we hosted a data forum last May where we brought together other enforcers from around the world, policy leaders, and think tank representatives to look at issues of data and how they interrelate with competition issues and consumer issues. We were planning on having a digital summit this May or June and bringing people once again to Ottawa, mainly enforcement
people, to share techniques on enforcing in the digital economy. We’re now repositioning that as something that we’ll probably do virtually.

Those types of events obviously tie back to our vision to be a world-leading competition agency in the digital economy. But they’re also about collaboration across jurisdictions with similar competition law frameworks so that we are not all working in isolation trying to tackle these incredible problems of investigating and enforcing in the digital economy, but sharing lessons learned, sharing techniques, and sharing software in fact used to advance cases in a more efficient and effective manner.

So those are a couple of examples.

In terms of advocacy, we are taking steps, to the extent we can—obviously, we have significant budget restraints in Canada; that’s not a surprise to anyone who observes the Canadian Competition Bureau, and the Bureau’s budget constraints have been commented on a lot by various stakeholders in Canada—but we’re seizing opportunities to encourage competition and innovation in areas that matter to Canadians.

We are intervening in other regulatory proceedings. We just intervened in a wireless hearing with our telecom regulator to advocate for solutions that increase competition in Canada to the benefit of Canadians.

Finally, in terms of investing in our people and in our organization, we are bringing onboard extensive additional training to assist our officers in all different aspects of their work. We’re bringing on new software and tools for them to use so that they can process large amounts of data and records electronically much faster to advance their cases.

Sorry I kind of went on there a bit, but there’s a lot going on, and has been going on, to advance these three priorities at the Bureau with the overarching digital economy theme to everything we’re doing. This is, obviously, only going to become more important in my view, especially given the implications of coronavirus and the world being forced to rely more and more on online marketplaces and platforms. So the pressure is really mounting for us to be at the top of our game in terms of digital economy competition and consumer protection.

**ANTITRUST SOURCE:** Looking at your background not only within the Bureau but in various litigation roles with the Securities Commission and as an Assistant Crown Attorney, do you think these previous positions have influenced your approach in terms of how you are going to face some of the challenges in getting the Bureau to be a world-class competition authority?

**MATTHEW BOSWELL:** I would say the answer to that is I like to think so. Having been an Assistant Crown Attorney in Toronto, I realized and I became very comfortable with the fact that enforcement authorities can bring responsible cases and advance the facts but you can still lose and you have to get comfortable with the fact that that is a possible outcome. You can’t always be looking for perfect cases.

As a prosecutor both for securities and criminal cases, you do come to accept that you are going to lose cases, but there is value in bringing the cases and showing justice being done.
ANTITRUST SOURCE: There clearly has been a close relationship between the U.S. antitrust authorities and the Bureau going back many years. How has this relationship evolved over the last decade? Are there any initiatives that you would hope to achieve to further that relationship with the U.S. authorities, either in competition, advertising, consumer protection, or other areas?

MATTHEW BOSWELL: I think one of the areas of focus beyond the priorities that we have set out in terms of international cooperation has been the recognition that we have to focus some of our international efforts on our key partners. Of course, the United States is a key partner to the Canadian Competition Bureau. Our economies are incredibly integrated, there is a tremendous amount of trade, a shared border, now a new free trade agreement about to come into place.

But, all that said, the relationship between the Bureau, the FTC, the U.S. DOJ—and others as well, I should point out: the U.S. Postal Inspection Service, the consumer branch of the Civil Division of the U.S. DOJ—these are excellent, excellent relationships that have thrived for years and years and years, with strong pick-up-the-phone relationships at all levels.

I don’t have any specific plans to enhance those because they are working so well. We have merger team leader meetings with our U.S. colleagues. We have abuse-of-dominance case team meetings with our U.S. colleagues. Our senior leaders in consumer protection are frequently in contact with the FTC on consumer protection issues. We have bilateral meetings. We cooperate on training. We have staff exchanges. We have executed search warrants on behalf of the U.S. agencies. We have relied on the Safe Web ACT to assist us in cases. These are incredible relationships that we value so much in Canada. I think it’s imperative that we continue along that trajectory. Especially in a global world where these companies are operating in multiple jurisdictions, we have to cooperate in order to be effective.

ANTITRUST SOURCE: I notice that in November 2018 the Bureau worked with the Organization for Economic Co-operation and Development (OECD) to advance research on gender equality in competition. How has the Bureau incorporated that mission into its work?

MATTHEW BOSWELL: Just a bit of background. I’m not sure the extent to which you’re aware. In 2015 the newly elected government at the time prioritized and promoted gender equality as a high-level priority in Canada and instituted something called Gender-Based Analysis Plus (GBA+) as a requirement for all government policymaking. We were asked to do this GBA+ assessment of a competition policy chapter in a free trade agreement. It led some folks at the Bureau into thinking that we ought to do some more work on the relationship between competition, competition law, competition policy, and gender equality.

Since then, we have been one of the driving forces at the OECD in terms of looking at this issue. They produced a research paper that is incredibly interesting and valuable, and we participated in that. We actually championed the research and fostered discussions on this at the OECD Global Forum on Competition in 2018. And then, in 2019, we chaired a session on Gender and Competition at the OECD Conference on Gender Equality and Business.

And we have incorporated it into our work in one sense. One example I can give you is that we did a market study into the broadband Internet market in Canada. As part of our study, we had some public opinion research done where we, as part of the public opinion research, asked a gender identity question that allowed us then to look at the results and see what differences there were based on gender identification and how that was playing out in the broadband market in Canada.

So it’s something that we continue to work on. We’ve actually promoted the OECD getting a grant from the Government of Canada to fund further research into this issue.
One thing we found when we started looking into it is that it's an issue in terms of competition policy that really had not been looked into at all in the past. That was one of the reasons we thought it’s worthwhile to look into these issues, certainly given our government's strong policy in favor of gender equality.

**ANTITRUST SOURCE:** Do you think it will have an impact on your enforcement methodology or case selection or staff selection? What do you think its implications will be long term?

**MATTHEW BOSWELL:** I think one of the things—and I wouldn't say this definitively—where it could certainly come into play—and we've seen some interesting research on this; as I say, there's an OECD paper—is on case selection. As you may know, in the deceptive marketing area of our work, we certainly have a never-ending list of potential cases in terms of complaints coming in about conduct across the economy, so we have to put a lot of attention on picking what cases we might advance in that area. One of the criteria, of course, is cases that matter to Canadians and resonate with Canadians. This could be the relationship between gender equality and, for example, this aspect of our work could drive our case selection in the future.

But we are certainly not there now. We are still participating in the research and looking into the issue to better understand how we might use it to better enforce our laws.

**ANTITRUST SOURCE:** We spoke earlier about the impact that the COVID-19 pandemic has had on the Bureau in terms of working remotely. Are there other changes or other challenges that you have had to address and come up with some novel approaches in the current environment?

**MATTHEW BOSWELL:** Yes. I would say that relatively early into the current crisis, we began to receive some communications from the legal community and the business community that there might be a need for guidance and/or loosening of our approach to competitor collaborations. This wasn't a sea of requests, but they were certainly strong requests.

We initially indicated that of course we would take a reasonable and principled enforcement approach in the current context. But we continued to think about the issue and look at the situation in Canada and look at the situation around the world.

Then, on April 8 we issued guidance to the business community that certainly goes further than anything the Bureau has done in the past, in terms of competitor collaborations that might cross the line in terms of cartel conduct. We put a document on our website about this. It acknowledges that we recognize the exceptional circumstances and the circumstances may call for the rapid establishment of business collaborations of limited duration and scope so that services and supplies get to Canadians in this particularly difficult time. It set out some criteria and signaled that in the circumstances where there’s a clear imperative for the companies to collaborate in the short term to respond, where the collaborations are undertaken in good faith and don’t go further than necessary, the Bureau will generally refrain from exercising scrutiny.

That was our general guidance, which was aimed at being as helpful as we could be. Our criminal cartel provisions, like yours in the United States, are very serious offenses—in Canada they have the potential for lengthy sentences and serious fines—so we wanted to signal enforcement discretion in this area, provided that people were doing it for the right reasons and not to gain a competitive advantage.

We also indicated that we had put together a team if businesses wanted additional informal guidance, where they could give us some information about the scope of the collaboration—what
they were talking about, how it would assist in dealing with the problems in terms of COVID-19, why it was necessary—then we could provide them informal guidance about how I might exercise my enforcement discretion in that context. That is certainly one thing we have done to try to be of assistance.

We have received some feedback recently from the Canadian Bar Association taking issue with the use of some of the language we used in our guidance document, but we continue to believe it provides for a fair bit of flexibility and a willingness on our part to provide that informal guidance so that these appropriate collaborations can go ahead to deal with the crisis.

The second thing I just wanted to mention, was how on the deceptive marketing side we have taken steps to react to protect Canadians from false or misleading representations. It's common to see this type of stuff emerge in times of crisis—deceptive marketing, mass marketing fraud, even—and we have seen a surge of complaints in this area since February.

We put together a dedicated team for this as well, who are monitoring social media, who are assessing the complaints we get in, who are in contact with our domestic law enforcement partners and our international partners, such as the FTC, on complaints they are seeing; conduct that might be coming out of Canada directed toward Americans. This team is on the go all day looking at these.

In the short term, we are taking action in terms of reaching out directly to the companies that are making the alleged false or misleading representations and giving them very clear warnings, or that are facilitating the representations. We have done that, I think, about 17, maybe 20, times so far.

We are seeing a very positive reaction to that in that representations are being changed quickly; products are being pulled off shelves, whether virtual or real shelves, if there are these alleged false or misleading representations. So it's working well. We are seeing it in all sorts of areas. I won't get into all the different types, but you can imagine the claims that are being made about how things can either prevent you from getting it or treat you. We are working as quickly as we can to stop this kind of conduct.

Those would be two examples of things we are proactively doing to be helpful, to enforce in this current unfortunate situation.

**Antitrust Source:** I’d like to switch gears a little bit into some specific merger and cartel issues. In a speech last November, you quoted a few studies that found that Canadian industries are on average twice as concentrated as their U.S. counterparts, and levels of consolidation in Canada have risen over the last 20 years. What do you think these findings mean for Canada? What can or should the Bureau do to address rising levels of consolidation?

**Matthew Boswell:** I think in terms of what they mean for Canada is we don’t have as competitive a domestic economy as I guess we would like, certainly from the Bureau’s perspective.

This has been pointed out. There was a blue ribbon panel in 2008 here in Canada on competition policy, called the L.R. (Red) Wilson Panel. At that time, they pointed out that Canada does not have a culture of competition. This is something that, as I pointed out in our priorities, the Bureau is very focused on advocating for: that we have more competitive intensity inside Canada to benefit our productivity, our GDP, and basically to benefit consumers with more choice, better products, lower prices—all of the things that come with a healthy competitive landscape.

Of course, concentration in and of itself is not an issue for competition law enforcement, if it exists—big is not bad; big behaving badly is bad—but that means we have to be more vigilant in the sectors of the economy where there is significant concentration because that does heighten
the risk of anticompetitive behavior, coordination among firms. The concentration point effectively means we have to be on the watch to make sure that in those particular sectors there isn’t inappropriate anticompetitive conduct.

I think the other thing that I was talking about in that speech—or maybe it was in the Q&A session afterwards—was that Canada is now second-to-last among OECD countries in terms of what’s called the Product Market Regulation (PMR) indicator that the OECD prepares, I think, every ten years. That looks at regulatory restrictions on competition. Very sadly, in 2018 Canada was 33rd out of 34 OECD countries, which I was quite shocked by when I discovered it. That looks at issues like administrative burden of regulations, barriers to entry created by regulations, restrictions on foreign direct investment and trade.

These are serious issues from the Bureau’s perspective in terms of competition in Canada. We think that we ought to have a mandatory competition impact assessment framework for all our laws and regulations in this country at all levels—municipal, provincial, federal—to address this product market regulation issue that ties back to concentration. It is difficult for new entrants to enter, and we have a system set up that isn’t as competitive as it could be or should be and that hurts our productivity, that hurts our GDP. These are issues that we are going to advocate on throughout my tenure at the Bureau.

ANTITRUST SOURCE: We talked earlier about the digital age and the digital economy that we are in, that we are all touching much more given the circumstances. What initiatives has the Bureau prioritized in order to advance competition goals in this much more pervasive digital age?

