During the recent 2015 Spring Meeting of the ABA Section of Antitrust Law in Washington, D.C., Crowell & Moring Antitrust Group attorneys attended many of the daily sessions and prepared summaries. We would like to thank the following attorneys for their contributions: Randa Adra, Mika Clark, Britton Davis, Alexis DeBernardis, Rachel Funk, Medvedovsky Konstantin, Dan Leff, Rob McNary, Sima Namiri-Kalantari, Emmy Parsons, Lauren Patterson, Brendan Sepulveda, Diane Shrewsbury, Christie Stahlke, Benjamin Wastler, and Megan Wolf.
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DON’T GUESS AT THE ETHICS

Presented by the Business Torts & Civil RICO, Compliance & Ethics, and Corporate Counseling Committees

Compliance lawyers must avoid ethical issues when advising clients, or they risk becoming part of the problem. Ethics have not changed, but changes in technology add new twists. Learn from ethics and compliance experts the right answers and questions to ask in this Jeopardy!™ game-show-format panel.

Chair and Moderator:
Dorothy G. Ratmond, Law Offices of Dorothy Gill Raymond, Loveland, CO

Panelists:
Timothy J. Bridgeford, Senior Corporate Counsel, Tyco International, Princeton, NJ
Kathryn M. Fenton, Jones Day, Washington, DC
Eli Wald, University of Denver Sturm College of Law, Denver, CO

Summary:

Privilege in a Corporation

- In matters before the European Court of Justice, the attorney-client privilege does not attach to communications from in-house counsel to other employees because in-house counsel are not independent (see the Akzo Nobel case). Individual countries vary on the protections afforded.

- In determining whether a communication between an in-house attorney and a corporate client that contains both legal and business advice is privileged, many courts apply the “primary purpose” test. In the recent In re KBR case, the D.C. Court of Appeals applied a different test, looking at whether one of the “significant purposes” of the advice was legal; if so, it should be protected by the attorney-client privilege.

Social Media

- You may end up with an “accidental client” if you provide legal advice (generally considered going beyond discussion of general principles of law) in an online forum. The formation of the attorney-client relationship is a question of fact and courts place a premium on the would-be client’s understanding.

- Blogging about a favorable result for a client may constitute an implied guarantee of success in violation of local bar advertising rules.

- Monitor Linked-in regularly, especially with regard to third party recommendations that may not be accurate as to your skill set, as a description of practice areas, skills, endorsements, or recommendations may constitute advertising. See New York County Bar Opinion 748.

- Responding to a client’s public criticism on social media may violate confidentiality and the duty of loyalty and raise conflicts, though some jurisdictions permit self-defense to claims of misfeasance or malpractice.
Who’s The Client?

- An in-house attorney’s client is the entity and not individuals or employees.
- Carefully document situations in which you might engage in joint representation of the entity and an individual. Many states require written waivers.

Compliance Programs

- Do not overuse the “Attorney Client Privilege” designation on documents, as it may provide false assurances. Be careful of comingling legal and non-legal advice, as that could waive privilege.
- An effective compliance program creates a significant amount of documents and records (policies, procedures, and training materials) that might ultimately not be privileged because they are disseminated widely throughout the company. Some materials, such as risk assessments and investigations may be covered by privilege, so be careful not to waive the privilege by sharing the materials with third parties.
- A litigation hold may not be privileged. In the recent *United States ex rel. Barko v. Halliburton Co.* case in the D.C. District Court, Judge Gwin held that the litigation hold was not protected by the attorney-client privilege because it had been widely disseminated, encouraged employees to share the notice with other employees who may not have received it, and lacked confidentiality instructions. It was also not subject to the work product doctrine, as the court found that it was not created in preparation for litigation.
- Despite the fact that materials may have to be produced in discovery, do not live in fear of potential discovery. An attorney’s job is to prevent, detect, and remediate violations.

Whistleblowers

- It is rare for an in-house attorney to go outside of the client to report a violation to the government, and no state mandates disclosure. There are many steps an in-house attorney must take before he or she can do this, including informing the client and ensuring that the violation would result in substantial injury to the client. Even then, the lawyer has discretion (not an obligation) to report to the government.
- If an in-house attorney does become a whistleblower, he or she may be prevented from collecting a reward because of conflict of interest rules.
AGENCY UPDATE WITH THE DEPUTY ASSISTANT ATTORNEYS GENERAL

Presented by the Federal Civil Enforcement Committee

The Deputy Assistant Attorneys General of the Justice Department’s Antitrust Division will discuss the latest in civil enforcement, cartel cases, and policy/initiatives.

Chair: Kenneth M. Vorrasi, Drinker Biddle & Reath LLP, Washington, DC

Moderator: Roxann E. Henry, Morrison & Foerster LLP, Washington, DC

Panelists: David I. Gelfand, Deputy Assistant Attorney General for Litigation, U.S. Department of Justice, Antitrust Division, Washington, DC
Renata B. Hesse, Deputy Assistant Attorney General for Criminal and Civil Operations, U.S. Department of Justice, Antitrust Division, Washington, DC
Leslie C. Overton, Deputy Assistant Attorney General for Civil Enforcement, U.S. Department of Justice, Antitrust Division, Washington, DC
Nancy L. Rose, Deputy Assistant Attorney General for Economic Analysis, U.S. Department of Justice, Antitrust Division, Washington, DC
Brent C. Snyder, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Department of Justice, Antitrust Division, Washington, DC

Summary:


Ms. Hesse introduced the new senior team members in the front office of the Antitrust Division, and explained that they are doing a lot of hiring across all of their programs. She described the Division’s policy initiatives in the IP area. She believed that the IEEE business review letter caused a “stir,” and that people were reading more into the letter than they ought to. For example, she thinks that people read the letter as mandating using the smallest saleable unit, but she explained that the letter uses “should,” not “shall.” The letter also says it’s not an endorsement of the policy, but people seem to think it is. According to Ms. Hesse, the letter should be reviewed for what it is: they were asked a question, and the letter is answering that question. The Division assumes that the IEEE policy is not retroactive. Ms. Hesse indicated that the DOJ will be issuing another business review letter on sharing of cybersecurity information. Ms. Hesse had “nothing exciting to report” regarding the ASCAP and BMI consent decree.

Mr. Snyder described the new Washington Criminal II section as focusing on bid-rigging in the real estate foreclosure market. Then he discussed the AUO and Motorola FTAIA rulings, which have important implications on the Division’s enforcement of antitrust laws. In particular, in the the AUO case, all of the factors were present for seeking a compliance monitor: including if the company doesn’t have an effective compliance program, and if guilty executives are still in key positions. The Division only seeks a compliance monitor in the “most egregious”
situations, and the Division will rarely seek a compliance monitor for companies that have pleaded guilty. The Division is open to the idea of taking a company’s extraordinary compliance efforts into account for sentencing purposes. Mr. Snyder described the idea that a company with an effective compliance program but a rogue employee is like “Bigfoot”—the Division would consider that factor, but he doesn’t believe this exists in reality.

Ms. Overton discussed the AmEx trial, where American Express was found liable for a section 1 violation based on rule of reason analysis, as a “wonderful victory for consumers.” She described that when it comes to merger enforcement, the Division is interested in effective remedies that address competitive concerns and explained that in horizontal mergers, they will always involve structural relief. Ms. Overton also discussed the Division’s international work.

Ms. Rose, the newest team member, is in the Economic Analysis Group of the Division and has an industrial organization background. She is looking to expand the group, rebuild the group’s expertise, and focus on the group’s core priority areas, including applied econometrics. She would like to engage economists within the division and provide them with opportunities to be testifying experts. She explained that economists are getting involved earlier in criminal investigations, while also being involved in the calculation of remedies in cases that end up settling.

Mr. Gelfand described the Section’s victory in receiving a sanction against a party for spoliation of evidence, and explained that it is something the Section takes very seriously. He discussed the FTAIA issues in AUO and Motorola, and added that both the Second and Seventh Circuits have sided with the Division. He discussed defendants’ failed efforts to get the Division to disclose facts it uncovered in investigations and in the Division’s interview notes from third party interviews; he explained that the Division is on a “winning streak” with regards to this issue. He believes this is core work product that the Division will fight to protect. He does not believe that it is unfair to defendants; he thinks both sides have a lot of time to investigate.

Mr. Gelfand discussed the remedy of requiring defendants to disgorge their profits, and how the Division is seeking such a remedy in its cases when the situation calls for such a remedy. When it came to what was described by an audience member as the “contentious relationship” between lawyers and consultants and the Division, Mr. Gelfand believed that part of the issue is that companies are trying to push the envelope a little too far. In regards to merger enforcement goals for the year, he would like the Division to keep doing what it does and to look at every deal on its own facts. He has a strong preference for structural remedies because he believes that is how to restore competition. In the Bazaarvoice case, the Division obtained a complete divestiture.
FOREIGN INVESTMENT & COMPETITION REVIEWS: INCREASING INTERFACE

Presented by the Foreign Investment & Antitrust Interface Task Force and International Committee

Foreign investment reviews are increasingly interfacing with competition reviews due to the growth of national interest and national security concerns, as reflected in cases such as GE/Alstom and ADM/GrainCorp. This panel will provide guidance on planning and navigating the challenges arising from merger transactions where there may be concurrent foreign investment and competition reviews, both within and between jurisdictions.

Chair:
Richard M. Steuer, Mayer Brown LLP, New York, NY

Moderator:
Ilene K. Gotts, Wachtell Lipton Rosen & Katz, New York, NY

Panelists:
John G. Davies, Freshfields Bruckhaus Deringer LLP, London, United Kingdom
Calvin S. Goldman, Goodmans LLP, Toronto, ON, Canada
Anne W. Salladin, Stroock & Stroock & Lavan LLP, Washington, DC

Summary:

- Illene Gotts said that we agree how domestic mergers are supposed to work. Foreign investment presents new challenges however, especially since the Dubai Ports bill, which increased the scope of review.

- Anne Salladin explained the scope of CFIUS review, historically and moving forward. In the past she explained, it used to be review of foreign investment in defense contractors, exclusively. As she explained, CFIUS uses a “could control” test, which leaves no bright line rules for which transactions qualify. Even a 1% investment could subject a deal to CFIUS review. Likewise, “national security” is not well defined – it’s an intentionally vague term to allow for greater flexibility. Deals for the sale of the Waldorf Astoria have been reviewed under this provision, because that’s where the UN Secretary General stays, and where the president stays when they are in town. She suggested a few ground rules for foreign investment:
  1) Don’t close your deal prior to the completion of CFIUS review – you don’t want to unwind your deal if something goes bad;
  2) Develop a strategy to deal with CFIUS’s concerns and questions;
  3) Respond to questions quickly;
  4) Don’t assume clearance because the review comes from a U.S. ally – the investing company’s track record is also salient.

- Shawn Cooley added that CFIUS cannot technically block a deal. They can only recommend to the President that he do so. Additionally, he gave an example of the Ralls investment in wind farms in Oregon.
as a time when a deal had to be unwound after closing, because the parties neglected to wait for CFIUS review.

- Calvin Goldman discussed investment review in Canada, and Australia. The Canada Investment Act is the equivalent of CFIUS review, and since 2009, multiple deals have been rejected. Unlike the U.S. however, bright line rules regarding control apply, and the review usually takes 75 days. Additionally, the review is not solely on national security grounds, but rather on “net benefit” grounds, which can lead to an extremely political process. Mr. Goldman gave the example of the Australian takeover a Canadian potash company as being blocked under the Act due to local electoral politics. Likewise, RIM has stated they don’t think they can be acquired by a foreign company, likely because of security concerns.

   In Australia, the standard is likewise vague, allowing for extremely political reviews in the interest of “national security”. This has led to situations where competition authorities approve deals, but the investment authority control blocks it, perhaps due to local pressure. Mr. Goldman stressed that national pride can be an important point in such reviews, so companies need to be concerned about accidentally stepping in front of a “political moving train.”

- John Davies spoke about the EU, China, and South Africa. Many of the themes were similar to Mr. Goldman’s, about how political and nationalistic the review process can be. In the EU, the EC bars countries from objecting to foreign investments on purely economic protectionist grounds, but political reviews still happen all the time.

   In China, MOFCOM has a broad mandate, to do reviews on ground beyond merely competition. While it’s rare for deals to be blocked, he noted it does happen, and the reasons can openly include branding, culture, R&D, manufacturing facility reasons, as well as national security. He gave the case of Coca Cola acquiring a national drink company as being blocked. China also has a separate purely national security review.

   Finally, in South Africa, it is openly a public interest analysis, looking at factors like employment, national competitiveness, and small business interests. Mr. Davies gave the example of Wal-Mart acquiring Massmart, and being forced to rehire some recently laid-off workers.
MARKET MANIPULATION: NOT YOUR COMMON CARTEL

Presented by the Cartel & Criminal Practice and Civil Practice & Procedure Committees

Benchmarks and indices are common across many industries, such as financial, energy and commodities markets. Is antitrust the right tool to protect consumers from market manipulation? When is price transparency pro-competitive? When does conduct cross a line from active participation to manipulation? What intent is required? What frameworks are best for unilateral versus coordinated conduct?

