

Antitrust in the Technology Sector: Policy Perspective and Insights From the Enforcers

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Skadden's Antitrust and Competition Group and the economics firm Charles River Associates recently co-hosted the ninth annual "Antitrust in the Technology Sector: Policy Perspectives and Insights From the Enforcers" seminar in Palo Alto, California. The event, held on January 29, 2019, provided attendees with the opportunity to hear directly from a highly placed European enforcement official, leading practitioners and economists, and academic scholars about global antitrust developments impacting the technology sector. Cecilio Madero Villarejo, deputy director-general for antitrust at the European Commission, delivered a keynote address to open the conference. Mr. Madero's remarks were followed by discussion panels on antitrust developments impacting tech companies.

Seminar panelists included:

- Philip Marsden, senior adviser at Charles River Associates, professor of law and economics at the College of Europe, deputy chair of the Bank of England's Enforcement Decision Making Committee and a member of HM Treasury's Digital Competition Expert Panel;
- Carl Shapiro, senior consultant to Charles River Associates and Transamerica Professor of Business Strategy at the University of California, Berkeley Haas School of Business;
- D. Daniel Sokol, professor at the University of Florida Levin College of Law; and
- Hal Varian, chief economist at Google.

Skadden partners Bill Batchelor, Boris Bershteyn, Maria Raptis, Tara Reinhart, Steve Sunshine and Ingrid Vandenborre also served as panelists.¹

Keynote Remarks: Cecilio Madero Villarejo

Mr. Madero began the conference by highlighting trends in European Commission (EC) antitrust enforcement, including how European Union competition rules and theories have adjusted to capture changing realities and new phenomena brought about by our rapidly changing digital economy.

¹ Two Department of Justice speakers scheduled to speak at the program — Deputy Assistant Attorney General Barry Nigro and San Francisco Office Acting Chief Manish Kumar — were unable to participate due to the federal government shutdown.

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Key Takeaways

To shape competition policy in the era of digitization, Mr. Madero noted that the EC is focused on three core concepts: (i) data privacy and artificial intelligence; (ii) digital platforms' market power and (iii) preserving newcomers' entry and digital innovation through competition policy. These three areas of law and economic analysis, along with the need to provide European consumers with the ability to exercise "genuine and informed choice," comprise the DNA of the EC's competition policy so regulators can intervene in the markets early to enforce when appropriate fair competition in the age of "big data." To further its mission of protecting consumers against distortions of competition and promoting a well-functioning market where "companies compete on the merits," the EC has taken a proactive approach in asking dominant market players like Google, Qualcomm and others to comply with EU competition rules. Large digital players that abuse their dominant position in the market may be faced with significant fines, strong remedies and, last but not least, a "reputational" damage difficult to digest. Mr. Madero reminded the audience that of course the last word on every European Commission decision pertains to the European Courts in Luxembourg.

Additionally, in 2018, the EC imposed fines on manufacturers that used price monitoring software programs to engage in fixed or minimum resale price maintenance (RPM) by restricting their online retailers' ability to set their own retail prices for consumer products. Manufacturers engaging in RPM use sophisticated software and pricing algorithms to track resale prices so manufacturers can intervene with online retailers that offer their products at low prices and to automatically adjust retail prices to competitors' pricing, thereby limiting effective price competition on the merits and leading to higher prices for consumers. Mr. Madero noted that the EC will not hesitate to challenge the issue of vertical restraints implemented by businesses in the EU who use artificial intelligence and pricing algorithms and software to manipulate the market and engage in RPM practices.

Finally, Mr. Madero discussed how the exponential growth of computing power has led to the expansion of the digital economy and to the emergence of business models based on the collection, use and manipulation of "big data." Under the current approach of the EC, if consumers value data protection/privacy as a critical component in the quality of an offered product, and competition takes place based on that dimension, then data protection/privacy should be factored into a competition law analysis of a transaction. The EC will continue to focus on how to capture the full benefits of data-driven innovation in Europe while also protecting consumers and guaranteeing and securing fair market conditions for all market players.

Cartel Enforcement: A Review of Hot Topics and Recent Developments

Mr. Batchelor, Mr. Bershteyn and Ms. Reinhart discussed hot topics and recent developments in cartel enforcement. The panelists discussed (i) "e-collusion," (ii) bid rigging in connection with company financing, (iii) prosecution of no-poaching agreements and (iv) enforcement trends in relation to information exchanges.