MATTHEW BOSWELL: In terms of advancing competition goals, a good example might be our digital enforcement callout to the Canadian business community, as well as other parts of the Canadian landscape, to invite small businesses, businesses operating in the tech sector, media businesses—really anybody who had a perspective on it—to come in and talk to the Bureau about their observations in terms of competition or competition problems in primarily certain aspects of the digital economy—online platforms, online marketplaces, online advertisement.

This was something that was a bit different than what the Bureau has traditionally done in terms of reaching out. That was basically a callout across the country. We got significant pickup on it and heard from people in a variety of different areas of the economy and who operate different businesses in the online economy. That has informed—I can’t really say much beyond this—some of the areas where we are going to be focusing our digital enforcement work, particularly with respect to looking into unilateral conduct, abuse-of-dominance-type situations. That’s one example.

I can go back to some of the earlier stuff I was discussing about the Chief Digital Enforcement Officer and our work to bring the international community together, our work with the G7 to come to an understanding on how we all view competition in the digital economy and how they intersect.

ANTITRUST SOURCE: One thing that has been of particular interest here in the United States is what has become known as “killer acquisitions,” acquisitions of smaller tech companies by larger tech companies that may be seen as stymieing innovation. Is the Bureau doing anything to better understand the effect of those and to increase enforcement, if required, of killer acquisitions?

MATTHEW BOSWELL: I guess what I can say at a high level is that in September 2019 we changed our Merger Notification Unit to become what we now call the Merger Intelligence and Notification Unit. This changed the focus from simply taking in filings and processing the filings—I shouldn’t
say “simply”; there's a lot of work there—to also monitoring for non-notifiable transactions in Canada.

This is consistent with our vision of more proactive enforcement of the law. Normally, although we have jurisdiction over non-notifiable transactions—we have jurisdiction over all mergers in Canada—we only become aware of potentially problematic non-notifiable transactions through complaints. But now we have shifted a bit to proactively monitoring the marketplace, identifying transactions that could potentially be problematic, that fall under the thresholds for our notification regime, and then taking steps to triage and examine some of those to ensure that they aren't in fact problematic. As I say, this began around September of 2019—maybe a bit before then—and we have dug up some non-notifiable transactions that we then examined.

This is something we are going to continue to do. It will continue to be important, given probably the impact of COVID-19 as well, in terms of more transactions falling under the notifiable threshold. It's incredibly important, as you mentioned, in the digital economy where you have small firms being swallowed up, whether for the intellectual property they have or the particular platform they have or whether it's to simply kill a competitor. I'm not saying that is the case, but it is worth taking a look and having a unit that is unearthing transactions that might be problematic.

Obviously, once again, it is something that we can do, but we can only do it in a limited way given our budget constraints. We don't have hundreds of people sitting around doing nothing at the Bureau, so we do as much as we can within our current envelope.

**ANTITRUST SOURCE:** I want to shift away from mergers to the new Abuse of Dominance Enforcement Guidelines that were issued in March 2019. Now that they have been in place for over a year, what are the key takeaways from the changes in terms of either policy or your enforcement agenda by virtue of those new Guidelines?

**MATTHEW BOSWELL:** I think one of the key takeaways that people seem to discuss a fair bit is this notion about taking away the 35 percent market share safe harbor in the Guidelines. That change in the Guidelines, obviously, from our perspective reflects the Bureau's approach, informed as well by the jurisprudence of Canada's Competition Tribunal, which hears our abuse-of-dominance cases. The jurisprudence in Canada has long held that a market share of less than 50 percent would generally not give rise to a finding of dominance, but it is also clear that this doesn't imply that market power can never be found below 50 percent.

The change in the Guidelines here simply reflects that it is possible, depending on the particular facts of the case, that a firm could be found to be dominant under 35 percent. In fact, in the Credit Cards case, the Tribunal found that MasterCard actually had a dominant position with less than 35 percent. This is more than anything just an effort to be very clear that there isn't a “magic line,” that it depends on the facts of the particular case.

We have also had, of course, firms that don't compete in the market at all that have been found to have market power. The Tribunal held in the Toronto Real Estate Board case that the Toronto Real Estate Board held market power in the supply of residential real estate brokerage services in the Greater Toronto Area—but they didn't actually compete in that market; they were a trade board. In the Vancouver Airport Authority case as well, they had market power by controlling access to the airside of the airport.

So we are just trying to be very clear and transparent in terms of legal practitioners understanding that there isn't in fact a bright line.
ANTITRUST SOURCE: U.S. agencies have promoted leniency and self-reporting initiatives in recent years for cartel activity as well. How has the Bureau used leniency programs to aid in its investigation and prosecution of cartels? Do you feel it has been effective from a Canadian perspective?

MATTHEW BOSWELL: The Bureau was, I think, the second jurisdiction, behind the United States, to implement a leniency program. Like our colleagues at the U.S. DOJ, it has historically been the most effective method to detect, deter, and prosecute cartel activity in Canada. We had a surge in immunity and leniency applications in the early 2010s, cases that everyone is very familiar with—the auto parts cases and financial cases—and that drove our work significantly.

We continue to believe in the power of immunity and leniency programs, particularly in the value of immunity and first-in leniency, in Canada because, all things going according to plan, both those situations provide immunity to corporate executives and directors in terms of their involvement in the cartel.

We made some changes in 2018 and 2019 to reflect some things we had learned over the last couple of years and to reflect some initiatives that the Public Prosecution Service of Canada wanted included in our programs. We think that our programs, as I say, continue to offer tremendous benefit, and they have been changed a bit with a focus on prosecution readiness. That, as I say, ties back to the fact that we have a bifurcated model: Unlike the U.S. DOJ, we, the Bureau, are the investigators. We gather the evidence, we then assemble the evidence and provide a referral to the Public Prosecution Service of Canada (PPSC), they make the decision as to whether to prosecute the case based on factors that are well known in Canada, and then they prosecute the case.

So one thing that we changed in our programs was prosecution readiness and making some things more clear, things that had previously been included in our Frequently Asked Questions, and we incorporated those directly into our policies. For example, generally in Canadian criminal law, statements from conspirators or parties or witnesses generally are taken—where feasible, and certainly in a large investigation like this—under video, and that has been made clear in the policies.

We have also changed some aspects of the policies to deal with issues where there are documents in the possession of the cooperating parties that might be subject to solicitor-client privilege and how to address those issues. Obviously, we don’t want to violate solicitor-client privilege issues, but we have to have a method to make sure we have all of the documents that are relevant that are not privileged.

So we have done a lot of work. We’ve had a very positive experience over 20 or 30 years with immunity and leniency. We are seeing, just like many of our colleagues around the world, a significant drop-off in applications for immunity or leniency. This is something that has been talked about at length in multiple different fora. It was discussed at the ABA/IBA International Cartel Workshop in February, where I laid out some of the numbers in terms of Canada’s current number of applications.

The only last point I’d make, is yes, we think they are incredibly important programs. We value them very much. We administer them jointly with the prosecutors. But we are also putting more emphasis internally on what people call ex-officio detection of cartel conduct using other tools, using other networks, to have problematic conduct brought to our attention so that we can investigate further. This is, of course, primarily domestic cartel-related, but includes better relationships with other domestic law enforcement police forces, who can tip us off if they see bid rigging or price fixing in the course of a fraud investigation, with procurement agencies, who can provide problematic bidding to us to investigate further, and developing screens and algorithms to apply to bidding information to generate red flags for potential bid rigging. So we are doing a lot of work outside of immunity and leniency to drive detection.
**ANTITRUST SOURCE:** You mentioned the Bureau’s collaboration with the Public Prosecution Service and the different roles that each agency plays. Have there been any differences of opinion in how the leniency program works with guilty pleas or consent orders?

We have seen references to a recent bid-rigging charge that was handled via consent orders instead of guilty pleas. The press has suggested that there might have been differences of opinion for what the Bureau may have preferred as compared to what the Prosecution Service ended up doing. Can you comment on this or more generally on the collaborative relationship with how the Bureau and the Prosecution Service work together and perhaps work against each other sometimes?

**MATTHEW BOSWELL:** I would say that there are certainly advantages to our bifurcated model, and of course, there are challenges that we work on all the time with our prosecutorial colleagues. That’s like any relationship—there are ups and downs and there are disagreements. But I would say presently there is a good working relationship with the PPSC, the prosecutors, strong personal relationships between the two organizations that work together closely day-in and day-out.

In terms of your referring to the sort of alternative method of resolving some bid-rigging cases in the Province of Quebec, using a provision that’s in the Competition Act, Section 34 Subsection 2, this is something that ultimately has to be brought to a court. There is no guilty plea, but the court has to be satisfied that there was a commission of an offense or activity towards the commission of an offense. This was done on notice to the Bureau, on notice to me, that this was something that the prosecutors were proposing to do as part of one of the decisions they make in terms of prosecutions, which is whether it is in the public interest to lay charges to have a full trial. In this particular matter, they suggested to the Bureau that this might be a way to resolve these particular cases. As I say, I was consulted and I didn’t object.

What I can say is that there were a variety of factors that went into those resolutions that I should point out did result in significant—they’re not fines, but they’re agreed-upon payments to the Government of Canada to the tune of, I think, over CAN$6 million. The three companies in question had participated in a voluntary reimbursement program to municipalities that had been victimized by a bid-rigging scheme, so damages were paid to the municipalities.

There were overlapping investigations by other law enforcement agencies for this conduct. Some charges were laid by provincial attorneys against some of the same parties. The individuals involved in the bid-rigging conduct were not covered by these resolutions, and in fact to date with respect to one particular area of the Province of Quebec four individuals have been charged criminally with bid rigging. Those four individuals have now all since pled guilty and obtained what are called in Canada conditional sentences, effectively house arrest sentences, varying from 12 months up to, I think, 20-some-odd months, for their participation in these bid-rigging schemes. This also comes out of a huge inquiry in Quebec into bid-rigging conduct in municipal contracts.

In the overall picture, the Public Prosecution Service thought it was an appropriate way to resolve these particular matters, and the Bureau was consulted and we didn’t object. As I say, the relationship with the PPSC is a good working relationship. Obviously, there are moments when we disagree, and we work through those disagreements towards advancing matters in the best possible way.

**ANTITRUST SOURCE:** One last question. Are there any other initiatives outside of the COVID-19 pandemic emergency that you would like to highlight in terms of misleading advertising?

**MATTHEW BOSWELL:** This is an area of focus for the Bureau. It has been for me—I used to run our
Cartels and Deceptive Marketing Practices Branch. In the last few years the focus has been on consumer trust in the digital age and going after companies that are engaged in false or misleading practices.

I guess the best example is with respect to price. We have taken a series of cases against large corporations for what we call “drip pricing.” Drip pricing is where you get an advertisement on your phone or your tablet that such-and-such product is X dollars; and then you start clicking through the buying process and at the end of it, it’s “X + 20%” or “X + 50%.”

This is something we’ve seen in the ticket industry. In February, we resolved a case with StubHub for this alleged practice of drip pricing where additional mandatory fees were added as you went through the process. You’re going to have to pay the fees anyway; they could have been included in the up-front price. StubHub agreed to pay a CAN$1.3 million penalty in February, to enter into a compliance program and a consent agreement in Canada.

Before StubHub, we last June resolved a case against Ticketmaster for the same type of alleged conduct, drip pricing, where they paid a CAN$4 million penalty in Canada and Bureau costs and other things as well as implementing a compliance program for this kind of conduct. Prior to that, we went after four of the large car rental companies for the same type of conduct. They all resolved at the Bureau, paying administrative monetary penalties.

So alleged online false or misleading representations are an area of focus. We want to send a message not just to specific companies but to businesses throughout Canada that this is something we are monitoring; we’re not afraid to take enforcement action against it.

In October we got a temporary consent agreement against a company called flighthub.com and justfly.com for online false or misleading representations where we were talking about hidden fees for seat selection and cancellation of flights. It’s a flight reseller.

We are constantly monitoring the marketplace, and an area of focus at the Bureau is trust in the online world. We have to have trust in the online economy. If we, as Canadian consumers, are all going to operate in it now, every day, it’s important that we have trust in that economy.