Chair and Moderator:
Amy B. Manning, McGuireWoods LLP, Chicago, IL

Panelists:
Eve Giles, Kingsley Napley LLP, London, United Kingdom
John H. Lyons, Skadden Arps Slate Meagher & Flom LLP, Washington, DC
Hilary H. Scherrer, Hausfeld LLP, Washington, DC

Summary:

LIBOR

Eve Giles provided an overview of the London Interbank Offered Rate (LIBOR), the Panel Banks that are responsible for setting LIBOR, and the financial instruments that are tied to LIBOR. She then identified the evidence of alleged manipulation of LIBOR:

- Bias towards derivative trading book;
- Attempts to influence other Panel Bank submissions; and
- Reputational considerations, i.e., “low-balling”

The enforcement agencies in the U.S. that investigated alleged LIBOR manipulation include the DOJ, SEC, and CFTC, and private plaintiffs brought lawsuits against Panel Banks as well. In the United Kingdom, the Competition and Markets Authority (CMA), Serious Fraud Office (SFO), Financial Conduct Authority (FCA), and European Commission (EC) all opened investigations into alleged manipulation of LIBOR, and a private lawsuit was brought by Guardian Care Homes.

Forex

John Lyons briefly described how the foreign currency exchange market (Forex) operates and the various methods of alleged market manipulation. He noted that the internet chat rooms where alleged manipulation occurred were called the “cartel,” the “bandits club,” and the “mafia.” The allegations of market manipulation in the Forex market arose from conduct in these chat rooms:

- “Netting” off orders with those outside the core chat room prior to the fix of the currency exchange rate to reduce the volume of orders held by third parties in the other direction (“clearing the decks”); then
- Transacting with third parties outside the chat room to increase the volume of orders held by those in the core chat room in the desired direction (“building”); then

- Coordinated trading with banks in the chat room (often through one trader)

In the United States, the DOJ, SEC, and CFTC all investigated alleged manipulation of the Forex markets, and private plaintiffs brought lawsuits as well. In Europe, alleged manipulation was investigated by the SFO, EC, and the Swiss Financial Market Supervisory Authority. The FCA “outsourced” its investigation to the banks, a common practice in the United States but not in the United Kingdom.

Legal Framework

Hilary Scherrer provided an overview of the statutory regime governing market manipulation in the United States. Antitrust statutes including the Sherman Act, Clayton Act, and FTC Act apply to market manipulation generally, and a number of “fiefdom” statutes and regulations apply to specific acts of market manipulation. These laws include: FTC’s Petroleum Market Manipulation Rule (effective 2009); Commodity Exchange Act; and the FERC Energy Market Anti-Manipulation Rule.

Eve Giles summarized the legal framework in the United Kingdom governing market manipulation. For criminal, it is the Enterprise Act 2002 (amended by Enterprise and Regulator Reform Act 2013). Statutory immunity from prosecution is available, with a “first-past-the-post” immunity system. UK criminal proceedings may include a fraud prosecution, or a prosecution by the Financial Conduct Authority. For civil, there are Articles 101, 102 TFEU, Chapter I, II Competition Act 1998.

Is Antitrust Law the Right Tool to Protect Consumers from Market Manipulation?

Amy Manning asked the panelists to share their opinion as to whether antitrust law is the appropriate tool to protect consumers from market manipulation. Hilary Scherrer, a plaintiff’s attorney, argued that antitrust law is the appropriate tool to protect consumers from market manipulation. She emphasized that market manipulation in the LIBOR and Forex markets amounted to collusion, the type of conduct governed by, and contemplated by, the Sherman Act and other antitrust statutes. Furthermore, antitrust law captures conduct that falls outside of other regulatory regimes and provides appropriate redress for victims. The DOJ Leniency Program has provided an important incentive for whistleblowers to report misconduct and has been effective in helping the enforcement agencies crack down on market manipulation.

Ms. Giles and Mr. Lyons, both defense attorneys, argued that antitrust is an inappropriate tool to protect consumers from market manipulation because there are regulatory regimes and consumer protections already in place that govern this conduct, and those regimes are adequate. Moreover, expert regulators are in a better position than inexpert courts and practitioners to determine why market failures occur and how to fix them. Mr. Lyons conceded that one significant “gap” in the current regulatory regime is that hefty settlements are deposited in the U.S. Treasury and not in the pockets of the parties who were harmed by market manipulation.
CROSS-NATIONAL MERGER REMEDIES: STILL SAFE IN ANTARCTICA

Presented by the Mergers & Acquisitions Committee

Today’s global transactions are reviewed by antitrust authorities on almost every continent, complicating the coordination of merger remedies and increasing the risks of conflicting remedies. This program, designed as a frank exchange between agencies and counsel on remedy practice and process, will provide invaluable guidance for counsel running the merger remedy gauntlet.

Chair:
A. Neil Campbell, McMillan LLP, Toronto, ON, Canada

Moderator:
John H. Ratliff, WilmerHale, Brussels, Belgium

Panelists:
Patricia Brink, Director of Civil Enforcement, U.S. Department of Justice, Antitrust Division, Washington, DC
Johannes Luebking, Head of Unit A2, DG Competition, European Commission, Brussels, Belgium
Susan Ning, King & Wood Mallesons, Beijing, China
Christine A. Varney, Cravath Swaine & Moore LLP, New York, NY

Summary:

To what extent should remedies be global? Christine Varney noted that what was once the exception is quickly becoming the rule. While at the DOJ, Ms. Varney met with Fortune 100 CEOs, who all expressed that the issue of coordination of merger reviews and remedies was important to them. Ms. Varney noted that in the Cisco/Tandberg merger review, the parties understood that working with regulators in the United States and European Commission together would result in a more acceptable remedy solution to the parties and the agencies.

Johannes Luebkeng provided some statistics to support that coordination is a growing trend. In 2012-13, nearly sixty percent of remedies crafted by the EC involved international cooperation among reviewing agencies. For example in the Medtronic/Covidien transaction, the EC cooperated with the FTC and the Canadian Competition Bureau to craft remedies, even though the agencies concluded the relevant markets were national in scope. They recognized that the remedy would need to be global in scope to be successful in every jurisdiction.

Patricia Brink explained that the DOJ has coordinated on 17 investigations with 14 different agencies around the world. Susan Ning confirmed a similar trend in China, where MOFCOM has become more aggressive in considering structural remedies in previous years, it largely preferred behavioral remedies. MOFCOM is also more likely to be focused on local remedies than global, but has shown a willingness to work with other agencies to ensure remedies are appropriately structured so as to resolve the competitive concerns globally.

Is it acceptable for parties to focus on the United States/EU agency reviews first? Ms. Brink noted that if you looked back over the last decade, there was a definite trend that parties would focus on the United States and European Commission reviews first, but those days are waning as the merger review regimes in other jurisdictions...
continue to mature. She recommended that parties consider the best approach to move agency reviews along within a common timeframe. Do not attempt to jam a review through one jurisdiction in hopes others will feel pressured to follow suit. The DOJ will coordinate with other agencies and it is best to have parallel tracks in order to ensure coordinated remedies.

Ms. Ning explained the growing importance MOFCOM plays for parties when determining a strategy for seeking global clearance and she noted MOFCOM’s decision in A.P. Moeller – Maersk/MSC Mediterranean Shipping Company/CMA CGM joint venture review, where MOFCOM rejected the parties’ suggested remedies and blocked the transaction. This was only the second deal blocked by MOFCOM, but it established a position that the Chinese regime could not be ignored.

Neil Campbell and John Ratliff both confirmed that parties should also focus on smaller jurisdictions, where agencies do not wish to defer to larger jurisdictions, but must find a way to get a sensible remedy locally. These agencies will often seek enforceable orders in order to accept remedies crafted by other agencies or the parties to ensure compliance can be guaranteed within their borders. They also will coordinate with other agencies to ensure concerns are addressed.

**In what ways do the agencies cooperate with one another?** Ms. Brink cited the usefulness of a framework for cooperation between agencies in the United Technologies/Goodrich review, where the United States, the European Commission, Canada, Mexico, and Brazil coordinated to craft remedies acceptable to all and not in conflict with one another. She noted that the parties were very involved in negotiations with the agencies and encouraged and facilitated cooperation from the beginning, which the agencies found very beneficial. Mr. Luebking noted that timing is the tricky issue, particularly when dealing with the United States process, which is heavy at the end of the review period in the Second Request phase, while the European Commission is front-loaded. The International Competition Network recently adopted recommended practices for international cooperation in merger reviews. These best practices establish tools for structuring cooperation and focus on early communication, alignment of timing for reviews, information sharing (with or without waivers), and remedies with consistent outcomes.

Ms. Varney suggested that parties not assume agencies are going to cooperate. She noted that attorneys may need to facilitate such coordination on behalf of their clients. She noted in the Thermo Fisher/Life Technologies transaction, the parties pushed MOFCOM and the FTC to coordinate. With time, this will become less necessary.

**How can you minimize the risk of conflicting remedies among agencies?** Ms. Varney suggested starting at the end of the window of time a client needs in order to close the transaction and work backward to know when to notify each jurisdiction. What is required in each jurisdiction where notification will occur and at what point in time must such requirements be met in order to meet the client’s timeline? Pay attention to the process and timing and not just the substantive analysis and set expectations with clients. She also recommended attorneys speak to the agencies about where they are in their review.

Mr. Luebking added that there is no way to avoid conflicting remedies if coordination does not start until the remedy phase. Start coordinating at the pre-notification phase to get better results.

**How do you implement cross-national merger remedies?** The panel reviewed several remedies on which the agencies typically cooperate. The parties and agencies will often coordinate to work to identify and select an upfront buyer for divestiture assets. Coordination among agencies is necessary to ensure the remedy will work
since the selection of an upfront buyer in one jurisdiction may be acceptable, while it could create an entirely new set of competitive issues in another jurisdiction. In addition, agencies will cooperate to identify and select a monitor, often choosing one monitor for multiple jurisdictions where a remedy is global in scope rather than local.
DATA LOCALIZATION

Presented by the International and Privacy & Information Security Committees

Countries in Asia, Latin America and even Europe (e.g. the German proposal for an intra-EU Internet) are increasingly considering and adopting laws that restrict or completely prohibit cross-border data transfers to protect their citizens’ privacy or security. But these laws also advantage local over global providers in critical data industries without recourse to competition or trade law.

Chair and Moderator:
Aryeh S. Friedman, Vice President, Associate General Counsel and Chief Privacy Officer, Dun & Bradstreet, Short Hills, NJ

Panelists:
Christine J. Bliss, Assistant U.S. Trade Representative for Services & Investment, United States Trade Representative, Executive Office of the President, Bethesda, MD
Lisa Sotto, Hunton & Williams LLP, New York, NY
Yael Weinman, Vice President, Global Privacy Policy and General Counsel, Information Technology Industry Council, Washington, DC

Summary:

- Data localization describes the growing trend for countries to consider and adopt measures that require data collected from their citizens to be kept within the countries’ borders. These regulations ban or regulate the export of data to countries that are considered “inadequate” with regard to their protection of personal data.

- The United States is considered “inadequate” – accordingly, U.S. firms must conform to one of four requirements in order to receive data in countries with localization laws (consent of user, use of model contracts that require data protection, conformity with the safe harbor framework, or adoption of BCRs). “Adequate” countries include, among others, Australia, Canada, Argentina, Uruguay, and Switzerland.

- Data localization may be considered a form of data sovereignty. Countries are largely viewing data as a natural resource, like oil in previous centuries. In this sense, data localization can be used as a means to protect local technology firms from foreign competition and to impose costs and control on foreign firms.

- Lisa Sotto described a recent study, “Business Without Borders” that described the uniformly negative economic impact data localization regulations have on both local and foreign technology firms. In this sense, the panel agreed that these regulations do not achieve many of their stated aims. Christine Bliss characterized the growing trend towards data localization as “pernicious” – the panel was in agreement on this point.

- Data localization allows governments to build in additional regulations over the use of data, and sometimes to require companies to provide local governments with access to data. China is an example of this issue – it has imposed at least eight data localization regulations; one of which requires ISPs to allow the government to track and monitor “dangerous” groups.
• Data localization also imposes costs on firms – must establish infrastructure to store data in each country with a localization requirement. This type of requirement is especially costly in countries with poor underlying infrastructure, like Indonesia. In a real-world example, provided by Ms. Sotto, a firm that markets MRI machines in foreign countries may only have one or two qualified engineers in any given region. Accordingly, firms repair machines via remote conferencing, but data localization requirements prevent this model because personal data may be transiently transmitted across borders. In short, data localization is taking the “world” out of the “world wide web.”

• The panel expressed concern with the Russian data localization law that is going into effect in September 2015. Ms. Sotto explained that the law is expansive and vague, and there has been little guidance from Russian regulators on how the law will be enforced. The panel discussed how the Russian law might be lightly enforced at first. A similar law in Indonesia has been largely ignored. Also Nigeria imposed a similar law which has been unenforced. However, Russia has many more ties to foreign companies that collect data, and will thus pose a larger concern for technology firms.
THROUGH THE LOOKING GLASS: WHEN “DIRECT” MEANS “INDIRECT”

Presented by the Cartel & Criminal Practice and Civil Redress Committees and the International Cartel Task Force

A “crossfire-style” debate on the reach of the U.S. antitrust laws, focusing on the FTAIA’s “direct” requirement in the context of “benchmark” cases and “input” markets. The debate will consider specifically how the “direct” standard has been defined and applied in U.S. v. Hui Hsiung; Motorola Mobility LLC v. AU Optronics Corp.; Lotes Co. v. Hon Hai Precision Indus.; and Minn-Chem, Inc. v. Agrium, Inc.