Regarding e-collusion, Ms. Reinhart and Mr. Batchelor discussed the enforcers' increasing focus on use of social media platforms as evidence of cartel conduct and a de-emphasis on company email systems as sources of evidence. Because many employees use their personal devices to access social media sites, companies should ensure their compliance policies address employees' use of these apps and allow for the company to access personal devices if necessary to defend itself in a cartel investigation. The panel discussed recent cases involving use of algorithms to coordinate conduct, including the 2016 *Eturas* matter,² where travel agencies used a common online booking platform. The platform administrator sent a message to all participating travel agencies informing them that the platform would apply a cap to discounts offered via its online form. Because the travel agencies did not object, the conduct was considered to be a hub-and-spoke conspiracy. Mr. Bershteyn discussed analogous arguments made in litigation against payment networks, such as credit cards, whereby members' compliance with certain rules of the payment network is alleged to be an illegal agreement among those members.

Mr. Bershteyn discussed bid rigging in finance, highlighting practices in private equity and specifically the allegations in the 2015 *Dahl* litigation.³ The panel discussed the factors that distinguish lawful club bidding from unlawful coordination. Mr. Batchelor said allegations of improper communications in the financial sector — including in relation to aviation brokerage, pre-initial public offering share placement and government bonds — have become a focus of enforcement in the U.K.

Ms. Reinhart then discussed the Department of Justice (DOJ) Antitrust Division's efforts to prosecute "naked" no-poaching agreements criminally, following the 2016 guidance statement from the Antitrust Division and the Federal Trade Commission (FTC). In terms of current trends, Ms. Reinhart noted that a number of state attorneys general have been investigating no-poaching provisions in franchise agreements, in particular

² Judgment of the Court of 21 January 2016, Case C-74/14 *Eturas v Lietuvos Respublikos Konkurencijos Taryba* ECLI:EU:C:2016:42.

³ *Dahl v. Bain Capital Partners, LLC*, 937 F. Supp. 2d 119 (D. Mass. 2013).

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in the fast food industry. Private class actions have followed those investigations and are worth watching because they may develop new law regarding the legal standard used to evaluate both “naked” no-poaching agreements and agreements that are necessary to further the goals of a legitimate venture between employers. Mr. Batchelor noted that this has not been an area of active competition enforcement at the European level, so it is important to raise awareness among Europe-based human resources managers that this could be a serious compliance issue in the U.S.

Mr. Bershteyn and Mr. Batchelor discussed trends in enforcement related to information exchanges. Mr. Bershteyn explained that, in the U.S., information exchanges are analyzed under the rule of reason, and they generally are not *per se* illegal unless they are part of an agreement to fix prices or other *per se* illegal conduct. By comparison, Mr. Batchelor said that, in the EU, certain types of forward-looking price and volume information exchanges are considered cartel-type conduct for which significant fines apply.

Monopolization and Dominance: Recent Enforcement Developments in the US and EU

Mr. Marsden and Mr. Varian discussed competition rules and theories with respect to data and digital platforms. Ms. Vandendorre moderated the discussion. Mr. Marsden explained that there was growing support for changes in how EU competition rules address collection and ownership of data and access to digital platforms but a consensus has yet to form regarding the degree to which changes may be warranted. Mr. Marsden opined that in addition to important tweaks to antitrust enforcement, such as improved use of interim measures, and a better recognition of potential competition and dynamic aspects of competition in merger control, broader changes could be focused on regulation of companies with a “strategic market position” where consumers and businesses are dependent on a particular service and crafting rules and theories that promote competition and innovation within such service. Mr. Marsden explained that alternative proposals have focused on new entrants having open API access to digital platforms and the sharing of aggregated data and referred to the UK Groceries Supply Code of Practice as providing one type of approach to dealing with such B2B dependency within a world of accepted consumer benefits — *i.e.*, a clear alternative to a pure consumer welfare theory of harm. In his position as an expert on the HM Treasury Digital Competition Expert Panel, he expressed interest in further input from industry and indicated that the HM Treasury report would be issued in March 2019.