**ANTITRUST SOURCE:** Thank you, Matt. This has been really interesting and we expect our readers will find it interesting to hear your perspective, initiatives, and insights into the Bureau’s work. Thank you again for the time you’ve given us, and we hope that you, your family, and your colleagues in the Bureau stay safe and healthy.
The Price of Price-Gouging Laws

Ann O’Brien and Brady Cummins

American consumers are used to having instant access to a wide variety of choices of products. Consumers can typically compare price and quality between online and brick-and-mortar stores. Companies are generally free to sell their products at any price they choose. The COVID-19 outbreak rapidly changed all of this. American consumers and healthcare providers saw widespread supply shortages. Demand for consumer products such as hand sanitizer, cleansing wipes, and toilet paper suddenly spiked as households began disinfecting frequently and stocking up on supplies to limit trips to stores. It became difficult to find many previously ubiquitous products for sale in either retail stores or online. Demand for personal protection equipment (PPE) and related medical supplies also increased drastically, causing dire shortages. Protective face masks in particular have been in short supply, and tragically there were reports of front-line healthcare workers unable to obtain face masks.

Amid the surging demand for and dwindling supply of these products, prices jumped where these items were still available for purchase. Before the first COVID-19 case was detected in the United States, outrage and allegations of price gouging quickly filled the internet over prices for products like hand sanitizer and toilet paper. Some who could afford it paid the high prices and stocked up in anticipation of shortages to come. Those who could not afford it went without. Those early allegations of price gouging were based on moral outrage, but price-gouging laws typically require a trigger, usually a state of emergency declaration, and many were not yet in effect. As the COVID-19 crisis reached U.S. soil, states of emergency were declared by the President of the United States and by every state and the District of Columbia. The declarations of these states of emergency triggered price-gouging laws on the books in at least 38 states and the District of Columbia; many of these laws carry criminal penalties as high as $10,000 per violation and one year in prison. States and local governments quickly jumped into action, issuing cease and desist orders and bringing enforcement actions for alleged price gouging on essential products as COVID-19 became a larger threat. And on March 23, 2020, President Trump signed an execu-

---

1 At least 38 states have price-gouging legislation. In some states without price-gouging laws, such as Minnesota, governors have targeted price-gouging activities with executive orders. And in other states without price-gouging laws, attorneys general have threatened to prosecute price gouging under state consumer protection laws. See, e.g., Press Release, Montana Attorney General Tim Fox, Attorney General Fox Warns of Potential Coronavirus Scams, Price-Gouging (Mar. 13, 2020) (reminding Montanans that “state law protects them from unfair or deceptive trade practices and price fixing”), https://dojmt.gov/attorney-general-fox-warns-of-potential-coronavirus-scams-price-gouging/.


As the world has witnessed, COVID-19 infections can spread widely throughout the population. With no clear end in sight and the expectation that outbreaks will continue to flare up at different times in different places across the globe, sudden spikes in demand for and shortages of critical products like N95 masks are likely to occur frequently over the next year and perhaps beyond. The widespread state law prohibitions, federal and state enforcement actions, and media coverage of price gouging suggest prohibiting price gouging is a no-brainer policy. But price-gouging laws influence the speed and size of supply responses to affected areas. And because supply responses will have an impact on the number of lives lost, the reasons for and impacts of price-gouging laws need to be carefully considered. Additionally, if price-gouging laws are good policy, as at least 38 states and the Trump administration have decided they are, the laws should be structured and enforced with an eye toward prohibiting the most egregious behavior while allowing for the largest and quickest possible supply responses.

Case for Price-Gouging Prohibitions

Price gouging is generally the sale of a product for an excessive price during an emergency. There are several reasons underlying the outrage over price gouging and the laws prohibiting it, all of which seem to be moral in nature. First, every element of a transaction viewed as a price gouge seems grossly unfair. Price gouging occurs in the wake of economic shocks, typically natural or man-made disasters. The victims of the disaster are one and the same as the victims of price gouging. This is because disasters cause spikes in demand for certain essential products—products needed to mitigate or respond to the harm caused by the disaster (e.g., protective face masks) or to meet basic needs that have become more difficult to meet as a result of the disaster (e.g., food, water, electricity, ice). So the people hardest hit by the disaster have an immediately increased demand for the same essential products at the same time. Those most affected by the disaster thus see the sharpest demand spikes and resulting supply shortages, and are most likely to become the victims of price gouging.

On the other side of the price-gouging transaction is the seller. The seller is typically (though not always) an individual or company not devastated by the disaster who has access to or the ability to produce the products in high demand. The unharmed seller is the one who gains financially from the transaction and is often seen as an amoral profiteer.

So, in the eyes of many, price gouging involves an amoral profiteer selling a vital good to a twice victimized person in dire circumstances.

Second, because price gouging typically has to do with necessities at times when those items are exceedingly scarce, price-gouging transactions can be seen as coercive. A justification for allowing sellers to charge whatever price they choose under normal circumstances is that transactions are voluntary—buyers can simply choose to walk away from prices that are too high. But in price-gouging situations, buyers are seen as not having a choice. The products are often necessary to meet people’s basic needs—health, safety, food, or shelter. The coercive rather than vol-
untary nature of price gouging is seen as a justifiable reason for the exception to the general rule that sellers are free to set their price.

Another objection has to do with the distribution of critical goods. By allowing sellers to charge high prices, some argue that those with the most money, or only those with a lot of money, are able to acquire the products. The argument is that life necessities should not be distributed according to ability to pay.

Last is the notion that price gougers do not add any value to the products they sell to justify the high prices charged. Often price gougers are seen as “middlemen” who make windfall profits out of circumstance—often tragic circumstances—rather than because of useful production. The middleman seizing on an opportunity to make a buck during a crisis is often the disdained profiteer that price-gouging laws seek to punish, while in a nonemergency situation that same person might be viewed as the type of scrappy entrepreneur Americans often applaud for seeing and seizing on an opportunity.

Supply Case for Letting Prices Rise
The counter to this moral case for price-gouging laws is primarily an economic one, namely that price-gouging laws set artificial caps or ceilings on prices and profits, resulting in lower total supply of products that victims of disasters need the most. In our market economy, prices act as both incentives and instantaneous signals to both buyers and sellers. A market price that is much higher than the cost to supply the product is an incentive for and a signal to potential sellers to supply that product to the market. Conversely, a high price is a signal to and incentive for buyers to either reduce their consumption or substitute away from that good.

In economic terms, prohibitions against price gouging are price ceilings. They set a maximum price allowed by law. That price ceiling sets a profit cap as well. When laws prohibit prices from rising to the level that buyers would be willing to pay, prices lose some of their ability to function as an incentive for and a signal to buyers and sellers.

Unfortunately, price ceilings do not solve the underlying market condition of excess demand for limited supply. But price ceilings do suppress the price signal, limit the incentive to supply, and, as a result, reduce the total level of supply as compared to the level that would be supplied if prices were allowed to rise. This is because producers (individuals and companies) are willing to undertake more actions, make more investments, take on more costs, and take on more risk when the payoff, the price, is higher. In economics, this fundamental principle is known as an upward sloping supply curve. Even during a global pandemic when government orders and travel restrictions might limit the number of suppliers (a “shift the supply curve” in economic terms), the total quantity supplied to a market by the more limited set of suppliers is likely greater at higher prices.

Practically, new sellers who might otherwise enter a market may not do so because price caps limit or eliminate their profit incentive. In the COVID-19 crisis, this concept has very real implications. Those who have an inventory of, or access to, vital PPE and medical supplies, or who work in adjacent lines of business and have the ability to shift production to these products may be less likely to bring those products to markets with price ceilings in place. Selling products into markets with price ceilings limits sellers’ pricing and profit and comes with a risk of being prosecuted, a risk many will not be willing to take, particularly if the price ceiling is unclear. This barrier to would-be entrants worsens the supply gap that is typically filled by the promise of profits.

We are seeing this dynamic play out during the current pandemic. Perhaps the product in the shortest supply—and that which has been the source of most price-gouging prosecutions—has been respirator or surgical face masks. While demand for such masks has increased everywhere
for both medical workers and nonmedical consumers, the level of need for face masks is different in different places, and the need for face masks in a given place can change quickly. In the United States, New York has been an epicenter of the COVID-19 spread. There are certainly, on the margins, producers of face masks, or people who have inventory or access to producers of face masks around the world, who face the choice between (a) continuing business as usual, selling to the customers they already have relationships with in places in which they typically sell, and (b) shifting those sales to somewhere like New York City. While the second choice might be what is best for public health, as well as the moral thing to do, shifting those sales has significant costs and risks. There are costs associated with finding buyers, vetting buyers, and arranging logistics to deliver product to new buyers. There also are risks associated with diverting sales from other customers with which the supplier might already have long-term contracts. Ideally suppliers would make this shift despite those costs and risks, but many will not unless the reward encourages them to do so.

In the state of emergency world where price-gouging laws are triggered, many are simply not going to be able to acquire the products at all because there is insufficient supply. For those people, the price of the products is essentially infinite.

Supply responses triggered by high prices have another effect—in time they reduce the market price. As more supply enters the market, excess demand falls, and sellers more frequently have to compete for sales. As a result, sellers are forced to lower prices in order to sell all their product.

As long as price is able to act as a signal and an incentive, economics suggests that the market price will eventually fall to something close to what price-gouging laws demand: a price at or slightly above the price charged before the emergency (or, if costs have risen, the cost plus an ordinary profit). Prices in a world without price-gouging laws would thus eventually converge with those enforced in a world with price-gouging laws. The difference is that, in the world without, more people may be able to acquire the product, though those who acquire the product earlier in time will pay a higher price. In the state of emergency world where price-gouging laws are triggered, many are simply not going to be able to acquire the products at all because there is insufficient supply. For those people, the price of the products is essentially infinite. In addition, gray

---


markets quickly develop to connect those willing to pay the price, and such gray market transactions leave customers much more susceptible to counterfeits and fraud.

**Price-Gouging Laws**

In the United States, the case in favor of price-gouging prohibitions has largely won the day. At least 38 states and the District of Columbia have laws against price gouging. This includes states across the political spectrum, from California to Texas. Others are considering adding them. In Ohio, a state without a specific price-gouging law, the attorney general has brought an action for alleged price-gouging conduct under both consumer protection statutes and unconscionability contract law theories. And while there is no general federal price-gouging law, President Trump invoked the DPA, a Korean War-era law provision that in effect prohibits hoarding and price gouging.

The state price-gouging laws vary, though there are a few common threads seen among many of them. Almost all are limited in time to a period following some sort of declaration of a state of emergency. Most include some sort of price ceiling that is set at a certain percentage above the average price that the relevant good sold for during a time period immediately preceding the declaration of emergency. For example, some states like New Jersey and California prohibit selling products at prices greater than 10 percent more than the average price for the same product over the 30-day period preceding the emergency declaration. Some state laws make the percentage increase an element of the law while, in others, a price increase over the prescribed percentage is prima facie evidence of a violation. Some laws are vaguer and merely prohibit sales at unconscionably high or excessive prices. Most have exceptions or defenses, the most common being that the defendant can seek to show that the price increase is directly attributable to increases in costs, though many of these defenses also require a showing that the seller’s markup did not

---


10. See, e.g., ARK. CODE § 4-88-303 (30 days following the declaration); CAL. PENAL CODE § 396 (30 days following that proclamation or declaration of a state of emergency).

11. See, e.g., ALA. CODE § 8-31-4 (equal to or in excess of 25% of the average price during the last 30 days immediately prior to the declared state of emergency); CAL. PENAL CODE § 396 (price of more than 10% greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency); KY. REV. STAT. § 367.374 (more than 10% above the price prior to the declaration).


13. See, e.g., KAN. STAT. § 50-6,106 (“price difference of more than 25% shall be prima facie evidence of gross excess”).

14. See, e.g., 940 MASS. CODE REGS. § 3.18 (referring to “an amount that represents an unconscionably high price”); N.C. GEN. STAT. § 75-38 (referring to “a price that is unreasonably excessive under the circumstances”).
increase. While there are common threads, sellers do not really have a safe harbor under which they could increase their prices at all, or begin selling a relevant product, and be completely safe.