Chair and Moderator:
  Mark Rosman, Wilson Sonsini Goodrich & Rosati PC, Washington, DC

Debaters:
  Kenji Ito, Mori Hamada & Matsumoto, Tokyo, Japan
  Kristen Limarzi, Chief, Appellate Section, U.S. Department of Justice, Antitrust Division, Washington, DC
  Tiffany Rider, Skadden Arps Slate Meagher & Flom LLP, Washington, DC
  Hollis Salzman, Robins Kaplan LLP, New York, NY

Summary:

What is the reach of the Sherman Act in a globalized economy? The Foreign Trade Antitrust Improvements Act (“FTAIA”) has been described as a “riddle wrapped in a mystery inside an enigma.” The standard is not clear and courts have wrestled with it. Kristen Limarzi (DOJ) discussed the motivation for the FTAIA, which was to promote US exports by foreign entities by protecting them from liability under the Sherman Act if their acts do not affect US commerce. The FTAIA has become more significant as the DOJ has secured large fines from foreign companies involved in international cartels. Ms. Limarzi said that the fact that a company is foreign does not affect the FTAIA analysis, because foreign companies can impact US commerce. There is a large global market for many products, some of which are clearly affecting the US markets.

Kenji Ito (Hamada & Matsumoto) explained that there is no provision or framework like the FTAIA in Japan that limits the scope of Japan’s antitrust laws. The most recent standard articulated is that Japanese antitrust laws will apply when there is an effect on free competition in Japan. How far this standard reaches has yet to be determined.

For the FTAIA, Hollis Salzman explained that two standards have been articulated in trying to define the term “direct” under the “direct, substantial, and reasonably foreseeable effect” prong. The Seventh and Second Circuits have used a “reasonably proximate causal nexus” standard, while the Ninth Circuit has applied an “immediate consequence” standard. The Ninth Circuit standard seems to be an outlier in comparison to other Circuits, she said, and is considered a less functional approach for measuring directness. Many courts have expressly rejected the “immediate consequence” standard because they found that “direct” may look a little further down the causal chain. Ms. Salzman defended the “proximate cause” standard and said that she would prefer it to an “immediate consequence” standard. In her view, a flexible concept like the proximate cause standard can be useful in these tricky cases. However, despite the different standards, the different Circuits have reached the same result: in component price fixing cases, there can be a direct effect under either standard. She said the Circuit split might not be as meaningful as it seems at first blush.
Kristen Limarzi (DOJ) noted that there is a common fear that defendants will be fined for sales in one jurisdiction, and then be fined again for the same sales in another jurisdiction. But in her opinion, double-counting is rarely an issue, and there has not been much evidence of it. Cartel conduct has not been overpunished around the world, nor has there been friction with foreign enforcers. DOJ coordinates with other jurisdictions and has, at times, declined to bring cases where conduct has been adequately dealt with in other jurisdictions. Furthermore, most jurisdictions outside of the US, especially Asian countries where much of the most recent cartel activity has originated, do not allow for class actions or private remedies. Double counting will not occur in those cases. Finally, she also said that direct purchasers and indirect purchasers may recover from the same behavior, which she did not consider a double recovery.

Tiffany Rider (Skadden) discussed DOJ’s prosecutorial discretion in cases with no direct sales or harm in the US. Ms. Limarzi said that solely foreign commerce might meet the “substantial reasonably foreseeable effects” standard that is required by the statute. Sometimes foreign enforcers have little incentive to carry out vigorous antitrust enforcement, and the US statute requires the government to protect US commerce and victims of anticompetitive activity. In particular, in some cases, there is evidence that foreign cartels have sit in a room discussing price fixing in US markets. The lack of US sales should not prohibit DOJ from prosecuting these cases. Ms. Rider responded that the standard was too broad. She did not understand how she could explain to her clients that they may not be on the hook for civil risk in the US, but they may be found criminally liable.

The panel agreed it is a very fact-based inquiry and facts can change outcomes, especially in light of standards that are somewhat unclear. Also, more countries are enforcing their own antitrust laws, so international companies need to be aware of their own country’s laws in addition to US antitrust laws.
WALKING THE LINE BETWEEN WITNESS PREPARATION AND COACHING

Presented by the Compliance & Ethics and Trial Practice Committees

A lawyer may not improperly influence witness testimony, but where is the line between permissible witness preparation and unethical coaching? The answer is not always clear, and the ABA Model Rules of Professional Conduct frequently offer room for interpretation. This panel will offer practical advice for the challenging situations that lawyers face when they prepare witnesses to testify.

Chair and Moderator:

Panelists:
David Martinez, Robins Kaplan LLP, Los Angeles, CA
James H. Mutchnik, Kirkland & Ellis LLP, Chicago, IL
Douglas C. Ross, Davis Wright Tremaine LLP, Seattle, WA
Mary N. Strimel, Chief, Washington Criminal II Section, U.S. Department of Justice, Antitrust Division, Washington, DC

Summary:
Mary Strimel explained that sometimes the witnesses that she is preparing to put on the stand are not a client. In the government, she operates less frequently under cloak of privilege. Under the discovery rules, in particular on the criminal prosecution side, there are broad duties for disclosure. James Mutchnik said that interesting issues emerge when he is defending foreign companies and foreign witnesses. He described it like teaching a child to play tee ball, where the child has no idea what is going on. Preparing the witness with the very basics (such as the fact that they may be on camera) begins before the words. Douglas Ross thought that it is interesting that as much as you prepare, the witness will revert to their normal state. How do you prepare the witness so that you don’t have to coach them during the deposition? It takes a lot of hard work, long hours, and a mock deposition. David Martinez agreed with Mr. Mutchnik that it is challenging when working with foreign clients and witnesses, where the issue is highly technical and it’s difficult to translate concepts (specifically in Antitrust cases).

Model Rules. No model rule bears directly on witness coaching. Ms. Strimel explained that the line here is between things that we as advocates have to do, ought to do, and must do, versus what it means to go too far. Commentary to the Rule of Competence (Model Rule 1.3, Comment 1) explains that you can’t just put a witness on the stand without effort. This includes properly preparing your witnesses to testify truthfully. (Model Rules 3.3(a)(3), 3.4(b), 8.4(a) and (c).) The rules are “black and white” when it comes to the notion of knowingly putting on false testimony. Mr. Ross added that the Restatement talks in the affirmative as to what you can do, and the commentary to the Restatement is worth looking at. You are ethically expected to use documents and review other facts in order to review the factual context in which the witness’s observations or opinions will fit. Rehearsing testimony, while perhaps ethical, may perhaps be ineffective where the witness’s testimony sounds canned.

Mr. Mutchnik explained that in the “guard rails” of what is ethical are competence and fraud, attorneys have a lot of room to operate. The most important things you can do to prepare are the things you do in private, which are likely protected by attorney-client privilege. There was a case argued recently in the Eighth Circuit that goes right
to the heart of these issues. (The case on appeal was a District of Iowa matter, The Security National Bank of Sioux County v. Abbott Laboratories.) The district court wrote that the deposition transcript felt like a “tag-team match with Counsel and witness delivering the one-two punch of ‘objection’—‘rephrase’.” The attorney was sanctioned and ordered to write and produce a training video.

**Instructing Your Witness.** Mr. Martinez pointed to the duty to zealously represent your client, to instill a sense of discipline. You tell your client to listen to the question, understand the question, and answer only the question. Make sure the witness doesn’t go off-script. Ms. Strimel explained that it is often not enough to just tell your witness to tell the truth. Key to not be implanting thoughts or ideas into a witness who seems to want to please the advocate. Also Mr. Martinez believes “I don’t recall” is overused. Attorneys have to tell a witness that he or she should only answer questions that he or she knows the answer to. An attorney cannot facilitate perjury by suggesting to the witness that he or she shouldn’t talk about bad facts unless he or she is 100% sure about those facts. The practical aspect of “I don’t recall” is the idea of selective memory; juries pick up on that.

Mr. Mutchnik thought instructing the client on the law (before getting the facts) was ethical and a “great idea.” Putting a witness in the game without explaining the rules makes you a “moron.” He believes it is appropriate, if not required, to make sure your client understands how he or she fits in the case by instructing him or her on the law. For example, you explain that these are the claims, these are the defenses, these are the areas of uncertainty, and ultimately you’re going to be part of the issue. In summary, Mr. Mutchnik finds it fair and appropriate to explain the boundaries. Mr. Ross Suggested the following inquiry for determining whether instructing on the law first is ethical: if in explaining the law first, does it suggest the “right answers” to your question? He referred to the inquiry as a “balancing act” because attorneys need to give their clients the law to get to the relevant facts.

**Rehearsing.** Mr. Mutchnik finds that rehearsals are important to build up the witness’s stamina, to be able to stay focused for the length of his or her testimony. He added that while the goal of the attorney is to get to the truth, there are better versions of the truth. For example, there is a difference between answering “yes” and “yes, but.” The ethical rules allow your witness to explain what is true here. Ms. Strimel believes that part of adequate preparation of your witness is to show her documents and explain facts, to give her context. She explained that providing your witness with a particular word choice is fine if you are guiding them to use a more precise word; you are not permitted to purposefully guide the witness to use words that the witness is not comfortable with. Mr. Ross also thinks it is ineffective if an attorney guides his witness to use words the witness doesn’t know and where the witness will stumble over his words.

**False Statements.** Mr. Mutchnik explained that making false statements where witness has come in under a proffer letter is a “dangerous area.” Lawyers need to protect their clients from themselves; your job as a defense counsel is to get there first. You haven’t done your job if you haven’t figured out if there is another party there. It is a situation where the government has more information than you do, or it’s off by a little bit. There is tension around who is telling the truth or just forgetting. Can you sit back and let the witness hang themselves? Ms. Strimel explained that the government has no duty to warn the witness or his lawyer that the government knows the witness is lying. But that doesn’t mean the government wouldn’t talk to the lawyer privately. If the client intends to obstruct the government’s investigation then they are on their own and consequences will follow. Interviews with the government should not become a bargaining session. Mr. Martinez explained that lawyers have an ethical duty to correct a material misstatement, especially if was done on purpose. If innocent, he doesn’t know if he would correct it, unless it was concerning an issue important to the case. Mr. Ross would correct a misstatement every time (with very few exceptions), whether it is a big or small issue, because it goes to credibility of your witness.
BEYOND REVERSE PAYMENTS: THE NEW FRONTIERS IN PHARMACEUTICAL ANTITRUST

Presented by the Health Care & Pharmaceuticals and Trial Practice Committees

While the courts and the FTC are keenly focused on the size and form of consideration exchanged in reverse payment patent settlements and the resulting competitive effects, new waves of pharmaceutical antitrust investigations and litigations are underway into life cycle management, alleged abuse of REMS, and biologics/biosimilars. What are these new frontiers and how will they pan out?

Chair and Moderator:
Kenneth R. O’Rourke, O’Melveny & Myers LLP, Los Angeles, CA

Debaters:
Markus H. Meier, Assistant Director, Health Care Division, Bureau of Competition, Federal Trade Commission, Washington, DC
Linda P. Nussbaum, Grant & Eisenhofer PA, New York, NY
J. Douglas Richards, Cohen Milstein, New York, NY
Steven C. Sunshine, Skadden Arps Slate Meagher & Flom LLP, Washington, DC

Summary:

Life Cycle Management and Product Hopping

- Antitrust claims have been brought against branded manufacturers for manipulating FDA’s regulatory scheme by making minor, non-therapeutic changes to a drug’s formulation to obtain new patent protection on the reformulation, while, at the same time, withdrawing support for the prior formulation that faces imminent or nascent competition from generics.

- Steven Sunshine offered the branded maker perspective, which was that an “Innovation Standard” should be applied to avoid chilling innovation, particularly because the reformulated products can increase consumer choice and improve the therapeutic options or benefits. If the new formulation offers anything that is arguably a benefit, antitrust should not stand in the way. This cannot be an after-the-fact look at benefits; innovation is too important to leave to judges and juries. Courts should not require companies to continue selling the original version of the drug because there are free-riding concerns.

- Markus Meier gave the government perspective. The FTC’s amicus brief in the Doryx case identified the circumstances under which product hopping may be anticompetitive: any combination of 1) the branded manufacturer makes minor, non-therapeutic changes to the brand product; 2) pulls the original product or jacks up the price; 3) knowing generic entry is on the way. Courts should require companies to continue selling the original version of a drug so long as Plaintiffs establish a violation of Sherman § 2, and there are no countervailing procompetitive benefits. See New York v. Actavis PCL.

- Linda Nussbaum stated the plaintiffs’ view. She said if we focus on a standard for innovation, the benefit must be supported by scientific evidence. Otherwise, the purpose of the change is to defeat consumer
choice. Allowing a product to be pulled is against Hatch-Waxman. Doug Richards noted that using the rule of reason, legitimate procompetitive justifications could justify the change. In determining whether a company should have to continue to sell the original version, normal market forces are not at work – there is a breakdown because the doctor who prescribes and the person who pays are different.