Mr. Varian opined that the digitization of the economy has promoted innovation and competition. For example, Mr. Varian explained that the expansion of cloud computing services and the numerous digital platforms that are supported by some of the largest technology companies in the world have lowered the barriers to entry for new firms to enter into market. Mr. Varian also opined that traditional competition rules and theories do not adequately reflect the realities of the digital economy. For example, Mr. Varian explained that because many technology companies now support numerous digital platforms, companies can both compete against and be a customer of the same company within what traditional competition rules may consider the same “market.”

Hot Topics in Mergers and Monopolization

Professor Shapiro, Professor Sokol and Mr. Sunshine discussed hot topics in mergers and monopolization. Ms. Raptis moderated the discussion. The panelists discussed whether vertical mergers will be more closely scrutinized in the wake of the AT&T/Time Warner case and political pressure to ramp up antitrust enforcement, as well as recent calls to update the Vertical Merger Guidelines. The DOJ’s challenge of AT&T’s acquisition of Time Warner was the first litigated challenge to a vertical merger in decades, prompting the legal community to question whether such mergers will be subject to stricter standards, similar to the EC approach. Professor Sokol predicted that the FTC and DOJ may take closer looks at vertical mergers but questioned whether they could successfully be challenged in U.S. courts, where the weight of the authority supports a more permissive standard for vertical deals. Mr. Sunshine said the FTC’s recent decision to allow office supplier Staples to acquire office supply wholesaler Essendant represents a traditional and limited U.S. approach to vertical mergers, but he noted that the commissioners openly sparred in dueling opinions about the proper scope of vertical merger enforcement and behavioral remedies.

Professor Shapiro said the inconsistent approaches to behavioral remedies taken by the DOJ in the AT&T/Time Warner acquisition and the FTC in its Staples decision make it difficult for the business community to know what to expect from the federal government’s review of vertical mergers. Professor Shapiro advocates updating the Vertical Merger Guidelines, and while Professor Sokol said many antitrust practitioners agree a revision is due, there is very little consensus on how to revise the guidelines. On the topic of vertical mergers by technology companies, Professor Sokol suggested that for political reasons and due to shifts in thinking by the EC’s Directorate-General for Competition, such deals are now higher risk than before.

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The panelists next discussed the doctrine known as the structural presumption, which posits that large mergers in highly concentrated markets are so likely to have anticompetitive effects that the burden of proof should be shifted — from the antitrust agencies being required to demonstrate that competition will be harmed as a result of the proposed merger, to the merger parties needing to demonstrate that the proposed merger will not harm competition. Mr. Sunshine noted that in many cases, changes to the presumptions are being advocated for by those that believe the antitrust agencies should be taking a tougher stance on proposed mergers. Professor Shapiro, who supports a reinvigorated structural presumption, asserted that there is a general movement toward the antitrust agencies being tougher on proposed mergers and that burden-shifting is an important part of taking a tougher stance.

The panelists also discussed Assistant Attorney General Makan Delrahim’s “New Madison Approach” and the implications it appears to have on antitrust enforcement. Delrahim’s approach, based on the Madisonian understanding of the “right to exclude” as a key feature of patent rights, rejects the use of antitrust law as a tool to police FRAND (fair, reasonable and nondiscriminatory) commitments of standard essential patent holders, preferring to

rely on contract law for this purpose. Mr. Sunshine explained that there is a general sense within the DOJ front office that antitrust enforcement has swung too far away from protecting innovators and should refocus on anticompetitive conduct by implementers, and that it should not be the role of antitrust laws to determine what the right FRAND royalty rate should be. He also noted that this position is in sharp contrast to previous administrations and perhaps most of the mainstream bar.

Professor Shapiro discussed the current FTC case against Qualcomm, which alleges that the company leverages its patent portfolio to obtain unreasonable royalties for certain smartphone-related licenses. Professor Shapiro testified on behalf of the FTC in that case. He said some have argued that Qualcomm’s royalties can’t be considered unreasonable given the growth in the smartphone industry during the period in question. He rejected such arguments and took the view that the mere fact that an industry is growing rapidly does not imply that there can be no anticompetitive conduct in that industry. Professor Sokol opined that the FTC’s pursuit of Qualcomm, juxtaposed against New Madison, suggests divergence between the two agencies, perhaps even greater than between U.S. and EU policy on this issue.

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