The executive order that President Trump signed in March invokes the DPA to prevent hoarding of certain critical items as designated by the U.S. Department of Health and Human Services (HHS).\(^\text{15}\) For such items, including PPE and ventilators,\(^\text{16}\) individuals and companies are prohibited from accumulating them either (1) in excess of reasonable needs or (2) for the purpose of selling them in excess of prevailing market prices.\(^\text{17}\)

This is new federal territory. Outside of the authority granted to the president under the DPA, there is no general federal price-gouging law. Federal price-gouging laws have been proposed after past crises, and there have recently been renewed calls for new legislation. When price-gouging concerns arose after natural disasters like hurricanes, the disasters affected particular geographic regions, and concerns were focused on products like gas, water, and building supplies. Price-gouging enforcement was typically a state enforcement issue limited to the region and a few essential products. Under the new federal enforcement regime, U.S. Attorney General William Barr said the DOJ will prioritize hoarding and price gouging involving vital supplies needed to fight COVID-19 and created a COVID-19 Hoarding and Price Gouging Task Force.\(^\text{18}\) The task force quickly initiated federal investigations of hoarding and price gouging, and it has announced charges.\(^\text{19}\) It is unclear how far the administration will go in invoking the DPA with respect to pricing and how “prevailing market prices” may be pled and proven beyond a reasonable doubt in the criminal context.

The existing patchwork of state and federal laws makes selling essential products during a time of crisis an uncertain and risky venture. First, it is very difficult to ensure compliance with laws that use undefined and vague standards in prohibiting “excessive” and “unreasonable” pricing. It also is often not clear whether the relevant reference “price” is the advertised price or the actual price and how discounts should be accounted for. Given the infrequent enforcement of the relevant state laws, case law defining these terms is sparse. The executive order in place under the DPA

---

15 White House, supra note 3.


17 50 U.S.C. § 4512. As a result of this executive order, it is a misdemeanor to engage in this prohibited activity, which is punishable by up to one year in prison and a fine of up to $10,000.


19 U.S. Dep’t of Justice, Long Island Man Charged Under Defense Production Act with Hoarding and Price-Gouging of Scarce Personal Protective Equipment (Apr. 24, 2020), https://www.justice.gov/usao-edny/pr/long-island-man-charged-under-defense-production-act-hoarding-and-price-gouging-scarc-0 (DOJ filed a criminal complaint charging a Long Island man with violating the DPA by hoarding personal protective equipment at a warehouse in Brentwood, New York, amid the COVID-19 pandemic, and price-gouging customers of his retail store in Plainview, New York); U.S. Dep’t of Justice, supra note 4 (Brooklyn man was arrested by FBI agents investigating hoarding and price gouging and charged with assaulting a federal officer and with making false statements to law enforcement).
falls into this category as well. It provides no guidance as to what it means for a price to be “in excess of prevailing market prices.”

Second, even with respect to laws that use a more certain standard, the laws tie the acceptable selling price to the selling price of the product in the affected area (the boundaries of which may be unclear) over a specific time period preceding the emergency. A seller, therefore, needs to compile and sort through available data to determine what the acceptable price is in any relevant area. And new suppliers—those that shift production to the needed good or have not previously sold in the area—likely do not have ready access to market data needed to determine the acceptable price ceiling under the law. As a result, in a situation where time is of the essence, sellers looking to sell critical products to buyers across many different states have to spend a significant amount of time and resources in order to ultimately get only an incomplete level of certainty that they are not in violation of one of the many different price-gouging laws. Coordination with competitors of efforts to do so may even put companies at increased risk of running afoul of federal or state antitrust laws.

Third, laws that prohibit price gouging based on the price charged during an emergency unnecessarily mandate that prices remain at the levels they were at during a rather arbitrary time (usually either in a period immediately before the emergency or at a price that is the average over a number of days before the declaration of an emergency). At the very least, standards for price gouging should be tied to profit margins, not gross prices. During crises and times of market turmoil and increased demand, it is simply unrealistic for prices to remain unchanged. For example, during the COVID-19 crisis, we see that the price many are willing to pay for N95 masks is many times higher than the price they would have been willing to pay before the pandemic, when such masks typically cost just over a dollar and were plentiful and used by painters as well as healthcare professionals. A 10 percent price cap above pre-crisis prices, which allows for only pennies in increased prices for masks, is simply unrealistic today and far out of line with what a free market would dictate. If the prevention of profiteers seeking windfall prices is the real aim of price-gouging prohibitions, the laws should be based on profit margins rather than prices. Additionally, because a complaint can cause enormous reputational harm even if the accused is ultimately successful using an increased-cost defense, the burden should be on the prosecution to show excessive profits, not merely excessive prices.

Last, states could consider adding an “increased output” defense to price gouging. This would allow a defendant accused of price gouging to rely on a defense that they would not have supplied the product had they not been able to charge the price they did. This would be akin to an antitrust “rule of reason” analysis under which the defendants are given the opportunity to show that their actions had procompetitive or output Enhancing effects. In this case, defendants would have the burden, but be able to show that their actions ultimately resulted in greater aggregate output of the product sold.

The current prosecution model of price-gouging enforcement is resource intensive for enforcers and not transparent or easy to navigate for market participants responsibly trying to price essential products during the current pandemic. A more radical rethink after this pandemic could involve governments stepping in to directly sell or facilitate sales to get essential products to hos-
pitals or customers who need them, or even temporarily communicating specific price ceilings for certain essential products so that market participants would have more transparent price limits. These alternatives could certainly raise other competition and supply concerns but may be worth considering in a post-COVID-19 world.

**Conclusion**

The reasoning that underlies price-gouging laws is straightforward and morally sound—protecting victims of life-altering disasters from having to pay exorbitant prices for ordinarily common and necessary products. Unfortunately, because they could suppress supply responses, price-gouging laws can exacerbate, not relieve, the product shortage problems that they are meant to address. The price we pay to prevent people from entering into voluntary transactions at temporarily inflated prices is that more people are forced to go without. While it is unlikely that states and the federal government will change course in the short term, lawmakers could use lessons learned from the current COVID-19 crisis to improve price-gouging laws with an eye toward mitigating the supply effect and encouraging increased output in the wake of disasters.
Looking Ahead: Nascent Competitor Acquisition Challenges in the “TechLash” Era

Tracy J. Penfield and Molly Pallman

Antitrust regulators have long focused on the competitive harm that may result from combinations that implicate potential or future competition. While this focus remains, regulatory approvals of several high profile “Big Tech” acquisitions have prompted many to criticize the enforcement agencies for being too lax in their reviews, particularly in their treatment of acquisitions of nascent competitors. Acquisitions of nascent competitors—or companies with products and technologies that could one day emerge as significant head-to-head competitors—are certainly not new. Recently, however, high-profile acquisitions of small but successful companies by the likes of Facebook (Instagram and WhatsApp) and Google (Waze), and concerns that these acquisitions have served to enhance the dominance of Big Tech, have cast the topic into the enforcement spotlight.

Officials at the Federal Trade Commission and Department of Justice (the Agencies) have made clear that nascent competitor acquisitions are potentially harmful to competition and, as a result, are an enforcement priority. In recent years, the Agencies have devoted significant time and energy to understanding better the competitive implications of nascent competition. For example, the FTC devoted three panels and two presentations during its 2018–2019 Hearings on Competition and Consumer Protection in the 21st Century to the issue of nascent competition “to illustrate the importance that Chairman [Joseph Simons] specifically and the [FTC] collectively is putting on this issue.” A key topic of discussion was whether current antitrust law is sufficiently equipped to evaluate the competitive impact of nascent competitor acquisitions in light of the dramatic growth in the digital sector. Furthermore, the Agencies have dedicated substantial resources to issues relating to Big Tech: in February 2019, the FTC launched a Technology Task Force (now called the “Technology Enforcement Division”) with the stated goal of “investigating


2 Joseph Simons, Chairman, Fed. Trade Comm’n, Remarks at Georgetown Law Global Antitrust Enforcement Symposium 5 (Sept. 25, 2018), https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf (stating in his first key speech as FTC Chairman that “one of our interests in this area will be mergers of high-tech platforms and nascent competitors”). See also Makan Delrahim, Ass’t Att’y Gen. Antitrust Div., U.S. Dep’t of Justice, “. . . And Justice for All.” Antitrust Enforcement and Digital Gatekeepers, Remarks as Prepared for Delivery at Antitrust New Frontiers Conference: The Digital Economy and Economic Concentration 11 (June 11, 2019), https://www.justice.gov/opa/speech/file/1171341/download (“It is not possible to describe here each way that a[n] acquisition of a nascent competitor] may harm competition in a digital market, but I will note the potential for mischief if the purpose and effect of an acquisition is to block potential competitors, protect a monopoly, or otherwise harm competition by reducing consumer choice, increasing prices, diminishing or slowing innovation, or reducing quality.”).

anticompetitive conduct and consummated mergers in the digital economy.”4 The DOJ similarly confirmed last summer that it is “reviewing the practices of market-leading online platforms.”5

The Agencies' concerns have not manifested themselves in words alone; they have also recently challenged a series of nascent competitor acquisitions—a signal that they are shifting towards a more aggressive approach to their review of such transactions than they have previously.

While there are a number of challenges associated with assessing the likely competitive impact of a nascent competitor acquisition, it seems unlikely that the Agencies will back down any time soon. Whether in the form of pre-consummation challenges, post-consummation reviews, post-consumption conduct investigations, or possibly even the unwinding of consummated transactions in the most extreme circumstances, all indications are that the Agencies will closely examine and challenge potentially anticompetitive nascent competitor acquisitions, particularly those in the digital sector, in the years ahead. This is especially true given the centrality of digital platforms to daily life. Now more than ever, as Americans navigate the COVID-19 pandemic, tech companies and their product offerings have increased relevance, and the Agencies will closely assess how potential acquisitions by these firms will impact consumers.

As the Agencies adapt to the complexities of the digital age, we anticipate that their analytic toolkit for assessing acquisitions of nascent competitors will necessarily adopt a more flexible form, though—as we discuss below—most likely staying within the confines of the existing enforcement framework (i.e., we do not anticipate a wholesale overhaul of the Agencies’ approach to merger review). By coupling creative refinement of the existing enforcement framework with more aggressive enforcement, the Agencies will enhance their ability to mount credible nascent competitor acquisition challenges, influence merging parties’ conduct, and even deter certain mergers altogether.

The Current State of Play: An Uphill Battle for the Agencies

*Nascent Competition, Nascent Competitor Acquisitions, and Killer Acquisitions Defined.*

A nascent competitor, as distinct from a potential competitor, is a current competitor whose competitive presence is not fully actualized but could develop into a significant head-on competitor of the acquirer.6 Agency concerns about the potential anticompetitive impact of nascent competitor acquisitions have primarily arisen in three different scenarios. An example of the first scenario is Facebook’s acquisition of Instagram, in which the acquisition of an incipient product or technology with the intent of fostering or growing it may result in one large entity owning two major competing products and/or technologies down the road. A second related scenario occurs where a company purchases a product or technology that currently operates predominantly in an adjacent market, but which could evolve into a full-fledged competitor in the acquirer’s market. The third scenario is the so-called killer acquisition of a nascent competitor. These are described as acquisitions in which one firm acquires another firm to “eliminate a potentially promising, yet like-

---


ly competing, innovation” by stifling rather than growing a potentially competing product or technology.7 This differs from the first scenario because in the case of a killer acquisition, the acquiring firm acquires the target without any intent to invest capital or resources to further grow and develop it, effectively stamping it out by virtue of the acquisition.