REMS Programs abuses

- Alleged abuse of FDA-mandated programs to minimize the risks associated with certain drugs (Risk Evaluation and Mitigation Strategies). Typically, a generic company sues a branded because the generic company wants to complete an abbreviated new drug application (ANDA) and needs product samples, which the branded company refuses to provide. Markus Meier said the defense bar frequently quotes the Colgate case to argue that they can deal with whomever they want, but the sentence quoted begins with the phrase “in the absence of any purpose to create or maintain a monopoly.” If the government cannot go after REMS issues, there will be no samples, no ANDAs, no generics, and no competition.

- Douglas Richards said the focus should be Otter Tail, Aspen Skiing, and the Namenda case: if the branded company sells the product to the public or other researchers, there may be a prior course of dealing and support for an inference of illegality. Steven Sunshine called it “a real stretch” to say that there is a duty to give a product to a competitor so that they can copy it. There are no cases that support that. Linda Nussbaum’s view is that more than forty percent of new drugs are subject to REMS, and that samples are essential. If branded companies do not have to provide samples, the public policy of Hatch-Waxman would be frustrated.

Follow-on Biologics (FOBs)

- Markus Meier said that FOBs can offer substantial benefits, but competition will not be the same as with generics. Biologics are more complex, and FOBs often are not identical to the branded biologic, so there is unlikely to be automatic substitution. FOBs will have to spend more on marketing and education. Therefore, the discounts for FOBs may be smaller. They will, however, still be significant, since biologics are extremely expensive. As far as antitrust concerns, as long as competitors can get together and divide monopoly profits at the expense of consumers, Actavis will be relevant.

- Steven Sunshine said that FOBs are fundamentally different than generics, so it would be very difficult to see generic-like competition. Most likely, competition between biologics and FOBs will be more like branded competition. One interpretation of Actavis says that it is one narrow holding: settlement agreements are subject to the rule of reason, and everything else is dicta. Justice Breyer looked at the particulars of Hatch-Waxman, so the decision should not apply to the BPCIA. Linda Nussbaum said that the BPCIA is patterned after Hatch-Waxman and contemplates patent litigation. Actavis should apply.
MAVERICKS WRESTLING WITH REGULATION: TESLA, UBER, AND AIRBNB

Presented by the Legislation, Pricing Conduct, and Transportation & Energy Industries Committees

On the one hand, consumers benefit when mavericks disrupt stale and stodgy markets. On the other, government regulations protect consumers. What role, if any, should antitrust law play in establishing the proper balance? Tesla, Uber, and Airbnb have all been met with regulatory resistance as they innovatively approach established markets, and their examples may help us answer this question.

Chair and Moderator:
David L. Meyer, Morrison & Foerster LLP, Washington, DC

Panelists:
Daniel Crane, University of Michigan, Ann Arbor, MI
Matthew W. Daus, Windels Marx Lane & Mittendorf LLP, New York, NY
Marina Lao, Director, Office of Policy Planning, Federal Trade Commission, Washington, DC
Paul R. Norman, Boardman & Clark LLP, Madison, WI

Summary:

Tesla. David Meyer introduced the problem facing Tesla as an entrant to the U.S. automobile market: Tesla’s business model is based on the direct sales of its automobiles, and it does not sell to independent automobile dealers, yet the majority of U.S. states prohibit direct sales of automobiles to consumers. Paul Norman (Boardman & Clark) noted that laws in thirty states prevent vertical integration of motor vehicle distribution by prohibiting manufacturers from owning or operating dealerships. Tesla is attempting to carve out an exception to this legal framework so that it can operate in these states under its model of direct sales of automobiles to consumers. Mr. Norman’s position is that the current system is working well and noted that no other automobile manufacturer has expressed a desire to amend the laws. He agreed that state laws should not be amended to provide an exception for Tesla. He listed several procompetitive justifications for the current vehicle distribution laws that require automobiles to be sold through independent dealerships:

- Dealerships promote intrabrand competition that is nonexistent in the direct sales model;
- Another layer of accountability is added because dealerships are motivated to enhance customer safety;
- Dealerships employ workers in local economies and contribute to the tax base;
- Dealers act as an advocate for customers in retaining warranty coverage; and
- Dealers continue to exist when manufacturers exit the market, so competition is not diminished.

Daniel Crane (University of Michigan) strongly disagreed with Mr. Norman’s position. He noted that Ford and General Motors both have sought to implement direct dealerships, and Elio Motors, a manufacturer of three-wheeled automobiles, also is lobbying for direct dealerships. He argued that state laws prohibiting direct dealerships were originally intended to protect dealerships, not consumers. Mr. Crane countered Mr. Norman’s
list of procompetitive justifications for the legal status quo with a list of arguments for permitting Tesla to sell directly to customers:

- Current dealer networks are poor with regard to promoting electric vehicles—surveys and audits demonstrate that over half of automobile dealers discourage customers from buying electric automobiles.
- Direct dealerships would reduce costs; and
- Direct dealerships would continue to employ workers in local economies;
- Dealerships exit automobile markets in the same way that manufacturers do; and
- It is questionable whether dealerships enhance customer safety because manufacturers make recall decisions, and dealerships are required to follow them.

Marina Lao (FTC) said that ideally, the law should permit automobile manufacturers to choose the method of automobile distribution that works for them and that is responsive to customer desires. The FTC takes the position that state laws should not completely prohibit direct dealerships unless there is evidence that there are rational reasons to do so. Ms. Lao explained that absolute bans on direct dealerships limit the ability of automobile manufacturers to experiment with their sales models. However, it is unfair to carve out exceptions in the law that allow Tesla, but not other automobile manufacturers, to sell directly to customers. Rather, states need to re-examine laws regulating automobile sales, identify the purposes of the laws, and determine whether those purposes are legitimate, and whether the laws are effective in attaining them. If the laws are to be amended, then those amendments should apply universally, not just to Tesla.

Uber. Matthew Daus (Windels Marx Lane & Mittendorf) provided the backdrop for the regulatory battle underway between transportation network companies such Uber and Lyft, and state and municipal regulatory agencies, noting that the dispute is much more complex and nuanced than that involving Tesla. He explained that taxis and limousines are regulated by such a hodgepodge of agencies with complex schemes that it is difficult for consumers to understand the requirements for the industry. San Francisco provided “perfect storm” conditions for a regulatory maverick such as Uber to enter the market. With the backing of venture capital from Silicon Valley, Uber entered a market where taxis were strictly regulated yet served customers deficiently—i.e., there weren’t enough of them—yet the limousine industry was loosely regulated. It was in this environment that Uber entered as a limousine service, and turned the limousine industry into an on-demand taxis service. Crucially, Uber added a meter in its app that distinguished it from traditional limousines and significantly enhanced transparency for customers. Uber succeeded in revolutionizing the taxi and limousine industries, but it did so without changing the laws regulating them; in fact, it succeeded by violating those laws. Although Uber and Lyft are now seeking to overhaul state and local regulations, they initially succeeded by implementing a highly effective marketing strategy and lobbying campaign to carve out exceptions to state and municipal regulations. Many states now regulate TNCs under a different framework than taxis. With the exception of New York City, where Uber maintains a legally compliant business, TNCs now operate under a different legal standard in many states than taxi and limousine services, which Mr. Daus believes is difficult to justify.

Mr. Daus outlined the regulatory framework governing taxi and limousine services and to explain how Uber is attempting to evade the law. They include liability insurance requirements, criminal background checks,
Americans with Disabilities Act obligations, weights and measures requirements, and pricing regulations. Uber charges surge pricing during times of peak demand; however, taxis are not free to charge surge prices. The panelists agreed that the conduct of Uber likely does not violate antitrust laws. Mr. Daus noted, however, that laws regulating Uber and Lyft may violate the Americans with Disabilities Act because these companies’ cars are not equipped to provide access to persons in wheelchairs. He argued that by the time the laws are overturned, however, “Big Uber” will have taken over the market, and lawmakers will go back to the drawing board to completely re-write laws governing the transportation industry.
A company holding sensitive consumer data has been hacked, releasing millions of private records. The twist is that the company is already under FTC order stemming from a prior breach, and despite its claimed compliance, has been breached once more. In this mock argument, the FTC will seek a finding of contempt. Leading litigators will argue these cutting edge issues before a federal judge.

**Chair and Moderator:**
Christopher A. Cole, Crowell & Moring LLP, Washington, DC

**Panelists:**
The Honorable Rosemary M. Collyer, Judge, U.S. District Court for the District of Columbia, Washington, DC
Janis C. Kestenbaum, Perkins Coie LLP, Washington, DC
Avi Rubin, Johns Hopkins University, Washington, DC
David C. Vladeck, Georgetown University Law Center, Washington, DC

**Summary:**
- David Vladeck acted as counsel for the FTC in the hearing. Janis Kastenbaum represented Stratosphere, a hypothetical corporation, Stratosphere, a major entertainment and media company involved in distributing movies, TV shows, and other entertainment properties in addition to owning a subsidiary involved in online gaming.

- **Facts.** In 2008, Stratosphere’s gaming division was hacked and millions of customers’ credit card data was hacked. As a result of the 2008 hacking, Stratosphere was subject to an FTC consent order that required Stratosphere to undertake various security measures to prevent a future breach. In the summer of 2013, Stratosphere announced the upcoming premiere of “Dumber in the Desert,” a controversial new, big budget film that lampooned a Middle Eastern regime. The government of the country featured in the movie issued a press release lambasting Stratosphere and the United States government, and threatening retaliation. In July 2014, on the eve of the Los Angeles premiere of Dumber in the Desert, Stratosphere suffered a major data breach – Stratosphere music and movies were released and embarrassing emails between Stratosphere executives were posted on 4chan. In December 2014, the FTC filed a complaint for contempt in the United States District Court for the District of Columbia. The complaint alleges that Stratosphere breached the existing Order.

- **Jurisdiction.** First, the parties argued over whether the FTC has jurisdiction over the relevant issues under its “unfairness” jurisdiction. Judge Collyer questioned how the FTC could establish this jurisdiction in light of its apparent statutory mandate rooted in consumer protection – she did not see the link between consumer protection and data breaches like this one. Mr. Vladeck answered that Congress wanted the FTC to create a jurisprudence of consumer protection that was flexible. He cited the Chenery case as the prime example of how the FTC has jurisdiction and authority in this area (SEC v. Chenery Corp., 332 U.S. 194 (1947)). In response, Ms. Kastenbaum argued that other statutes have expressly granted the FTC and
other agencies authority over privacy issues, and thus FTC’s expansive jurisdictional interpretation is meritless.

- **Violation of the Order.** The parties examined Avi Rubin, a prominent privacy and cybersecurity expert, as an expert witness in the case. The FTC argument centered on whether Stratosphere adequately complied with the Order, which if complied with should have prevented this type of breach. Stratosphere argued that there is “no such thing as perfect security,” quoting the FTC in one of its previous cases.

- At the conclusion of the Mock Hearing, Judge Collyer indicated that she would have “punted” because of the jurisdictional argument, which is currently on interlocutory appeal at the Third Circuit.
NEXT GENERATION CARTELS: NEW TOOLS FOR ENFORCERS’ TOOLKITS?

Presented by the Cartel & Criminal Practice and International Committees

International enforcers appear to be looking outside of traditional “hard-core” price fixing or market allocation cartels and considering practices that may be less obvious antitrust violations. This panel will consider the challenges posed by this new “gray area” of antitrust enforcement, including most-favored nation, hub-and-spoke, information exchange and signaling conduct.

Chair:
Joyce Choi, Linklaters LLP, Brussels, Belgium

Moderator:
Kathleen Beasley, Haynes and Boone, Dallas, TX

Panelists:
Juliette Enser, Director, Cartel Enforcement Competition and Markets Authority, London, United Kingdom
Matthew Hall, McGuireWoods LLP, Brussels, Belgium
Thomas Mueller, WilmerHale, Washington, DC
Elizabeth Prewitt, Hughes Hubbard & Reed LLP, New York, NY

Summary:

In the U.S., many enforcement actions have been brought in the last 15 years, and there is no indication that cartels will dry up. Cartels are getting more sophisticated and harder to detect and prosecute. As “hard-core” offenses become less frequent, there will be a move to define other conduct that decreases output or increases prices and can be considered a per se violation.

In the EU, enforcement is booming. Cartels are prosecuted under Article 101, which allows enforcement of either object or effect infringement. “Object infringement” simply requires a sufficient degree of harm, but does not analyze the ultimate effects of the harm on the market. “Effect infringement” focuses on the effects of the anticompetitive behavior. The EU also has a lower bar for what constitutes an agreement, requiring only concerted practice (a meeting of the minds, but no actual agreement).

The panel discussed three emerging issues in cartel enforcement: hub-and-spoke cartels, information exchange, and signaling.