**The Current Enforcement Regime.** The current enforcement regime for potentially anticompetitive mergers includes premerger notifications of certain transaction under the Hart-Scott-Rodino Act (HSR Act) and enforcement under the Clayton and Sherman Acts. These statutes are agnostic as to the industry involved, and the Agencies have not developed distinct standards for addressing acquisitions or conduct in the digital sector. Rather, the Agencies are uniformly driven by the goal of maximizing consumer welfare in the form of lower prices or greater or higher quality output.8

Section 7 of the Clayton Act’s prohibition on mergers and acquisitions where the effect “may be substantially to lessen competition or to tend to create a monopoly” has been the Agencies’ primary vehicle for challenging nascent competitor acquisitions. To determine whether mergers and acquisitions by competitors may harm competition, the Agencies use the analytical framework set forth in the Horizontal Merger Guidelines, in which they look at market shares and concentration deltas pre- and post-merger and use quantitative and qualitative evidence of price and non-price effects (such as product quality, product variety, and innovation), efficiencies, and the potential for new entry.9 To prevail on a Section 7 claim, the government must show a “reasonable probability that the merger will substantially lessen competition.”10

As then-FTC Director of the Bureau of Competition Bruce Hoffman noted, “Mergers are not necessarily completely compartmentalized from anticompetitive conduct analysis.”11 As such, in certain situations the Agencies may also turn to Section 2 of the Sherman Act to evaluate whether the acquirer undertook the nascent competitor acquisition to acquire or maintain a monopoly. A Section 2 claim requires “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.”12 The crux of the Section 2 nascent competition issue is “whether, as a general matter, the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant’s continued market power.”13

**Difficulties Policing Nascent Competition Acquisitions Under the Current Regime.** Even with these tools, the challenge for the Agencies in addressing nascent competitor acquisitions is two-fold. First, it is difficult to determine whether a nascent competitor acquisition is likely to have anticompetitive effects by asking the same questions typically asked when analyzing an acquisi-

---

7 Id. at 2.
11 Hoffman, supra note 4, at 7.
tion of a full-fledged current competitor—e.g., to what extent is there head-to-head competition between the parties today or to what extent is one party a competitive constraint on the other. When a nascent competitor is involved, the answers to these questions may not provide meaningful insight into a transaction's likely impact on competition and whether a nascent competitor will become competitively significant. This injects considerable uncertainty into the Agencies' evaluation, which will necessarily plague any assessment of a nascent competitor's future viability and competitive significance.

Second, even if the Agencies determine that a nascent competitor acquisition is likely to harm competition, they then face significant evidentiary hurdles in attempting to prove in court that the transaction is indeed anticompetitive. This means demonstrating that, absent the transaction, competition in the relevant market would intensify as a result of the growing significance of the nascent competitor, even where that firm's current market share is small and the data do not show that the firm presently acts as a significant competitive constraint on other market participants.

While the case involved the acquisition of a potential, rather than a nascent, competitor, the FTC’s 2015 failed challenge to Steris Corporation’s $1.9 billion acquisition of Synergy Health illustrates these evidentiary challenges. The FTC alleged that the acquisition “would violate the antitrust laws by significantly reducing competition in regional markets for sterilization of products using radiation, particularly gamma or x-ray radiation.” The FTC argued that until the merger, UK-based Synergy planned to enter the U.S. market and provide x-ray sterilization services as a competitive alternative to the gamma radiation sterilization services provided by Steris in the United States. Despite the evidence presented by the FTC, an Ohio district court determined that the FTC had not proved that Synergy would have introduced competing sterilization technology in the United States absent the merger. The case exemplifies the challenges the Agencies face in persuading courts that a transaction is anticompetitive when they lack evidence of robust present day competition and their arguments instead largely hinge on the future state of competition—even where compelling documentary evidence as to anticompetitive motive exists.

In the aftermath of this case, many wondered whether the Agencies would step back from bringing these difficult challenges. Looking back, Hoffman noted that the Steris case serves as “a reminder that future competition cases pose challenges in weighing and assessing evidence, since predictions about entry can often be called into question.” Despite the inherent difficulties of bringing these challenges, the FTC was confident that it had gotten Steris/Synergy Health right; just last year Hoffman stated:

Our view is that case [Steris] came out the wrong way . . . At the FTC, we are persistent. The mere fact that we lose a case is not itself a deterrent to us. The nascent-competitor issue is a complex issue because we are not prescient . . . Our job is to look at a merger and make a fact-based, evidence-

---

14 Yun, in his Statement before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, aptly explained: “The term ‘potential competitor’ has a longer history and is typically defined as a firm that is predicted to have a product that will compete at some point in the future, but not currently. ‘Nascent competitor,’ however, is a term that is relatively new in antitrust jurisprudence . . . [I]t is a term that typically refers to a current product or technology, whether inside or outside some relevant product market, that could, at some point, be considered a significant competitor.” Yun, supra note 6, at 2.


18 Id. at 18.
based, economic-based prediction about what will happen . . . We are not afraid of these cases. We will bring them.\textsuperscript{18}

In line with these statements, the FTC has pressed forward and continued to mount challenges against nascent competitor acquisitions and will likely continue doing so in the years ahead. Similarly, as discussed in more detail below, the Delaware District Court’s recent holding rejecting the DOJ’s challenge to Sabre Corporation’s proposed acquisition of a nascent competitor serves as another example of the high evidentiary hurdles the Agencies must clear in pursuing such challenges.\textsuperscript{19} However, there is no indication that the DOJ will be deterred by the setback.\textsuperscript{20}

**Finding a Middle Ground: The Future of Nascent Competitor Challenges**

To assess future competition more accurately when reviewing these acquisitions, the Agencies must look beyond the typical factors used to assess competitive impact (such as price) to less tangible predictive factors, including the likelihood of innovation after the merger and also in a but-for world. As we have noted, it can be difficult for the Agencies to foresee which acquisitions are aimed at stifling a potentially threatening competing product or technology and which are aimed at bolstering a promising idea in need of additional resources to reach its full potential. As Chairman Simons stated, “These types of transactions are particularly difficult for antitrust enforcers to deal with because the acquired firm is by definition not a full-fledged competitor, and the likely level of future competition with the acquiring firm is often not apparent.”\textsuperscript{21}

This is not to say, however, that the Agencies’ approach to nascent competitor acquisitions will remain stagnant. Although we do not expect the Agencies to seek a complete overhaul of the existing approach to enforcement under the Merger Guidelines, as has been suggested by some,\textsuperscript{22} there are a number of different approaches the Agencies can take to supplement their existing enforcement toolkit and more effectively mount these challenges. It is our view that they will make incremental changes in their approach to nascent competitor acquisitions, without a wholesale departure from the traditional anticompetitive indicia that guide the Agencies’ approach to merger reviews, such as the current presumptions, burdens of proof, and industry-neutral


\textsuperscript{20} Makan Delrahim, U.S. Dep’t of Justice, Statement from Assistant Attorney General Makan Delrahim on Sabre and Farelogix Decision to Abandon Merger (May 1, 2020), https://www.justice.gov/opa/pr/statement-assistant-attorney-general-makan-delrahim-sabre-and-farelogix-decision-abandon (remarking that the decision by the United Kingdom’s Competition and Markets Authority to block the deal “confirms our view that the merger was anticompetitive”).

\textsuperscript{21} Simons, supra note 2, at 5.

Guidelines, to enable them to more squarely address the unique competitive concerns these acquisitions raise.

For example, the Agencies may depart from their practice of limiting challenges implicating future competition issues to those transactions where they have powerful internal documentary evidence that is probative of anticompetitive impact. The Agencies surely will continue to bring challenges where there is strong internal documentary support for their position, as the parties are arguably the best suited to anticipate how their markets will evolve and their internal documents are viewed as uniquely persuasive to a court in evaluating the nascent competitor's future competitive significance to determine if the transaction is likely to have anticompetitive effects.23 However, in the face of mounting pressure to preserve competition, particularly in the technology industry, we expect to see the Agencies press ahead when they conclude competition will be harmed even if there is a significant litigation risk enhanced by limited documentary evidence from the parties. Doing so would enable the Agencies credibly to threaten litigation and thereby influence the conduct and incentives of major companies considering acquiring a nascent or potential competitor, signaling a warning that parties should proceed with caution if they are unable to articulate a strong procompetitive rationale for the proposed transaction.

Alternatively (or additionally), the Agencies may seek to push the boundaries of the current enforcement approach by straying from the Guidelines’ “focus on narrowly defined markets and ‘one acquisition at a time.’”24 Instead, they might begin to evaluate acquisitions of nascent competitors from an “expanded…lens” that focuses less on single acquisitions and instead on serial transactions and their longer-term effects on market concentration and entry barriers.25 The Agencies may deem this approach most useful in the technology sector where acquisitions are often rapid and numerous and where many transactions are not reportable under the HSR Act. The general idea is that this expanded lens gives the Agencies a long view of an acquirer’s business strategy and insights into how the acquirer expects that the market will evolve, thereby providing the Agencies with an additional tool for establishing whether a particular acquisition of a nascent competitor is being undertaken for anticompetitive reasons or is likely to have an anticompetitive outcome. In furtherance of this approach, we may begin to see a focus on merger retrospectives and an emphasis upon agency transparency into their actions in the tech sphere.26

Indeed, the FTC recently exercised its authority under Section 6(b) of the FTC Act and issued orders to five large technology companies (Alphabet Inc. (including Google), Amazon.com, Inc.,...
Apple Inc., Facebook, Inc., and Microsoft Corp.) requiring that they provide information and documents about prior acquisitions that were not required to be reported to the Agencies under the HSR Act. The orders seek information about the companies’ corporate acquisition strategies, voting and board appointment agreements, agreements to hire key personnel from other companies, post-employment covenants not to compete, and post-acquisition product development and pricing. The materials produced to the Agencies in response to the orders will enable the Agencies to have a full retrospective of these companies’ acquisition histories and to determine whether these companies are habitually acquiring nascent or potential competitors and, if so, the reasons for doing so. Armed with the information gleaned from this effort, the Agencies may feel emboldened to challenge acquisitions of nascent competitors, particularly if they believe technology companies and others are embarking on a long-term strategy to thwart rivals’ growth or entry.

One possible result may be an uptick in the number of monopolization cases the Agencies choose to bring. For example, where an acquirer has made a number of non-reportable acquisitions which, examined individually, do not raise competitive concerns under Section 7, the Agencies may choose to challenge the strategy as violating Section 2, which prohibits attempted monopolization and attempts to unlawfully maintain a monopoly, where a buyer may be implementing a strategy to eliminate competition through acquisitions of smaller or emerging rivals. Indeed, during a recent webinar, Ian Conner, Director of the FTC’s Bureau of Competition, confirmed the FTC’s view that Section 2 reaches exactly this type of conduct and stated that the FTC would not hesitate to bring a monopolization case to challenge serial acquisitions of potential competitors.

It may also become increasingly common for the Agencies to take an alternative or even broader approach to market definition, such as in the FTC’s challenge to Illumina’s proposed acquisition of Pacific Bioscience, where it broadened its product market definition to include adjacent markets where the nascent competitor predominantly operated. Market definition also took center stage in the DOJ’s Sabre/Farelogix challenge, where the DOJ framed the combination of dominant Global Distribution System (GDS) operator Sabre with Farelogix, an entity that developed a service enabling airlines to circumvent GDS and sell directly to travel agencies, as the horizontal acquisition of a competing booking service rather than a vertical acquisition of a complementary technology. The Delaware District Court invoked the Supreme Court’s 2018 Amex decision that “[o]nly other two-sided platforms can compete with a two-sided platform for transactions” in rejecting the DOJ’s contention that the two parties compete in the same relevant market, finding that

---


30 Plaintiff’s Pretrial Brief at 7–11, Sabre Corp., No. 1:19-cv-01548-LPS, at *1–2 (D. Del. Apr. 8, 2020); see also Defendants’ Pre-Trial Brief at 15–16, United States v. Sabre Corp., No. 1:19-cv-01548 (D. Del. Jan. 15, 2020) (arguing that “DOJ ignores how the industry actually works in order to concoct a ‘market’ consisting of one isolated service of Sabre’s GDS . . . that allegedly overlaps with a technical function of FLX OC”).

Sabre is a two-sided platform while Farelogix is not. This district court determination, if not vacated on appeal given that the parties terminated their merger agreement on May 1, could give the Agencies pause in bringing challenges against acquisitions of a non-two sided platform by an arguably two-sided, even where documentary evidence exists that the parties view themselves as competitors. In spite of this setback, we expect to see the Agencies continue to push the bounds of traditional market definitions as they seek to address the complexities of digital marketplaces.

In addition to adopting alternative or broader market definitions, the Agencies may give greater weight to innovation—or the potential that the combined entity will have muted incentives to invest in innovation than has traditionally been the norm—in their assessments of nascent competitor acquisitions. The DOJ recently put this tactic to the test in Sabre/Farelogix, where it alleged that the combination would harm competition by eliminating Farelogix as an independent “disruptive competitor” that had previously spurred Sabre to innovate. The district court ultimately rejected the DOJ’s argument that Sabre’s purchase of Farelogix will “reduce competition to innovate.” According to the court, the “DOJ offers nothing more in support of its contention than vague theories,” explaining that “no party offered evidence that Farelogix has more recently created or introduced innovative products or services” and that the evidence does not suggest that Sabre seeks to eliminate Farelogix’s technology. Notwithstanding this decision, we expect that the Agencies will continue to raise this theory of competitive harm, especially where evidence of incentive and intent to stifle innovation is robust and compelling.

It is unlikely, however, that the Agencies will adopt dramatic changes to the existing framework when evaluating nascent competitor acquisitions like those that have been endorsed by some in the antitrust community. These include instituting presumptions that apply to transactions by certain technology companies, imposing affirmative burdens on certain firms to justify their acquisitions, finding “proxies for innovation” that would instead be measured and used to evaluate a potential acquisition, or breaking up the large technology giants altogether. Although we expect the agencies to eschew these aggressive proposals, we believe the issuance of the FTC’s Section 6(b) orders, coupled with the Agencies’ focus on responding to public concern about acquisitions of smaller competitors by much larger ones, ensures that the Agencies will prioritize acquisitions by large players of emerging ones in the years ahead, especially where the acquirer has been particularly acquisitive.

32 Plaintiff’s Pre-trial Brief at 15, Sabre Corp., supra note 19; see also Complaint at 18–19, Sabre Corp., supra note 23.
33 Sabre Corp., 2020 WL 1855433, at *42.
34 See Raut, supra note 22.
35 Id. at 1–2 (Recognizing the challenges with quantifying harm in nascent competition analyses, Raut encouraged enforcers to “move beyond price and output analysis to find proxies for innovation,” including “the rate at which market shares change, or the frequency with which the market lead shifts,” the frequency of new developments or technical features, or even the number of patents filed (an approach tested in the European Union’s investigation of Dow-DuPont)).
36 Particularly noteworthy were Senator Elizabeth Warren’s public calls to break up the tech giants altogether. See Elizabeth Warren, Here’s How We Can Break Up Big Tech, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9aad9e0da324.
37 We may soon learn more about how the Agencies evaluate competitive concerns related to digital platforms and large technology players. Press reports in May stated that the DOJ and some state attorneys general might bring suit against Google as soon as this summer. Although the suit likely would not be a challenge to a nascent competitor acquisition (the states have largely focused on Google’s conduct in the online advertising business, while the DOJ has focused on Google’s conduct in the search business), it might offer insights into how the Agencies view efforts by Google and similarly situated firms to further grow and develop their offerings. See Brent Kendall & John D. McKinnon, Justice Department, State Attorneys General Likely to Bring Antitrust Lawsuits Against Google, WALL ST. J. (May 15, 2020).
Conclusion
Dominant firms’ acquisitions of nascent competitors have increasingly drawn scrutiny, and all indications are that the Agencies will continue to examine these acquisitions closely despite the considerable challenges involved. Indeed, as the Agencies are facing rising public pressure to thwart potentially anticompetitive nascent competitor acquisitions, especially in the digital sector where large firms enjoy significant incumbent advantages, we expect to see them apply subtle shifts in approach to better address these inherent challenges. As such, it is unlikely the Agencies will depart significantly from the existing enforcement framework. Instead of drastic measures or bright line rules, we expect that the agencies will implement incremental changes within the existing enforcement framework—such as adopting alternative market definitions, closely considering the parties’ incentives or potential to innovate after the merger and in a but-for world, and investing substantial resources in consummated merger retrospectives.

For those advocating a major overhaul of the antitrust laws, this may seem like too little. But the Agencies can have a significant impact even with modest shifts in approach. The Agencies can use subtle changes not only to seek to stop anticompetitive transactions but also to send a forceful message to the business community. The Agencies’ impact will thus extend beyond merging parties or particular transactions to industry as a whole, leading companies to consider even more carefully the likelihood of agency scrutiny (and associated costs) when seeking to acquire a nascent competitor, the importance of fostering innovation and development of acquired products and technologies long after the preliminary acquisition review hurdles have been cleared, and the risks involved with serial acquisitions.
Government Contractors Beware: Implications of the DOJ’s New Procurement Collusion Strike Force

Vic Domen, Gerald Stein, and Amanda Wait

The Antitrust Division of the U.S. Department of Justice enforces U.S. antitrust laws to protect consumers. This includes some of the nation’s largest consumers—federal, state, and local government agencies and instrumentalities. The Antitrust Division recently signaled a renewed interest in prioritizing the enforcement of antitrust violations in public contract procurement by launching the Procurement Collusion Strike Force in November 2019.¹ This initiative likely means an increase in the number and scope of procurement fraud audits, investigations, and prosecutions for current and aspiring government contractors.

The Strike Force is particularly relevant and timely in light of procurement activities of federal, state, and local governments responding to the COVID-19 pandemic.² On March 9, 2020, for example, Attorney General William Barr announced the DOJ’s intention “to hold accountable anyone who violates the antitrust laws of the United States in connection with the manufacturing, distribution, or sale of public health products such as face masks, respirators, and diagnostics.”³

The Procurement Collusion Strike Force

Historically, the public procurement space has been uniquely vulnerable to collusion for several reasons. To begin with, it can be a lucrative target for anticompetitive conduct.⁴ In 2018, the federal government spent over $550 billion on contracts for goods and services. Of this $550 billion, state and local governments received over $79 billion in grants to fund major public infrastructure projects. Public procurement is particularly vulnerable because regulatory requirements or processes governing public procurement can be repetitive and predictable, making them more readily subject to manipulation through collusion than other types of procurement. And because government agencies often require highly specialized goods and services, the pool of qualified firms that repeatedly bid for the contracts may be limited. This small market facilitates the ability of qualified bidders to collude, particularly during emergency procurement, such as disaster relief projects. Lastly, the enormous volume of goods and services that the government buys makes monitoring contracts and orders difficult.⁵

⁵ Id.
To combat this problem, in November 2019, the Antitrust Division launched the Procurement Collusion Strike Force (PCSF), an interagency partnership with a broad mandate to deter, detect, and aggressively prosecute companies and individuals violating antitrust laws to the detriment of government procurement programs at federal, state, and local levels. In announcing the new PCSF, Assistant Attorney General Makan Delrahim explained:

When competitors in any given industry collude and conspire to rig bids, fix prices, or allocate markets—that is, commit criminal antitrust violations—they distort the free market and harm customers with high prices and lower quality goods and services. This is no less true in the area of public procurement, where the customer is the government and the American taxpayer foots the bill for artificially high prices.

The PCSF aims to accomplish this mandate through a three-pronged approach: first, by increasing the probability of detection; second, by imposing severe sanctions on bad actors; and third, by incentivizing compliance.

**Increasing the Probability of Early Detection of Potential Procurement Collusion.** The PCSF seeks to increase the probability of detection through the pooling of government resources, targeted outreach and education, and facilitation of whistleblowing. The announcement of the PCSF makes clear that one of the goals is to promote interagency information sharing to execute joint investigations and prosecutions under various federal laws. The PCSF includes representatives from the following agencies: the Antitrust Division, the FBI (including special agents assigned to 13 districts within the District of Columbia and eleven states), the DOJ’s Office of the Inspector General, the U.S. Department of Defense, the General Services Administration, and the U.S. Postal Service.

A unique feature of the PCSF is that it uses a “district-based” organization structure to streamline cooperation among the Antitrust Division, 13 U.S. Attorneys’ Offices, the FBI, and Inspector General Offices. The Antitrust Division has designated Trial Attorneys to serve as PCSF Liaisons for each of the 13 partner U.S. Attorneys’ Offices. Each U.S. Attorney has designated an Assistant U.S. Attorney to serve as a PCSF Liaison for that district. Finally, the FBI designated Special Agents from the field offices in each of the 13 districts to serve as PCSF Liaisons. Together, these teams will lead the outreach training in their districts. The PCSF has not released specifics about how this outreach will occur, but we would expect a large part of it would involve coordinated trainings by the participating groups.

The PCSF will conduct targeted outreach training and education programs to key constituencies on both the “sell” and “buy” sides of the public procurement field. On the “sell side,” the PCSF will contact government contractors, trade associations, and public contract lawyers to educate them about criminal antitrust laws to raise awareness of potential penalties for criminal and civil antitrust violations. On the “buy side,” the PCSF will educate federal, state, and local government officials on how to recognize and report potential antitrust violations.

---

6 Delrahim, supra note 1.
7 Id.
9 Id.
procurement officials on identifying potential indicators (or “red flags”) of collusion and assist with structuring the acquisition process to remove vulnerabilities.\textsuperscript{10}

With the acronym “MAPS,” the Antitrust Division has outlined four “red flags” of collusion it considers important to its review of procurement matters:

- **M**: Is the Market for the award dominated by a few participants or small group of competitors?
- **A**: Do the Applications or bids share similarities, such as the same typographical errors?
- **P**: Have Patterns developed among competitors for submitting bids, such as repeated rotation of similar awards across multiple vendors or the same group of competitors hired as subcontractors?
- **S**: Is there other Suspicious behavior evidencing some other form of collusion, such as competitors submitting proposals who lack the ability to provide the requested goods or services?\textsuperscript{11}

Further, the PCSF has invested in an improved data analytics program to better identify and analyze irregularities and “red flags” of anticompetitive conduct in government procurement data. The PCSF announced plans to coordinate an interagency roundtable in early 2020 to bring together data scientists from across the law enforcement and Inspectors General communities. Additionally, the PCSF has begun analyzing significant volumes of contracting data housed in government agencies to efficiently uncover signs of possible anticompetitive collusion for further investigation.\textsuperscript{12}

Lastly, the PCSF has increased the prospect of whistleblowers emerging from government contractors, competitors, and other third parties. In addition to both the DOJ’s general online complaint form\textsuperscript{13} and the Antitrust Division’s general Citizen Complaint Center,\textsuperscript{14} the PCSF maintains a dedicated webpage that offers training materials to the public and hosts a “citizen complaint” page that the public can use to report suspected antitrust violations with government procurement.\textsuperscript{15} The PCSF also created a Tip Center to receive and review complaints, concerns, or tips concerning potential antitrust crimes. A company or individual can submit a concern to the Tip Center via email or regular mail. The submission should identify the party or parties involved; describe the conduct suspected of violating the law, including the products and/or services that are the subject of the government contract, grant, or program; explain the suspected illegal conduct involved (e.g., bid rigging, price fixing, or market allocation); and detail when or where the illegal conduct allegedly occurred.\textsuperscript{16}

**Seeking Sanctions for Anticompetitive Conduct.** The second method for accomplishing its mandate is that the PCSF will seek severe sanctions on actors engaged in anticompetitive behavior. Beyond criminal penalties imposed for anticompetitive behavior, the DOJ has also sought civil

\textsuperscript{10} The DOJ has a history of working with state enforcers to educate state procurement officials but appears to be expanding its previous efforts. See, e.g., Christine A. Varney, Remarks as Prepared for the National Association of Attorneys General (Oct. 7, 2009), https://www.justice.gov/atr/speech/antitrust-federalism-enhancing-federalstate-cooperation.


\textsuperscript{12} Powers, supra note 4.

\textsuperscript{13} U.S. Dep’t of Justice, Your Message to the Department of Justice, https://www.justice.gov/doj/webform/your-message-department-justice.


\textsuperscript{16} Id.
penalties for FCA violations and will likely continue to leverage additional federal statutes to compound liability, such as Section 4A of the Clayton Act, which allows the government to recover treble damages when it is the victim of an antitrust violation. If the courts ultimately impose liability under these other statutes in addition to antitrust liability, it could compound immensely any financial penalties imposed.

**Creating Incentives for Compliance.** The third method that the PCSF is employing to fulfill its mandate is the creation of two primary incentives for compliance with antitrust laws: (1) the Antitrust Division’s Corporate Leniency Policy and Leniency Policy for Individuals (collectively, Leniency Program), and (2) a corporate compliance consideration policy. Through the Antitrust Division’s Leniency Program, an individual or company that discovers an antitrust violation and is the first to self-report (or “wins the leniency race”), cooperates with the Antitrust Division’s investigation, and meets other requirements, may avoid a criminal conviction, a criminal fine, and prosecution of a company’s directors, officers, and employees. For companies or individuals that “lose the leniency race,” the PCSF will investigate and likely prosecute remaining members of the conspiracy. This may present a harsh reality to many: win the leniency race or face potential criminal convictions with lengthy prison terms, severe monetary penalties, the risk of debarment, and full liability exposure in private litigation.