- **Hub-and-Spoke Cartels.** “Hub” is typically the dominant purchaser or supplier in the relevant market. The “spokes” are a series of agreements between the Hub and its distributors or suppliers. If there are facts showing agreements among the distributor/suppliers, who are horizontal competitors, then the rim of the wheel is created, and there may be an actionable conspiracy. In the context of a “next generation” cartel where relationships may be more complex than the more familiar supplier-distributor and distributor-retailer vertical relationships, a “hub and spoke” cartel might arise, for example, where another market participant (who is not necessarily in a vertical supply relationship with the cartel members) facilitates a cartel among competitors.
In the US, there are several examples:

- Supplier/retailer model (Toys-R-Us)
- Corrupt purchasing agent (seen in bid rigging scenarios)
- Invested facilitator (Apple Ebooks)
- Trade Associations
- Brokerage cases – where the hub acts as a direct link between clients to buy and sell a product or service

Hub-and-spoke cartel cases are challenging because it might be difficult to prove the horizontal element of an agreement. Because communication occurs between the hub and the spokes and not between the spokes themselves, knowledge of an agreement by the spokes is difficult to prove.

In the European Union, hub-and-spoke cartels are often called ABC cartels. ABC cartel cases often revolve around a concerted practice claim, which requires anticompetitive conduct and intent. Mr. Hall provided some recommendations on practical client advice when dealing with situations where competitive informant is shared with a third party that also communicates with competitors. First, be explicit with the third party about the confidential nature of the information being shared. Second, ensure there is a good commercial reason for the information sharing.

**Information Exchange.** The sharing of commercially sensitive and confidential information between competitors was discussed. The U.S. is mostly concerned with exchanges that are aimed at hard-core offenses and is not concerned with price signaling on its own. For the EU, it was said that information exchange is not just about sharing actual pricing, but can include any information that would indicate potential future pricing or provide the ability to predict future commercial behavior. It may be relevant if the information is about intended future pricing; is competitively useful; is part of a wider horizontal collaboration agreement; or is part of the monitoring mechanism of a cartel.

**Signaling.** Actions short of direct communications between competitors (such as, e.g., public announcements) may still facilitate pricing coordination above the competitive level. There is less emphasis on signaling in U.S. enforcement efforts. The EU is mostly looking for announcements of future price increases or intentions to raise prices in the future. Signaling is harder to prove if the price increase is announced publically rather than privately, because there may be a competitive reason for public announcements of price changes.
SECURING NET NEUTRALITY: ANTITRUST, RULES, BOTH OR NEITHER?

Presented by the Federal Civil Enforcement, Media & Technology and Unilateral Conduct Committees

This program examines antitrust enforcement and regulation as a means to achieve net neutrality. What antitrust theories could be used, in what circumstances, and with what likelihood of success? Is antitrust enforcement a better, worse, or complementary approach to FCC enforcement of net neutrality rules? What benefits and drawbacks come with each approach?

Chair:
Kim M. Van Winkle, Chief, Antitrust Section, Office of the Attorney General, Austin, TX

Moderator:
David S. Turetsky, Akin Gump Strauss Hauer & Feld LLP, Washington, DC

Panelists:
Jonathan Sallet, General Counsel, Federal Communications Commission, Washington, DC
Barbara Van Schewick, Stanford Law School, Palo Alto, CA
Christopher S. Yoo, University of Pennsylvania Law School, Philadelphia, PA

Summary:

Introduction. David Turetsky began the session by providing a brief overview of the history of Net Neutrality. In 2002 the Federal Communications Commission (FCC) determined that cable modem services should be classified as information service providers (ISP) rather than as telecommunications service providers (CSP). The ruling permitted the FCC to regulate cable modems and was designed to promote the development of broadband services. In 2005 the FCC expanded the ISP classification to include wireline broadband Internet services and adopted an Internet Policy Statement outlining its commitment to promoting competition and the continued development of the Internet. Later it classified mobile broadband services as ISPs and brought an enforcement action against Comcast for slowing down, or throttling, peer-to-peer network traffic. In 2010, the D.C. Circuit Court of Appeals ruled that the FCC had overstepped its authority in the actions against Comcast. The FCC responded by adopting an Open Internet order that included three core provisions: 1) no blocking, 2) no unreasonable discrimination by wireline providers, and 3) mandatory transparency regarding performance and management. In response, Verizon filed a lawsuit against the FCC, arguing that the Commission had exceeded its regulatory authority. In 2014, the D.C. Circuit upheld the FCC’s authority to adopt open Internet rules, but found that the no blocking and antidiscrimination provisions exceeded the FCC’s authority to regulate ISPs.

2015 Net Neutrality Rules. In 2015, the FCC adopted a new policy that reclassified broadband providers as common carriers, or CSPs, and again subjects broadband providers to three key regulations: 1) no blocking, 2) no throttling, and 3) no paid prioritization.

Barbara Van Schewick described the Net Neutrality rules as “codifying a de facto regime” that has been in place since the beginning of the Internet. She argued that the rule against paid prioritization represents a continuation of what has always been in place. Application developers have never paid ISPs for access, and to permit payments for access or preferential treatment would represent a “fundamental and radical shift” in how the Internet functions. Net Neutrality rules capture a broader set of practices than those governed by Antitrust laws, Ms. Van
Schewick said. Antitrust laws can be used to regulate harms to competition when the harm is tangible, when ISPs block access to a competing application, for instance. When the potential harm is more about a “ripple effect” on future innovation, however, antitrust law cannot easily address that problem.

Christopher Yoo said that Net Neutrality is about “standardization and interoperability.” Antitrust provides an analytical framework for considering interoperability. In some instances, interoperability is preferred and leads to being part of a larger network: being able to buy one printer cable that works with a variety of printers. In others, interoperability leads to a loss of finding the perfectly tailored solution for each individual scenario. Interoperability, Mr. Yoo said, provides a new dimension to competition. Net Neutrality can address concerns about vertical integration. Broadband providers cannot vertically integrate and discriminate against competitors. Net Neutrality will not, however, address horizontal concerns, and it will not solve the problem of regions having access to only one high-speed Internet service provider. This reality, Mr. Yoo said, raises concerns. In a large percentage of scenarios, vertical integration is actually “welfare enhancing or neutral.” Perhaps, Mr. Yoo said, a better option would have been to put in place dynamic standards.

Jonathan Sallet stated that the Net Neutrality rules are meant to drive competition and encourage investment in the deployment of broadband networks around the country. He said that competition for high-speed broadband, characterized by speeds of 25 Mbps down and 3 Mbps up, is still very limited. Furthermore, the lack of competition is a problem disproportionately faced by rural areas. The D.C. Circuit’s 2014 ruling recognized the need to encourage innovation by removing barriers to competition and by promoting openness. The FCC has been given the authority by Congress to look at competitive issues “beyond the realms of antitrust law.” The FCC has the authority to protect localism in broadcasting, to implement ex ante rules to prevent harm, and to look to the future to promote innovation. Ms. Van Schewick said that antitrust law is most useful for addressing anticompetitive exclusion, particularly in the context of blocking or slowing access. In the United States, there has been relatively little blocking. In Europe, however, where the system is based on disclosure rather than prohibition, there has been much more blocking and discrimination. Although European consumers may know it is happening, they are still not changing providers. Prof. Yoo replied that the question of Antitrust involvement in this space includes the question of how broadly to read Verizon v. Trinko, and we do not yet know the answer. Trinko may be read broadly to suggest that Antitrust is entirely displaced from this space. Mr. Sallet believes the FCC’s actions are consistent with Trinko.

Agency jurisdiction. There is fear that based on the common carrier exemption in Section 5 of the FTC Act, we will now have sector-specific privacy. In a vertical chain, where carriers and applications or devices are treated differently, we may see bias in terms of the types of technology that can be reviewed and how the law will be applied. Ms. Van Schewick believes the reclassification of Internet service providers as common carriers does remove the Internet from FTC jurisdiction, but consumers are still protected by the FCC. Still, there is growing debate about urging the FTC to repeal the common carrier exemption. From a public interest perspective, repealing the exemption would be a good idea. From a corporate entity’s perspective, keeping the exemption in place would mean that regulation is limited to the FCC, rather than shared between the FCC and the FTC.

Paid Prioritization. Paid prioritization refers to ISPs charging third-party content providers for access to end users. This rule addresses both competition-related and non-competition-related concerns. Ms. Van Schewick said that exclusionary conduct can be dealt with by antitrust law; terminating monopolies cannot. Terminating monopolies refer to the monopoly ISPs have over the end user. In order for a third-party application to reach the end user, it must go through the ISP. There is also a threat to innovation. If ISPs can charge for access, start-ups
will not be able to pay the fees, and innovation will be slowed. Finally, the ban on paid prioritization ensures that all content and all speech reach everyone.

Prof. Yoo noted that the original Internet design included prioritization. ISPs could experiment with what worked best, including prioritization. ISPs, for instance, were allowed to block video streaming if it would consume too much of the available bandwidth. There are welfare-enhancing justifications for paid prioritization, Prof. Yoo stated, and there are reasons to be concerned about the new framework. There is an exception for “reasonable network management,” but it is unclear what that exception includes. This leaves a “regulatory overhang,” that may have a chilling effect on innovation. Mr. Sallet said that the FCC order represents a determination that there are standards that will protect the public interest and provide clarity to the system in order to enhance innovation. The FCC has operated in this space since roughly 2004, so it has the experience needed to set standards. Adjudication is more appropriate in areas where the FCC has less experience.

**Over-The-Top Providers.** For Ms. Van Schewick, the OTT question fails to recognize that there has been a de facto Net Neutrality regime in place for many years, and there was a continued level of protection for new providers to enter the market. The problem would have arisen with a roll back of protection. Prof. Yoo said that Neutrality has been a moving target. The original concern was about blocking, and then moved into non-discrimination, and now we are talking about interconnection. The new rules do not simply freeze everything in place. At the same time, when large companies assert that they are taking steps to protect the interests of small providers, Prof. Yoo said that he views such statements with cynicism. Mr. Sallet responded that OTT providers have two key questions: access to programming and access to broadband. The new rules are similar to the policies that have been in place for more than a decade, which are meant to send a strong signal. The various rules and policies should be viewed as a success and as reason for continuation of that policy in broadband.
TIME IS OF THE ESSENCE - CAN THE DEAL BEAT THE DEADLINE?

Presented by the Mergers & Acquisitions Committee

A major merger is pending before the FTC or DOJ. The clients need to have it closed by a date certain or serious adverse financial and other consequences will follow. How can the parties and the government work together to get both sides what they want?

Chair and Moderator:
Ronan P. Harty, Davis Polk & Wardwell LLP, New York, NY

Panelists:
Sabine Chalmers, Chief Legal & Corporate Affairs Officer, Anheuser-Busch InBev, New York, NY
Deborah A. Garza, Covington & Burling LLP, Washington, DC
Michael R. Moiseyev, Assistant Director, Mergers I, Bureau of Competition, Federal Trade Commission, Washington, DC
William H. Stallings, Chief, Transportation, Energy and Agriculture Section, U.S. Department of Justice, Antitrust Division, Washington, DC

Summary:

- **External and internal counsel.** Sabine Chalmers said internal and external counsel roles should be complementary. With respect to internal counsel, they are not antitrust experts, and their work on a large transaction may be a once in a lifetime experience. From personal experience, an in-house team is under a high amount of pressure to get it right – more so than external counsel. Deborah Garza said that internal counsel are not antitrust experts, and a best practice is to remember that the General Counsel is the main client. At the outset, it is important to explain the process and offer recommendations based on the aspects and timing of the transaction. External counsel needs to build trust and convince them of the detailed nature of the deal. To get ready for a merger filing, Ms. Garza suggested speaking with the client to get corporate facts and better understand timing, then sit down with the GC and key business people to properly understand the industry and transaction. Gather basic information and documents from the business side and then work with those teams to get a sense of what keeps them up at night to understand the necessary facts to properly assess the transaction.

- **Deadlines.** Sabine Chalmers explained that a long-stop deadline may be agreed to in the term sheet. Financing conditions drive timing and costs; from business perspective, greatest pressure is an assumption in value of transaction for synergies and as timing pushes against that date, the value decreases. Uncertainty among the business’s employees can also cause damage within an organization. Immediately preceding the financial crisis, we announced merger of Anheuser-Bush & InBev, and there was great pressure to close the transaction before the world collapsed. Ms. Garza agreed that financing is a large driver of a timeline, costs often increase as time drags on. Value of the transaction is determined by timing – whether loss of personnel or synergies – buyer doesn’t want to move forward with a transaction that is gradually deteriorating from the announcement. Regardless of timing pressure, you can’t rely on agencies to accommodate your schedule.
Michael Moiseyev said timing is always an issue to the parties. Communication is paramount. Be sure to be transparent with regulators regarding factors affecting timing pressure. Regulators may try to work with parties when they better understand the context. It’s important to establish at the outset. William Stallings agreed communication is important, but needs to be framed in such a way to allow regulators to advocate to decision makers at the head of the agencies. Knowledge of industry is very important and factors into the review of the transaction. The competitive concerns also drive timing.

- **Multiple jurisdictions.** William Stallings said his section asks about collateral filings from the outset. Coordination with sister agencies is crucial and is something he takes seriously. Simultaneous discussions can allow expeditious and efficient review. Mr. Moiseyev agreed that coordination is alive and well among regulators. It is in everyone’s interest to coordinate among jurisdictions. Many sister agencies will not engage in discussions until a filing is made, so staggering timing doesn’t always work.