The second incentive—announced just in the past year—is that the Antitrust Division will consider and credit corporate compliance programs at the charging stage in criminal antitrust investigations. On July 11, 2019, AAG Delrahim announced that the Antitrust Division adopted a new policy to reward companies that invest in and instill a “culture of compliance.” Along with the policy changes, the Antitrust Division also published a guide for prosecutors evaluating a company’s compliance program. Thus, an effective antitrust compliance program may be the last line of defense against severe penalties and collateral consequences that an investigation and prosecution may cause.

**Past Procurement Initiatives**
The Antitrust Division’s recent decision to devote significant investigative resources to the public procurement space is neither new nor unique. The Division has a long history of prosecuting criminal antitrust conspiracies that target government contracts, ranging from construction projects to food and hardware supply. In the 1970s and 1980s, the Division prosecuted hundreds of corporations and individuals for bid-rigging road construction projects across multiple states. In the

---


20 See Powers, supra note 4. The Antitrust Criminal Penalties Enhancement and Reform Act (ACPERA) provides that a leniency applicant can face liability only for single damages (not the treble damages otherwise provided for in antitrust litigation) and does not face joint and several liability with other defendants in private litigation.


early 1990s, the Division investigated and prosecuted multiple companies and individuals involved in a decade-long conspiracy to rig bids for frozen seafood contracts.

Consider one important example of successful antitrust enforcement—the Antitrust Division’s criminal cases against milk and dairy products suppliers. The Division uncovered evidence that dairy companies had been conspiring since at least the early 1980s to rig bids to supply milk and other dairy products to public school districts and other public institutions in several states. The Florida Attorney General’s Office first noticed suspicious bid patterns by milk suppliers and brought this information to the attention of the Antitrust Division’s Atlanta field office in 1986. The Division began a grand jury investigation, which uncovered a state-wide conspiracy to rig bids to public school districts in Florida and evidence of similar conspiracies in other states. The Division filed 134 milk bid-rigging cases involving 81 corporations and 84 individuals. Corporations and individuals received criminal fines totaling more than $69.8 million, and 29 individuals were sentenced to jail. Civil damage settlements between the Division and defendants exceeded $8 million. 23

In the mid-2000s, the Division and its investigative partners prosecuted multiple individuals in several states for schemes to rig bids with the E-Rates program, which was designed to provide disadvantaged schools and libraries with internet access and telecommunications services. One of the primary defendants was convicted at trial, sentenced to over seven years in prison, and debarred for ten years. Most recently, in November 2018 and March 2019, the Division obtained guilty pleas from five South Korean oil companies for a decade-long bid-rigging conspiracy targeting contracts to supply fuel to U.S. military bases in South Korea. The companies agreed to pay $156 million in criminal fines and over $205 million in separate civil settlements. 24

Moreover, the strategy of utilizing strike forces (sometimes also called “task forces”) is not new for the DOJ. The PCSF is modeled from prior initiatives 25 that resulted in increased investigations and prosecutions in certain markets or industries the government believed were high risk for or had high instances of corruption. The PCSF was created to continue the DOJ’s trajectory of successful prior strike force deployments.

In March 2007, the DOJ launched the initial Health Care Fraud Strike Force (HCF Strike Force), a joint investigative and prosecutorial effort against Medicare fraud and abuse in South Florida. 26 Using advanced data analytics to target suspicious billing patterns in cities with high levels of billing fraud, the HCF Strike Force charged over 4,200 defendants involved in approximately $19 billion in Medicare program billings. As of December 2018, based on the Strike Force’s success and increased federal funding, the DOJ has expanded the HCF to ten additional geographic

24 See Powers, supra note 4.
25 Some of these past initiatives include the Corporate Fraud Task Force, established in response to revelations about Enron and other major corporations, see U.S. Dep’t of Justice, President’s Corporate Fraud Task Force, https://www.justice.gov/archive/dag/cftf/; the Hurricane Katrina Task Force, established to combat fraud relating to Hurricane Katrina and its aftermath, see U.S. Dep’t of Justice, President’s Corporate Fraud Task Force, https://www.justice.gov/sites/default/files/criminal-disasters/legacy/2012/07/30/katrinareportfeb2006.pdf; and a Campaign Finance Task Force, established to investigate allegations of wrongdoing in the 1996 election cycle, see GOV’T ACCOUNTABILITY OFFICE, CAMPAIGN FINANCE TASK FORCE: PROBLEMS AND DISAGREEMENTS INITIALLY HAMPERED JUSTICE’S INVESTIGATION 1 (May 2000), https://www.gao.gov/assets/80/79297.pdf.
areas. 27 In October 2006, the DOJ Criminal Division formed a similar National Procurement Fraud Task Force (NPF Task Force), 28 targeting U.S. military procurement fraud tied to conflicts in Iraq and Afghanistan. The fraud included defective pricing, product substitution, misuse of sensitive information, false claims, accounting fraud, conflicts of interest, and other ethical breaches. By 2009, the NPF Task Force prosecuted and convicted over 35 criminals. Similarly, the Central District of California established a Procurement Fraud Task Force in 1991, focusing on alleged fraud in the defense industry. More recent DOJ initiatives have focused on elder fraud, organized crime, and human trafficking. 29

Since 2015, the DOJ has also increased its efforts to work cooperatively with state enforcers to educate state procurement officials about the warning signs of collaborative efforts by competitors in state contracting—which often include federal funds. This effort has included federal and state officials conducting joint trainings to educate state procurement officials and the sharing of enforcement experiences.

The collaboration among state and federal enforcers who share these initiatives led to the mobilization of government enforcement resources from various agencies to address a high priority issue.

Practical Guidance: The Takeaways

In light of this increased scrutiny and potential for severe consequences, companies contracting with federal, state, or local agencies should reexamine their internal compliance policies, business practices, and contract selection processes to ensure that policies are current and to consider these risks. Now is the time to look back at past and current behavior, to reexamine or create an antitrust compliance program, and to reaffirm to employees that the company expects strict compliance with these policies. Companies involved with government procurement should focus their attention on issues most related to the PCSF.

Effective compliance programs may help prevent any misconduct at the outset, thereby avoiding the costs of defending against or cooperating with a DOJ or state investigation and the enormous potential reputational costs of such a public investigation. Falling short of prevention, identifying the misconduct early will allow a company that discovers evidence of a possible violation to stop such conduct and possibly be the first to self-report to gain the benefit of the DOJ’s Leniency Program and its associated benefits. 30 Lastly, if a company loses the leniency race yet demonstrates that it has an effective compliance program and culture, the company may still avoid criminal conviction if, after the company becomes aware of an antitrust violation, it promptly self-reports and begins cooperating. 31 Such an approach has the potential to resolve the matter by a deferred prosecution agreement, rather than by guilty plea, and this can make an enormous difference when it comes to government contracting and the risk of debarment.

Although there are no formulaic requirements, an effective compliance program should be well-

---

27 These include Los Angeles, CA; Detroit, MI; Houston, TX; Brooklyn, NY; Southern Louisiana; Tampa, FL; Chicago, IL; Newark, NJ; Philadelphia, PA; and Dallas, TX. See id.


30 See Corporate Leniency Policy, supra note 18; Leniency Policy for Individuals, supra note 19.

designed, tailored to a company’s particular line of business, monitored, and updated regularly. A company should consider numerous factors when creating an effective compliance program:

1. **Address the MAPS factors.** When current and aspiring government contractors consider creating a truly effective antitrust compliance program and culture, we suggest focusing on the MAPS factors emphasized by the DOJ. Companies should be particularly cognizant of whether their industry is characterized by high market concentration, since the DOJ will be particularly attuned to parallel patterns of behavior.

2. **Create a team to oversee and manage the antitrust compliance program with a focus on government procurement.** As always, those responsible for the compliance program must have sufficient autonomy, authority, and seniority within the company’s governance structure, as well as sufficient resources for training, monitoring, auditing, and periodic evaluation of the program. They should also be knowledgeable in how the company competes in its industry and understand competitive trends. They should look out for patterns where successful bids are rotated among a select group of competitors. And they should be particularly aware of how government procurement works and thus the areas with the greatest risk of procurement fraud or manipulation.

3. **Tailor the compliance program to the company’s business,** consistent with industry best practices, and to detect particular types of misconduct most likely to occur within the company’s line(s) of business. An effective compliance program must be appropriately tailored to a company’s particular antitrust risks, including in the area of its government contracting.

4. **Collect, analyze, and leverage data/metrics** to inform trainings and to make appropriate modifications to the compliance program or internal controls. One new focus of the DOJ has been companies’ use (or failure to use) data/metrics to detect antitrust violations. On September 12, 2019, the DOJ announced that federal prosecutors will assess whether compliance officers make adequate use of data analytics in reviews of their companies’ compliance.

5. **Periodically review the company’s risk assessment and update policies or practices according to market, legal, or technical developments.** With respect to government procurement, a compliance team should track bid wins and losses so that any patterns regarding successes and losses can be detected.

6. **Use best practices to address and prevent any conduct that may be deemed anticompetitive.** For example, a common area of risk for collusion in government procurement is in the submission of joint bids. When jointly bidding on contracts, evaluate the bid information and changes in pricing to detect possible bid rigging or price fixing. It is crucial that you track various factors that can be used to demonstrate that the joint bid did not result from improp-

---

32 The Antitrust Division will consider nine elements in evaluating a compliance program’s effectiveness: (1) the program’s scope; (2) the program’s culture within the company; (3) the leadership and resources committed to antitrust compliance; (4) the procedures to assess risk; (5) employee training and communications; (6) monitoring and auditing techniques; (7) internal reporting mechanisms; (8) incentives and disincentives; and (9) remediation methods. Corporate Compliance Evaluation, supra note 22, at 3–4; see also U.S. Dep’t of Justice, Criminal Div., Evaluation of Corporate Compliance Programs (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download; INT’L CHAMBER OF COMMERCE, THE ICC ANTITRUST COMPLIANCE TOOLKIT 2 (2013), https://iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf.

33 Corporate Compliance Evaluation, supra note 22, at 6.

34 Id. at 7.

er collusion. Examples of best practices to address and prevent anticompetitive conduct in submitting joint bids may include the following:

- Document the factors that establish each company’s respective expertise that necessitates a joint bid for any contract to be completed, and document the plan to combine resources to complete the project. The documentation can include allocating different portions of the work to be performed separately where one party alone lacks the expertise to perform all the work itself. Demonstrating that each company provides complementary services will be viewed as a procompetitive justification for submitting a joint bid, thereby reducing the risk of an investigation or challenge.

- Ensure that each company does not discuss or coordinate its bid with any other competitors. Each company forming part of the joint bid should separately calculate and determine the cost for its respective work on the proposed project, which can then be combined as a total bid.

- Protect competitively sensitive information. Sharing sensitive information with competitors may expose companies to antitrust liability. The government recognizes that sharing information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations. However, the competitive concern depends on the nature of the information exchanged, and understanding the boundaries is crucial. If there is any doubt, engage external counsel to assess the information exchanged. Even the mere appearance of collusion can lead to losing the bid and a costly investigation.

- Confirm whether the state of the project requires certification of non-collusion when submitting the bid.

**Conclusion**

Government contractors beware! The Antitrust Division has made it clear that it will aggressively enforce any antitrust violations in the public procurement space. The consequences of even giving an appearance of anticompetitive conduct can be costly, particularly when considering both the actual costs of defending or aiding in an investigation and the reputational damage such an investigation may have, including the loss of future contracts. Establishing an effective antitrust compliance program can safeguard a company and prevent severe civil or criminal consequences.
Book Review
Including Africa in the Global Competition Law System

Eleanor M. Fox and Mor Bakhoum
Making Markets Work for Africa
Oxford University Press 2019
Reviewed by David J. Gerber

Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa describes and assesses African competition laws and competition law experience and relates that experience to the broader competition law world. In doing so, it goes a long way toward filling a major void in the literature on competition law in the world. Africa has played a limited role in discussions of transnational competition law. South Africa has received more attention, but analysis of its decisions and development remains limited. This inattention to competition law in the past is understandable. There have been few competition law cases outside of South Africa, and representatives from African countries are not prominent at international competition law meetings and conferences. Finally, African countries produce few studies of cross-border competition law. As a result, it is difficult to learn what is happening in the region, and it is rare to find searching analysis of the factors influencing decisions there.

Now, however, the lack of information and insight relating to competition law experience in Africa threatens to hinder business and international investment there. Africa has become an important player in international commerce. Moreover, the operation of markets has become an important issue in many African countries, and the value of competition law is more widely recognized.

Making Markets Work for Africa is, therefore, of enormous value. It fills many of these holes, supplying abundant information and careful reflections and analysis. The book is valuable for those interested in global competition law and in the legal and economic situation in Africa. Competition law can be an important tool for economic, social, and even political development anywhere. Yet it has remained largely unused in much of the world. Its potential benefits have not been widely available in Africa. Why have competition law’s benefits been so confined there and how can we expand its use without creating greater harms from its abuse?

It would be difficult to imagine two authors who could bring greater expertise to this subject. Eleanor Fox has been at the forefront of scholarship on the transnational aspects of competition law for decades. She has written extensively and insightfully not only on U.S. antitrust, but also on

---

1 Eleanor M. Fox & Mor Bakhoum, Making Markets Work for Africa (2019).
2 There are a few exceptions. See, e.g., Competition Policy and Regional Integration in Developing Countries (Josef Drexl et al., eds. 2012) (collecting six articles on African competition 2012).
3 See, e.g., Competition Law and Economic Regulation in Southern Africa (Jonathan Klaaren & Simon Roberts, eds. 2017); David Lewis, Enforcing Competition Law in South Africa: Thieves at the Dinner Table (2013); Precious N. Nolovu, Competition Law in South Africa (2018).
4 For an overview and discussion, see David J. Gerber, Global Competition: Law, Markets and Globalization (2010).
the competition law of Europe, Latin America, and other regions. Moreover, she has long had a deep interest in Africa and African development. Her co-author, Mor Bakhoum, is a native of Senegal, West Africa. From his position as a research scholar and professor at the Max Planck Institute in Munich, Germany, he taught and analyzed issues of competition law and intellectual property law on the transnational level. He was commissioned by the West African Economic and Monetary Union (WAEMU) to conduct a major study of the institutional structure of regional integration there. He has recently returned to teach in his home country.

In this brief review, I outline the book’s descriptive material, summarize its analysis, and identify its major conclusions. I also offer some comments that locate it in the literature and suggest potential directions for future work in the area.

Contents
The book usefully describes individual African competition law regimes and regional integration institutions and developments. It also describes the actions of regimes that have tried to implement their laws.

National Competition Law Regimes. The first section categorizes regimes according to geographical region. This structure facilitates generalizations and comparisons that can help readers to find and assess material from the covered countries. The regimes in each region share at least some characteristics that reflect economic, climatic and geographic features that predominate in the area, as well as similarities in their colonial experiences. For each region, the book provides general background about these shared characteristics.

It then includes for each regime relevant practical material, including references to statutes, institutions, and other factors that may influence decisions there. Where the competition authority has been active, it includes significant decisions and evaluates the authority’s enforcement and compliance efforts, taking account of the obstacles the authority faces.

The three categories are West Africa, East and South Africa, and the Republic of South Africa. For West Africa, the authors note the differences among the more stable and competition-friendly countries (above all, Senegal) and those that tend to be unstable and to show little evidence of competition or its development and protection (e.g., Guinea-Bissau). They note that countries in the region have often used price controls, and some still do. The focus is on Senegal, which had begun to take competition law seriously prior to the creation of WAEMU but has been stymied in its efforts to develop its own competition law. This effort at regional integration preempted national authorities from applying their competition laws, and this has hampered competition law development in the area. I discuss this project below. WAEMU is now considering eliminating its preemption of enforcement by national authorities.

Eastern and Southern Africa also present a varied picture in which some countries (notably, Kenya and Zambia) have developed their competition laws and enforcement policies in significant ways. Other countries in the region, such as Tanzania, have also shown serious interest in competition law development, although the prognosis for their efforts remains guarded.

South Africa inhabits a category of its own. Building on the well-developed bureaucratic system and the relatively high levels of education that were already in place before independence, the competition law institutions tend to be solid, well-staffed, and generally well-respected. As the authors put it, the South African regime has developed “one of the most outstanding even path-breaking [competition laws] in the developing world.”

5 Fox & Bakhoum, supra note 1, at 89.
to the obstacles to development in Africa. They have, for example, sought to be more inclusive of the varying interests in society. In South Africa, these efforts include providing protections for minority-owned businesses. It also been fortunate to have internationally prominent and articulate high officials, including David Lewis, long-time chair of the Competition Tribunal and a highly respected voice for developing country competition law concerns in international discussions. Accordingly, the authors cover this regime more extensively than others, including discussion of significant cases and commentary on the dynamics of the regime.

**Regional Integration.** Regional integration is often seen as central to prospects for competition law development in Africa. Accordingly, the authors carefully examine these integration efforts. Many believe that integration is necessary to enable small and resource-challenged competition law regimes of Africa to combat the power and resources of foreign firms. Foreign firms have often stymied the efforts of national competition authorities in the region to limit the firms’ influence. To mention one example, foreign firms often located distributorships and even manufactured in South Africa. They then distributed their products through distributors in neighboring countries. For years, these agreements included provisions that impeded development, such as requirements that national distributors relinquish any right to use information they gained in performance of the contract, and instead transfer their information to the South African firm. When destination countries complained, the foreign firms were in a position to threaten to supply consumers from another country. Only when the affected countries agreed to combine forces in resisting such agreements were they able to eliminate some of these provisions.\(^6\)

Integration can enhance competition law development but it has proven to be more difficult than some imagine. This was best shown perhaps in West Africa where, as noted above, the regional cooperation agreement creating WAEMU included a provision that precluded member state competition authorities from enforcing their competition laws. This took away incentives for competition law development, stifling efforts in countries such as Senegal that had begun serious competition law enforcement. The result has been an almost complete lack of enforcement anywhere.\(^7\)

COMESA (Common Market for East and South Africa) is a newer regional grouping to which the book dedicates more extensive treatment. Structured along the lines of the European integration institutions, it seems poised to become a significant competition law player. First, several of its members, especially Kenya and Zambia, have significant experience in developing and enforcing their national competition laws. And second, the initial and current head of the competition law project is George Lipimile. As head of the competition authority in Zambia, Lipimile applied his competition law successfully. He also has broad knowledge of competition law in other countries as well as international contacts that derive in part from several years in the competition office of UNCTAD in Geneva. Above all, he is by all accounts committed to the development of competition law in Africa. As the book points out, the organization faces extensive coordination hurdles among the members, but it also shows significant potential for development that can be valuable in other regional contexts.

**Overview and Recommendations.** The authors then step back to assess the material they have presented and make recommendations for improving competition law in Africa. Here they

---


\(^7\) For discussion, see Mor Bakhoum, *Delimitation and Exercise of Competence Between West African Economic and Monetary Union (WAEMU), and Its Member States in Competition Policy*, 29 World Competition 653 (2006).
look more broadly at the competition law situation in Africa and relate it to other competition law regimes. In this part, which they call “roadmaps,” they pose two key questions for African countries: “What is needed by the nations, what is needed for the world?”

One component of the roadmap is essentially comparative. It looks at African experience through the lenses of four “clusters” of regimes, using a typology based on stages of competition law development. The first three clusters include African regimes: least developed, somewhat more developed, and developing well. (South Africa is a category of its own.) The fourth cluster includes the more fully developed competition law regimes, especially the United States and Europe.

For each of the African clusters the authors assess the current situation and provide suggestions for further development. They ask three main questions: (1) “What market restraints and uses harm the nation and its peoples the most?” (2) “What are the available pathways for addressing these restraints?”; and (3) “What are the most significant limitations that might prevent the competition authority from successfully challenging the restraints and how do these practical limits influence the scope, perspective, and ambition of the developing country’s competition law?”

Surveys of decision makers and analysts from the countries involved might answer these questions, but useful surveys would be impractical in some African countries. Moreover, there is limited available literature from the countries themselves that might provide useful answers to the questions. Instead, the authors answer these questions on the basis of their own knowledge of competition law experience there. At this stage of African competition law development, these are the most valuable answers we can hope to get, and they are very valuable indeed—filled with insights into the issues and enriched by knowledge of competition law experience elsewhere.

The book then relates its description and analysis of national regimes to international developments. It argues that “synergistic alignment” with other countries could be of much value for African regimes. The authors envision an alignment in which African countries would not necessarily copy Western models but instead learn from them and choose which measures to adopt. The authors emphasize that Africa confronts developmental obstacles that call for a competition law response that differs from the competition law approaches in more economically developed parts of the world. They point to transnational efforts to reduce differences among competition laws and see “synergistic alignment” as the appropriate basis for such alignment. They also identify, however, some of the basic issues in achieving such alignment.

In a final chapter titled “Better laws for Africa: Pro-development, Pro-inclusion, Pro-outsider,” the authors provide their recommendations for the development of African competition law. They argue that competition law in Africa should be adapted to African circumstances and specify the types of policies that they consider appropriate for those circumstances. Basically, as the heading indicates, the laws should be more development oriented, more inclusive, and more aimed at reducing inequality. For example, they emphasize the need for African countries to target not only private restraints on competition, but also action by the state itself. They call for exemptions that support the development of small- and medium-sized businesses without enabling powerful firms to prevent the development that the exemptions are intended to provide. Another example: they note the potential value of private competition litigation and suggest procedural rules supporting class actions by consumers.

---

8 Fox & Bakhoun, supra note 1, at 159–78.
9 Id. at 160.
10 Id. at 176–78.
Further Down The Road

The breadth of coverage of this book as well as its assessments and insights can be of great value for practitioners, administrators, and scholars. For those with a practical interest in the competition law situation in Africa today, it provides information about relevant statutes and cases (where available). It also provides insights into how the competition law regimes actually work, and the dynamics of decision making. Those whose interests include policy or academic analysis will also find value in insights and analysis from a perspective that combines decades of experience in competition law in many contexts with deep commitment to responding to the obstacles that African countries face.

Yet the book is more. It is a pioneering work that provides a foundation for further research. It is the first comprehensive attempt to make sense of the African competition law experience. As such, it raises issues and questions for future writers. I note here a few of those areas and issues for which the book can serve as an important foundation:

First, competition law experience will develop soon in at least some African jurisdictions, and as those competition laws are interpreted and applied by African institutions, scholars will be able to use the descriptive elements of the book to structure and assimilate the new material. For example, the categories used to describe and assess current experience are likely to be further refined, allowing the authors to refine the insights and assessments the book provides.

Second, based on this work, a clearer picture of the relevant developmental models and pathways is likely to emerge. Making Markets Work for Africa is not always clear about the development model the authors are using for their assessments. It may be too early in African development to do that now, but further contours will emerge from further experience with developmental goals.

Third, these experiences and insights can lead to more nuanced views of which compliance methods work best under which circumstances. The authors put in the foreground the importance of enforcement as a source of compliance. Undoubtedly, enforcement is important, but other forms of achieving compliance may be equally or more effective in some circumstances. As the authors note, there are often major obstacles to enforcement, and experience may reveal which compliance-inducement methods tend to work best under which circumstances. For example, teaching has been an important focus in some other competition law contexts, including Europe. Persuasion and negotiation have also been effective. Consensus-building may turn out to be a particularly useful compliance tool in the African context.

Finally, Fox and Bakhoum’s descriptions and analyses of African developments will provide the basis for comparisons with other competition law experiences, not only with the United States and Europe, but also with the many other countries that have faced similar issues. These enriched comparisons are likely to be valuable for all who deal with competition law issues. They will also provide the material necessary for social science analysis.

The authors provide scope, depth, and insights related to competition law in Africa. It will be valuable far into the future, not only for those viewing African competition law from the outside, but also as a mirror for African decision makers themselves.

---

11 For discussion of comparative issues in competition law, see David J. Gerber, Comparative Competition Law, in OXFORD HANDBOOK OF COMPETITION LAW 1168 (Mathias Reimann & Reinhard Zimmermann, eds., 2d ed. 2019).