- **Provisions.** Mr. Moiseyev said they do pay attention to timing provisions and break-up fees. These are the result of corporate negotiations and certainly inform, but do not have major impact on review. More important are existence of provisions describing divestiture options. This raises a flag to regulators on what problems parties anticipate and gives insight as to areas of interest. Mr. Stallings said of course they review the contract’s provisions, but they still engage in a substantive analysis. Deal review must go up and down the chain within the agency before any divestiture or remedy is suggested.

- **Pre-filing discussions.** Mr. Stallings says pre-filing discussion was more common ten years ago but not so much today. This sometimes occurs once a deal is struck but before the deal is made public. The extra timing allows regulators to get a head start. Mr. Moiseyev suggested starting discussions at the outset, but agreed it’s very uncommon to share the deal prior to it being announced. Discussing a potential deal in a certain industry – competitive dynamics in certain spaces – can be helpful to all parties, even though there are great particularities to each deal. It would be a terrible practice to file a complex transaction with many implications and lots of data (e.g. pharma) and constrain regulators to just 30 days. Ms. Garza said that ninety percent of the time, she will not engage early because 2R request risk is unclear. You don’t want to force a pull and refile in a transaction that could’ve been ET. The most response you could receive from them is where there is an issue – you’re never going to get a green light. Clients need to trust external counsel that they have a good enough sense of risk. Very rarely would it make sense to seek an “advisory opinion.” Mr. Moiseyev agreed

- **Re-filing.** Ms. Garza was asked if she would pull and re-file where the 30 days is coming to an end. She said there was a time when she never recommended that, and even now she will only advise when confident it will succeed. If the remaining matters are routine and there is not a large risk that transactions has strong anticompetitive concerns, then may pull and re-file. On re-filing, Mr. Stallings said he tries to be transparent when there is a dispositive issue. The decision remains with the parties at all
times, but staff may try to signal to parties without recommending any particular course of action. A second request is in progress well before 30 day expiration, so a last minute decision is not necessarily helpful. Mr. Moiseyev said as a policy, they do not discuss pull and re-file. So you must be closely engaged in conversations with staff and be able to read signals from staff. Asked what is in the agency memos suggesting a second request, Mr. Moiseyev said the main issue is confidence in competitive effect and can they articulate it. Evaluation of industry is also important. Mr. Stallings said the memo is just a reflection of a month’s worth of discussions among staff and directors and experts: what are we looking for – what are we trying to find – what evidence do we have to go forward.

- **Settlement and remedies.** Asked about a party looking to resolve quickly, Mr. Moiseyev said it is not a natural process for these types of transactions because there is an assumption of one, quick fix. Reality is that once there is a sense of competitive issues as fairly significant, and then it’s important to come in and present proposed solution or remedy. It’s not a bad idea to consider these remedies all along the way. Remedy evaluation is an important part of the review and is time consuming in and of itself; “waving the white flag” does not trigger a rubber stamp. Engaging in a thoughtful sale process is important to the value of the deal, and this plays into timing realities as well. Mr. Stallings said regulators must attempt to resolve, but at the same time be prepared to file a TRO and litigate. It’s difficult to allow time for fruitful discussions and also prepare for litigation. Mr. Moiseyev said private practitioners must realize that the timing structure for regulators is incredibly compressed. To evaluate a deal and assemble a case in 30 days is unheard of. Regulators want to be able to deliver a decision as quickly as possible, but we must also properly assess a transaction.

- **Discussions with agency leadership.** Asked how to deal with a CEO who wants to meet with someone at the top, Mr. Moiseyev said there is a “natural order of things,” so when discussions with staff have been exhausted, it is natural to want to meet with section heads or even commissioners. Directors often allow staff to handle the matters with latitude, but discussions can proceed and are expected. Internal communication is important so as not to undermine staff. As you move upward, though, the detail of the deal is less known. Mr. Stallings said that just as the CEO never wants a surprise, so too in the government. If client threatens to go over someone’s head, it’s not productive. But there is a natural time for those discussions and it should be preceded by a prep session with staff in order to make them most fruitful. Ms. Garza said she would never surprise staff by going over their heads. Deputies, though, should know what is going on within the division, and should encourage staff’s awareness of these conversations. Sometimes additional discussions are helpful because they introduce another perspective, a new person with fresh eyes who may be able to communicate perspectives more clearly. If a client demands it, though, you may have to, but should always inform staff.
**ANTITRUST RISKS OF MINORITY ACQUISITIONS: U.S. AND WORLDWIDE**

*Presented by the International and Mergers & Acquisitions Committees*

Minority interest acquisitions increasingly attract antitrust scrutiny worldwide. The legal standards for minority acquisitions and ensuing company operations vary across countries. Our panel will explore recent international developments and agency guidance, and discuss how best to identify and minimize risks in minority interests.

**Chair:**
Krisztian Katona, Counsel for International Antitrust, Federal Trade Commission, Washington, DC

**Moderator:**
Fiona A. Schaeffer, Milbank Tweed Hadley & McCloy LLP, New York, NY

**Panelists:**
- Cerry Darbon, Senior Regulatory Counsel, Liberty Global, London, United Kingdom
- James W. Lowe, WilmerHale, Washington, DC
- Carles Esteva Mosso, Acting Deputy Director General for Mergers, DG Competition, European Commission, Brussels, Belgium
- Cristianne S. Zarzur, Pinheiro Neto, São Paulo, Brazil

**Summary:**

**United Kingdom.** Carry Darbon summarized the framework in the United Kingdom. In the UK, a move from material influence to “de facto control” creates a new, reviewable merger event. The same is true of a move from de facto control to control. Any assessment of material influence requires “a case by case analysis of the overall relationship between the acquirer and the target” (¶ 4.15). The CMA indicates that: “a share of voting rights of over 25% is likely to be seen as conferring the ability materially to influence policy – even when all remaining shares are held by only one person...” and “[a]lthough there is no presumption of material influence below 25%, the CMA may examine any shareholding of 15% or more in order to see whether the holder might be able materially to influence the company’s policy. Exceptionally, a shareholding of less than 15% might attract scrutiny where other factors indicating the ability to exercise material influence over policy are present.” The CMA will look to voting patterns and patterns of attendance at shareholders meetings in considering whether a shareholding confers material influence in practice.

- In 2006, BSkyB announced its acquisition of 17.9% of ITV shares. Having reviewed previous voting patterns in shareholder meetings, the UK found that BSkyB would be able to exercise enough votes to block special resolutions, and that this would limit ITV’s management and strategic options and lastly that BSkyB’s material influence over ITV was likely to lead to a significant lessening of competition. BSkyB was ordered to divest its shareholding to below 7.5%, the lowest level at which a shareholding alone has been found to confer material influence in UK.

- In 2013, Ryanair held a 29.82% interest in Aer Lingus. CC found that Ryanair had material influence over Aer Lingus because Ryanair’s stake gave it the ability to block special resolutions and to block the sale of Heathrow slots which allowed it to influence Air Lingus’s ability to pursue its commercial policy and strategy. Ryanair was ordered to sell down to 5%.
**Germany.** In Germany, acquisition of minority shareholding requires merger clearance if the turnover thresholds are met and no exemptions apply, and 1) the purchaser acquires (negative) sole or joint control over the Target; or 2) it results in the acquisition of either capital or voting rights of 25% or more; or 3) it results in an acquisition of competitively significant influence of the purchaser over the Target. The factors that make the acquisition competitively significant include the level of shareholding acquired; additional rights; and competitive relevance.

- In 2008, A-TEC/Norddeutsche Affinerie, an acquisition of 13.75%, was competitively significant because the voting presence at the target’s annual shareholder meetings in the last 3 years was very low, which granted the acquirer a de-facto blocking minority comparable to 25%.

- In 2001, Deutsche Post’s acquisition of a 24.8% in Trans-o-flex was competitively significant because the companies were active in neighboring markets. DPAG was entitled to nominate two members of the supervisory board allowing DPAG to make an increase in the share capital in trans-o-flex or an expansion of the company’s business activities into other markets more difficult.

- In 2004, Lausitzer Rundschau acquired 24.9% of KG Wochenkurier, which was competitively significant because the companies were direct competitors in newspaper publishing. Also the minority shareholding entitled Lausitzer to nominate a member of the advisory board.

**United States.** James Lowe explained that U.S. antitrust law has always reached minority investments. Sherman Act § 1 can reach a minority investment if it had an immediate impact on competition. Clayton Act § 7 also always reached stock acquisitions not made solely for investment, while § 8 addresses similar concerns in barring interlocking directorates. And § 7A requires pre-notification of most corporate transactions. Both the FTC and DOJ have challenged minority interests under both collusion and unilateral effects theories, including International Association of Machinists and Aerospace Workers (DOJ 1994), Dairy Farmers of America/Southern Belle (DOJ 2005), Carlyle/Riverstone/KMI (FTC 2007).

**EC.** Carles Esteve Mosso explained that in the EU, pre-existing non-controlling minority shareholdings are taken into account when analyzing the effect of a later concentration. Acquisitions of non-controlling minority shareholdings are not subject to notification. The EU drafted a white paper to enable the Commission to review certain acquisition of non-controlling minority shareholdings.

**Brazil.** Cristianne S. Zarzur explained that under the New Brazilian Competition Act and further regulation the acquisition of minority shareholdings became subject to certain rules based on financial thresholds and the competitive situation. These include:

- In cases in which the target is not a competitor nor active in a vertically-related market, 1) acquisition that confers upon the acquirer the direct or indirect ownership of 20% or more of the capital stock or voting capital of the target; and 2) acquisition made by an owner of 20% or more of the capital stock or voting capital, provided that the ownership interest directly or indirectly acquired, from at least one seller taken individually, is equal to or higher than 20% of the capital stock or voting capital.

- In cases in which the target is a competitor or is active in a vertically-related market, 1) an acquisition that confers a direct or indirect ownership interest equal to 5% or more of the voting capital or capital stock; and 2) a most recent acquisition which, individually or together with others, results in an increase in
ownership interest equal to or greater than 5%, in companies which the acquirer already hold 5% or more of the voting capital or capital stock.
ARE ANTITRUST ATTACKS ON PATENTS HARMING INNOVATION?

Presented by the Intellectual Property, International, and Unilateral Conduct Committees

In recent years U.S. and foreign antitrust enforcement has taken a far more aggressive stance toward the exercise of market power by patent holders. Enforcers here and abroad have focused on pharmaceutical patent litigation settlements and patents involved in standard setting as key areas. Our panel of four experts will debate whether these trends threaten to undermine innovation.

Chair and Moderator:
Alden F. Abbott, Deputy Director of the Edwin Meese III Center for Legal and Judicial Studies and the John, Barbara, and Victoria Rumpel Senior Legal Fellow, Heritage Foundation, Washington, DC

Debaters:
Jamillia P. Ferris, Office of General Counsel, Federal Communications Commission, Washington, DC
Damien A. Geradin, Founding Partner, EDGE Legal Thinking, Brussels, Belgium
Gail F. Levine, Vice President, Verizon Communications Inc, Washington, DC
Abbott B. Lipsky Jr., Latham & Watkins LLP, Washington, DC

Summary:
Abbott: Opening remarks

There is a concern that standard setting organizations (SSOs) may be increasing the market power associated with patents by setting standards that require access to those patents. On the other hand, many SSOs require standard essential patent (SEP) holders to make fair, reasonable, and non-discriminatory (F/RAND) commitments and prohibit SEP holders from seeking injunctive relief to enforce their rights. Recent government actions in this area include three FTC settlements (N-Data, Robert Bosch, and Motorola Mobility/Google), the 2011 FTC Report, the 2013 Joint DOJ-PTO Statement, the USG Statement to ITU, several DOJ and other speeches, the DOJ Business Review Letter regarding IEEE’s policy change, and the FTC PAE study.

Lipsky: Antitrust attacks on patents threaten innovation

In the past, the antitrust agencies have not kept up with antitrust law as it evolves. For example, when the courts moved away from the “per se tsunami” that prohibited almost all vertical restraints, DOJ still prosecuted patent tie-ins as per se violations, when such practices were instead subject to the Rule of Reason. This had a profound impact on the economy. As the agencies reigned in antitrust enforcement of IP rights, we have seen the benefits of innovation in the form of high technology – e.g., the Internet, smartphones. The more recent uptick in antitrust enforcement and policy speeches regarding the threats posed by SEP holders will threaten that progress.

Ferris: Antitrust enforcement of patents is limited to conduct that harms competition

We do not have to choose between antitrust and IP. The antitrust and IP laws share the common purpose of promoting competition and consumer welfare. Further, the antitrust laws recognize that IP rights do not necessarily grant market power. The three more recent FTC enforcement actions referenced above focused on the voluntary nature of the SEP holder’s commitment to license on F/RAND terms; the patent itself did not confer
market power. Instead, it was the standard-setting process that conferred market power in reliance on the SEP holder’s willingness to make a trade: market power in exchange for a voluntary F/RAND commitment. We need more clarity in the standard setting process so that both holders and implementers have a clear understanding of SEP holder commitments. The antitrust enforcers should engage with their international counterparts.

**Geradin: Concern regarding abuse by SEP holders does not reflect today’s market reality**

The question is whether antitrust attacks harm innovation, not whether enforcement does. For the last ten years, we have heard that SEP holders have too much bargaining power and can therefore engage in hold-up or royalty stacking bolstered by the threat of seeking injunctive relief. Contrast companies like Apple, who before 2007 was not involved in standardization, with companies like Nokia and Ericsson, who have participated in standardization for decades. If the concern is that SEP holders will abuse their bargaining position, how is it that companies like Apple are soaring, while companies like Nokia and Ericsson are fading away? Without injunctions, it is extremely hard for holders to get licensing agreements with big companies. The result is that patent holders assign their rights to patent assertion entities in order to receive some return on their investment. It is important to keep a sense of perspective. The smartphone market is one with many entries and exits. It is hard to reconcile the theoretical rhetoric on these issues with the reality of the market. If you restrict the ability to seek injunctions, you tip the balance in favor of implementers, causing a problem of hold-out instead of hold-up.

**Levine: The antitrust agencies treat patents like any other property rights**

Should antitrust agencies even be weighing in on issues regarding patents? DOJ and FTC weigh in because they have expertise in detecting how agency practices affect competition and consumers. They exercise that same expertise in patent law. As a result, we see antitrust agencies weighing in on patent issues. In modern antitrust advocacy, one theme is that patents are just like other kinds of property, which makes today’s question tricky. The agencies likely do not perceive what they are doing as attacks on patent rights; what they are doing is treating IP just like other types of property. Where hold-up can happen, abuse is possible, and patents should not be immune. Most recently, DOJ issued its BRL regarding the IEEE’s policy change. That action is probably best understood as part of a long and proud tradition of using economic analysis to help determine how to treat property rights in every field it judges, whether patent or otherwise.
COMPETITION LAW ISSUES AROUND BIG DATA

Presented by the Consumer Protection, Joint Conduct, and Unilateral Conduct Committees

Data is an increasingly important competitive asset for firms. This panel will discuss competition-law issues surrounding ownership of data and consumer-protection issues relating to data breaches in the U.S. and EU.

Chair and Moderator:
Ryan W. Marth, Robins Kaplan Miller & Ciresi LLP, Minneapolis, MN

Panelists:
Mary Ellen Callahan, Jenner & Block, Washington, DC
The Honorable Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, Washington, DC
Sara Walsh, Counsel, Google Inc., Mountain View, CA
Peter Willis, Bird and Bird, London, United Kingdom

Summary:
Commissioner Ohlhausen’s Presentation

- Commissioner Ohlhausen said the focus should be on reduction of competition in the market, and to use consumer protection laws to deal with Big Data issues. Previous merger reviews have treated data as a commercial good, including Microsoft / Yahoo!; Google/ITA; FICO/Experian. The FTC has taken a similar approach in Google/Doubleclick and Facebook/WhatsApp. Some arguments for using antitrust to enforce privacy concerns include 1) assessing privacy as a non-price dimension of competition; and 2) balancing corporate actions that may harm privacy. Privacy can be a tool in commerce, and new data-hungry products fuel privacy concerns, while increasingly websites and applications are competing based on their privacy settings. There are also concerns with inserting privacy values into competition analysis:
  - May ignore efficiencies from consolidation of data
  - May distort antitrust analysis, outcomes can depend on the reviewer’s unique personal view on privacy
  - Discriminates in favor of organic collection of data
  - Creates incentives for firms to experiment with new deal structures to obviate privacy issues
  - Risks innovation from data consolidation

- There are several questions for choosing the right approach to privacy in antitrust analysis
  - What is the nature of the harm? Can a regulator successfully blend an objective antitrust approach?
  - What is the likely scope of the harm? Antitrust is concerned with systemic harm; consumer law focused on individual choice
  - Can the available legal remedies address the harm? Blocking a transaction may not stop the relevant privacy harms

Hypothetical 1: The Social Network Merger. Two of the largest social networks agree to merge; they both collect user data for the purposes of marketing and refining their product
• Should user data be considered a relevant market? If so, how would we determine whether the merged firm is likely to substantially lessen competition in the market? Ms. Walsh highlighted that there are two types of data – that which is being sold and that which is used as an input to target advertising. She also indicated that data should be viewed as a “non-rivalrous good” like sunshine: everyone has access to it so it is less relevant to antitrust analysis. Previous mergers have provided the relevant framework for analysis (e.g., Facebook/Whatsapp). Existing antitrust analysis like SSNIP and hypothetical monopolist test are both useful in analyzing mergers implicating Big Data issues.

**Hypothetical 2: Online Retailer Acquires Search Engine.** A sophisticated online retailer that makes product recommendations based on deep analysis of prior purchases acquires a small search engine with a restrictive privacy policy and indicates that it will use the search engine as a tool to further this analysis of users.

• Does the move from a more restrictive privacy policy to a less restrictive policy raise any consumer protection concerns? Does the inability of consumers to use a search engine without providing user data raise antitrust concern? Ms. Callahan indicated that she would advise her clients to make sure that the parties are honoring their previous privacy policies. She would be especially concerned with “never” clauses (e.g., “we will never share your data”) in existing policies and material omissions from new policies. She would also fold the privacy policy analysis into the due diligence assessment of the deal. Commissioner Ohlhausen indicated that when the expectation that every user is going to read every privacy policy, that isn’t realistic. Learned intermediaries are useful (e.g. privacy and technology bloggers, super users). They provide an important check on flawed privacy policies. Mr. Willis indicated that there wouldn’t be much antitrust concern in the loss of the maverick search engine that had user-friendly privacy policies.

**Hypothetical 3: Online Retailer Expands Into New Fields.** Retailer from Hypothetical 2 starts an email service, a browser, a photo-sharing service, among other services, all with an eye towards gathering more user data.

• Does this expansion into new markets to gain even more user data raise an antitrust concern? The panel indicated the analysis would still focus on Section 5. Ms. Callahan indicated that this expansion does raise a “mosaic” issue in that a single entity would be able to build a complete profile of any given user based on the variety of data provided by each service. The competition analysis isn’t changed – in fact, competition may be enhanced with a new player in each relevant market.

**Hypothetical 4: Merger of Email Providers.** Two online email providers with similar privacy policies agree to merge. The target has invested in data security and has had few breaches, while the acquiring party has not made investments in security and has been compromised several times. As part of their synergies analysis, the acquiring party states that it will reduce costs of the merged firm by decreasing investment in security in the target’s operations.

• Does the potential for the transaction to increase likelihood of data breach raise a privacy or competition issue? Ms. Callahan indicated that the EU, Latin American countries, and some countries in the Asia-Pacific region have adopted broad data protection provisions that could handle situations like this. She also recognized that data localization was having an impact on competition. “Data protection, not data protectionism” was the right approach.
CUTTING-EDGE CONSIDERATIONS IN COMPLIANCE PROGRAM DESIGN

Presented by the Compliance & Ethics and Corporate Counseling Committees

Compliance programs can benefit from improvement or redesign to address new business practices and legal developments. Cutting-edge considerations in constructing and implementing state-of-the-art compliance programs include: global programs with local nuance, lessons from Apple’s monitor, using consultants, utilizing technology in document management and down raid and M&A issues.

Chair:
Elai Katz, Cahill Gordon & Reindel LLP, New York, NY

Moderator:
D. Daniel Sokol, University of Florida, Levin College of Law, Gainesville, FL

Panelists:
Roxane C. Busey, Baker & McKenzie LLP, Chicago, IL
Claire Debney, Vice President & General Counsel, Group Legal Affairs & Compliance, Reckitt Benckiser Group plc, Slough, United Kingdom
Kyriakos Fountoukakos, Herbert Smith Freehills LLP, Brussels, Belgium
Michele C. Lee, Senior Litigation Counsel, Twitter, San Francisco, CA

Summary:

• Kyriakos Fountoukakos spoke about the changes that globalization and IT are causing in compliance issues. In particular, tracking electronic documents has made the entire compliance industry much more sophisticated, and much more difficult. Then Daniel Sokol noted two key issues coming to the forefront lately. First, the rise of privacy concerns. Second, the case of AU Optronics, where management was extremely unrepentant after being caught engaging in anticompetitive behavior. The result was strict compliance terms being put into place.

• Claire Debney spoke about her company’s compliance program, which Sokol called “cutting edge” and innovative. The key feature of this program was the use of a service called “Contract Express,” which lets business people get contract terms approved by compliance people quickly and easily. In particular, specific terms go through review, and then are put on the approved list. If a contract involves only previously approved terms, then the entire review process is very fast.

• Roxane Busey discussed the importance of tracking what your JV partners are doing. Sometimes, you can be fully above board, but you run risks by going into business with other bad actors. Compliance difficulties result from tracking people who may not want to cooperate.

• Michele Lee suggested that compliance attorneys really try and learn the business in order to give case-specific advice. General antitrust counseling is fine, but you need to worry about the actual specific terms being put into contracts. You need to know the business, so you can tailor compliance programs around it.
• Kyriakos Fountoukakos suggested that compliance officers in the EU need to worry about information exchange issues, and about hub and spoke conspiracy issues. Both are very “hot” in Europe lately. Roxane Busey noted that antitrust monitors put into place as a result of prior consent decrees are not substitutes for compliance programs. They are really there to monitor past patterns of bad behavior, not to assess new practices. Daniel Sokol said that boards of director are increasingly aware of compliance issues, because of liability reasons. He suggested that GCs review the International Board of Trade’s manual on compliance.

Kyriakos Fountoukakos said companies should not get “credit” for a strong compliance program; a strong compliance program isn’t a bonus. Everyone should have a strong compliance program, so regulators won’t give you credit for trying and failing. Regulators also don’t want to make compliance into a box-checking exercise.

• One audience member asked the panel for their thoughts about external indicia of violations. How is someone to know if their compliance program is working? Roxane Busey said that internal leniency programs were a good sign – you want employees to feel like they can report violations to higher ups without reprisal. Claire Debney noted that one thing she looks for is if no violations are being reported, then that’s a bad sign. This is especially true in emerging markets, where it’s not plausible for their partners to not have violations.
INS AND OUTS OF GOVERNMENT CONDUCT INVESTIGATIONS

Presented by the Federal Civil Enforcement Committee

Learn how to navigate non-merger civil investigations, including strategies for getting the government to open (from the complainant’s perspective) or close (from the target’s perspective) an investigation, complying with government requests, voluntary submissions and expert contributions, and handling private follow-on litigation.

Chair:
Rebecca Valentine, Washington, DC

Moderator:
Owen Kendler, Assistant Chief, Telecommunications & Media Enforcement Section, U.S. Department of Justice, Antitrust Division, Washington, DC

Panelists:
Barbara Blank, Deputy Assistant Director, Anticompetitive Practices Division, Bureau of Competition, Federal Trade Commission, Washington, DC
M. Howard Morse, Cooley LLP, Washington, DC
Kevin J. O’Connor, Godfrey & Kahn SC, Madison, WI
Gary P. Zanfagna, Chief Antitrust Counsel and Associate General Counsel, Honeywell International Inc, New York, NY

Summary:

Recent areas of focus for conduct investigations. Ms. Blank and Mr. Morse observed that recent areas of focus for federal agencies in conduct investigations have included trade associations; standard essential patents and other IP issues; exclusive dealing; most-favored nation provisions; bundling; and standard-setting organizations. Mr. O’Connor addressed the state perspective. State AGs have recently focused enforcement efforts on issues related to healthcare; state-level criminal conduct; follow-on direct and/or indirect purchaser damages claims; and resale price maintenance; in addition to those cases in which the state agency believes the federal agencies will pass on an investigation.

Initiation of a conduct investigation. A conduct investigation may be spurred by competitor complaints (Ms. Blank noted that the FTC is “inundated” with competitor complaints); consumer complaints (e.g., from the FTC’s consumer hotline); internal initiation by the staff; or evidence uncovered in connection with another investigation such as a merger. The panelists gave the following tips for effective complaints, if you are the party seeking to bring a complaint to the agencies:

• Ensure that you have a well-articulated theory of harm to consumers, whether it is increased prices, reduced output, or reduced innovation;
• Manage client expectations with respect to time, cost, and burden of complaining to the agencies;
• Ensure that your documents and witnesses are “clean” of the conduct about which you are complaining
• When possible, use witnesses from the business to explain key issues and industry dynamics.

Practical differences between merger and nonmerger investigations. Merger investigations have a cooperative posture as the parties are coming to the agencies. The parties under investigation have an information advantage.
vis-à-vis the agencies, as they have had time to flesh out their arguments in advance of approaching the agencies. Also, the merger review clock adds a time pressure.

Conduct investigations have no set time limit and less time pressure as a result. The parties under investigation are at an information disadvantage vis-à-vis the agencies because often their parties only learn about the investigation upon receipt of a CID.

**Informal vs. formal investigations.** Mr. Zanfagna and the panelists in private practice advised that upon receipt of an access letter or other indication of an informal investigation, the first thing to do is to begin your own investigation to get to the bottom of the inquiry as soon as possible. Going to the government is usually in the best interests of the parties, as a way to feel out the government’s theories and evidence and try to convince the agencies to close the investigation during the informal phase. Voluntary productions of key documents and white papers can be helpful to the agencies.

When a subpoena is issued, in addition to launching your own internal investigation, it also is important to manage client expectations regarding the timing, cost, burden, etc., of responding to formal process. Ms. Blank observed that with conspiracy cases, the agencies tend to go to process very quickly. But, with conduct that is less clear-cut, the investigations may stay in the informal phase longer. There is no minimum amount of work that needs to be done to close an investigation. All of the panelists agreed that regardless of whether the investigation is formal or informal, maintaining credibility with the agencies is paramount.

**Use of experts.** Experts are useful when engaged early-on, even if they are not revealed until the agencies until later. However, it can be helpful for the economist to surfacing in the early stages of the investigation to initiate an economist-to-economist dialogue. All of the panelists agreed that industry experts can be very useful in investigations involving complex industries.

**Remedies.** Parties under investigation should begin considering potential remedies early on in an investigation, long before ever discussing them with the enforcement agency. Engage in a cost/benefit analysis with the client to determine what remedies may even be feasible for them. Parties should consider the phase of the investigation and whether there are advantages to settling during the informal phase. Ms. Blank noted that the FTC will always approach the parties first with a proposed complaint, not a proposed remedy. Mr. Morse explained that this is not always the case with State AGs, so parties should request a meeting to obtain more information about the State AG’s theories and evidence before engaging in any remedy negotiations.

**Pitfalls.** There may be a loss of credibility if the proffered arguments are not supported by or are contradicted by the company’s documents or witnesses. Also, parties should always assume that the government has an information advantage and the resources to pursue any of its theories. At the State AG level, avoid going to the front office too quickly and going around the staff. Finally, keep in mind changed market conditions (e.g., a company used to have 10% of the market for product X and now has 60% as conditions have changed).
YOUR LOSS, MY GAIN? PROVING DAMAGES ACROSS JURISDICTIONS

Presented by the Civil Redress and International Committees

As the EU moves to promote antitrust damages actions, litigants need to understand how differences in proving antitrust damages affect their claims across jurisdictions. This panel will examine how issues such as causation, treatment of direct v. indirect purchasers, umbrella damages, admissibility of evidence, use of economic analysis and expertise of the court can affect damages outcomes.

Chair:  
Melissa H. Maxman, Cozen O’Connor, Washington, DC

Moderator:  
Alexander Rinne, Milbank Tweed Hadley & McCloy LLP, Munich, Germany

Panelists:  
Catherine M. Beagan Flood, Blake Cassie & Graydon LLP, Toronto, ON, Canada  
Stephen Kon, King & Wood Mallesons SJ Berwin, London, United Kingdom  
Martha S. Samuelson, Analysis Group, Boston, MA  
Steven N. Williams, Cotchett Pitre & McCarthy LLP, San Francisco, CA

Summary:

- **EU.** Stephen Kon discussed the EU Directive signed into law on November 26, 2014. He referred to it as a “challenging piece of legislation.” He explained that it tries to 1) effectively implement the rules of competition throughout the EU, and 2) harmonize the rules. The EU Directive only establishes minimum standards, which means that any member state is free (subject to some fundamental principles) to introduce more stringent rules. Mr. Kon said the Directive reflects the principle of full compensation, but not overcompensation. Indirect purchasers do have a right to claim damages, and there is a pass-through defense available in member states. There is a minimum limitation period of 5 years from the point the victim is expected to have knowledge of infringement, and there is joint and several liability (besides the immunity applicant). Mr. Kon also discussed what the Directive doesn’t cover: questions of causation or quantification; collective redress (opt-out or class action); or jurisdiction.

- **Germany.** Alexander Rinne explained the German principles of full compensation and the unavailability of punitive damages. Germany is often chosen by litigators as a preferred jurisdiction with its transparent, efficient and (relatively) fast procedure. In Germany, there is no process for collective action by law; usually professional claimants can set up vehicles (e.g., buy claims and bring suit). Germany has a loser-pays-all system. There is no pass-on, but trends suggest that there is an exception if the defendant is unjustly enriched because the indirect purchasers will not seek damages (especially in the absence of a collective redress system). Courts are allowed to estimate the damages, but claimants have to bring forward reliable facts to support.

- **Canada.** Ms. Beagan Flood said that in Canada, indirect purchasers do have a cause of action. In theory, damages are allocated between direct and indirect purchasers; however, there has not been a trial decision subsequent to the finding that this cause of action exists. In Canada, subsection 36(1) of the...
Competition Act provides a private right of action to any person who has suffered loss or damage as a result of a violation of the criminal provisions of the Act (conspiracy, bid rigging, misleading advertising, deceptive telemarketing, price maintenance occurring prior to 2009). The costs of investigation and proceedings are recoverable, but there are no treble damages (only actual loss) and no punitive damages available. The limitations period is 2 years. In addition to relying on section 36, plaintiffs often plead common law torts or equitable claims to extend the limitations period and to obtain additional remedies (e.g., punitive damages, or possibly disgorgement under waiver of tort). The extent to which the Competition Act can be enforced indirectly through tort law or equity is unsettled. Ms. Beagan Flood explained the “waiver of tort,” which is an equitable claim for disgorgement. It is uncertain if this is a remedy (such that you first need to prove that damages were caused) or a cause of action (such that you only need to prove there was wrongful conduct). If the remedy is based on defendant’s gain instead of plaintiff’s loss, then that provides a commonality such that a class can be certified. She explained that it is significantly easier to obtain certification in competition law cases in Canada than it is in the US; all the class needs to show is that they have some common basis of fact. Finally, Ms. Beagan Flood described one case where U.S. courts allowed information received in the United States to be used in Canada, but the order did not stand in Canada.

- **United States.** Steven Williams said that in the US, private enforcement has an important role, along with public enforcement, in preventing anticompetitive conduct and cartels. He discussed the principles of joint and several liability, the recovery of attorney’s fees, and the unavailability of punitive damages. He introduced the judge-made rules that limit the Sherman Act—*Hanover Shoe* and *Illinois Brick*—and the approximately 32 states that allow indirect purchaser claims. He discussed the decision in *Associated General Contractors of California, Inc. v. California state Council of Carpenters (AGC)*, set forth a balancing test used to limit the broad scope of the Sherman and Clayton Acts so that wrongdoers do not have to pay everyone who was affected. The most important factors discussed in the case was the nature of the plaintiff’s injury and whether the plaintiff was a market participant in the relevant market. Mr. Williams also described that damages are determined by estimating the but-for price, which is typically determined by experts via regression analysis. In civil cases in the United States, the plaintiffs don’t get as much benefit as they do in some other countries for criminal pleas—it doesn’t relieve civil plaintiffs of the burden of proving their claims.

- Martha Samuelson provided her views as an economist. There are questions around the world as to whether the jurisdiction wants to be like the U.S. when it comes to private and public antitrust enforcement. For the most part, other countries generally want private actions, but don’t want to go as far as the U.S. does. She described that there is no general purpose damages approach in the US. There is a huge reward for the plaintiff to win its case (treble damages) but also huge burden to get there (the rigor around damages and pre-trial procedures). Pre-trial discovery rules, and funding behind private litigation, will be key to the evolution of international antitrust practice and will drive the ultimate requirements (process and substance) for proof of antitrust damages outside the U.S.
BENCH TRIALS: WHAT IS THE BEST PRESENTATION?

Presented by the Civil Redress and Trial Practice Committees

The DOJ’s recent antitrust cases against American Express and Apple were tried to the court. The FTC brings proceedings before an ALJ, and for private litigation, bench trials and injunctions are before a single fact finder. What are the best methods of presentation? What are good examples from recent trials? We will hear advice and criticism from a federal district judge and leading practitioners.

Chair and Moderator:
Layne E. Kruse, Norton Rose Fulbright, Houston, TX

Panelists:
The Honorable Michael M. Baylson, Judge, U.S. District Court Eastern District of Pennsylvania, Philadelphia, PA
Ted D. Hassi, O’Melveny & Myers LLP, Washington, DC
Melissa H. Maxman, Cozen O’Connor, Washington, DC
Robert C. Walters, Gibson Dunn & Crutcher LLP, Dallas, TX

Summary:

• **Choice of bench trial.** When deciding between a bench and jury trial the panel noted that juries are more likely to find for plaintiffs when the plaintiff is an individual consumer versus a corporation due to the sympathies involved and the impression that it is David v. Goliath. In situations where the plaintiff is also a corporation, however, there are fewer sympathies and fewer reasons to lean toward a jury trial. But it is important to consider that a judge is simply a jury of one and will still come to the case with his own prejudices and experiences, which is why attorneys should try to understand the propensities of the judge you are assigned to, especially to determine if the judge has experience with antitrust, business, or economics in previous cases. The panel also agreed that judges generally have shorter time limits for bench trials and that they often argue for more time. However, the time limits provide a positive restraint on the parties forcing them to be disciplined and focused with their arguments.

• **Pre-trial for a bench trial.** Judge Baylson and the practitioner panelists also noted that submitting proposed findings of fact and short briefs before trial can be very helpful to the judge. Judge Baylson commented that as long as the parties are not submitting repetitive documents, prehearing filings can be extremely useful in assisting the judge to organize his/her thoughts before the hearing. The panelists also suggested that *Daubert* motions are useful in bench trials as well as jury trials because they provide another opportunity for the attorneys to be persuasive about their case before the judge, even if the motion is likely to be overruled.

• **Opening statements.** Parties should always request to have opening statements even if the judge does not want openings. Judge Baylson agreed, stressing that it is his practice to always allow openings because it provides the framework for the case moving forward. With a bench trial, attorneys may weave the fact and law arguments together and should consider scaling down the fact presentation if the judge hearing the case has been involved from the beginning of the case.
• **Witnesses.** Some judges request declarations from witnesses instead of direct testimony to cut down on the length of the trial. One concern is that a judge reading a statement is not as persuaded as if they heard the witness in person. The parties should stress the importance of hearing key witnesses live for both direct and cross examination. Judge Baylson suggested that presenting dry information like statistics or data via declarations rather than in person testimony might be worthwhile. If the information can be explained in writing, it can be easier for the judge to follow and review again than if the testimony is only presented orally.

Judges sometimes also request to read deposition transcripts rather than playing video of the depositions. A potential compromise is for the lawyer to summarize the deposition content and only play key excerpts from the video to save on time. This can also be more persuasive because the attorney has the ability to characterize the testimony in her summary and highlight the most important sessions via the video.

• **Evidence.** Provide copies of exhibits to judge and have a second copy available for the law clerk. As technology improves, documents are often not shown in their entirety; instead attorneys focus the judge or jury on specific passages. The panelists recommended still showing the most important documents to the judge in their entirety to allow the fact finder to spend more time with the document and fully understand the significance.

• **Demonstratives.** Judge Baylson stressed the use of chronologies and other demonstratives, which he believes are extremely beneficial to understanding the case. The best demonstratives are simple and make the point obvious. The panel reviewed some demonstratives used in recent cases like *U.S. v. Apple*, *U.S. v. American Express*, *U.S. v. Bazaarvoice*, and *O’Bannon v. NCAA* to stress the importance of simple and effective demonstratives.
BRIEFING WITH THE STATE ENFORCERS

Presented by the State Enforcement Committee

A panel of distinguished state enforcers will describe their recent accomplishments, current actions and enforcement priorities, focusing on individual state efforts as well as multi state matters.

Chair and Moderator:
Victor J. Domen Jr, Senior Antitrust Counsel, Office of the Attorney General, Nashville, TN

Panelists:
Brett Delange, Deputy Attorney General, Office of the Attorney General, Boise, ID
Schonette Jones Walker, Assistant Attorney General, Office of the Attorney General, Baltimore, MD
Anne E. Schneider, Assistant Attorney General Antitrust Counsel, Office of the Attorney General, Jefferson City, MO
Saami Zain, Assistant Attorney General, Office of the Attorney General, New York, NY

Summary:
The moderator introduced the panel by explaining how well the AGs work together, primarily through NAAG.

Enforcement actions. Then Saami Zain (New York) summarized recent state enforcement actions in price fixing, including multiple actions involving government suppliers: a Connecticut enforcement action against snow plow companies who collectively refused to bid for town snow removal, an Oregon action against road marking vendors, a Michigan action involving a division of markets in the energy industry, and a Puerto Rico action against school bus providers.

American Express. Anne Schneider (Missouri) discussed the American Express case, which primarily involved seventeen states, and challenges to the membership agreement limitation on vendor assisting in a customer’s choice of payment card. This was coordinated by the payment systems group of the NAAG working group, along with the Justice Department. The case required extensive discovery, with many depositions, facts and experts, and revisions of the pleadings. The states were heavily involved throughout, including helping with witnesses at the trial alongside the Justice Department. Victor Domen (Tennessee) emphasized that the state enforcers are not just sitting back and piling on; they are an important part of the case.

Mergers. Schonette Jones Walker (Maryland) summarized the merger updates. In particular, she discussed the work of multiple states coordinating with the FTC on its challenge to the U.S. Foods-Sysco merger. Jones Walker said that the various states were especially important for collecting information from restaurant owners related to local food distribution. Victor Domen (Tennessee) agreed, noting that the state attorneys general can provide the views of local concerns. In his view, the merger would affect the profitability of small restaurant owners in his state.
GOVERNMENT ENFORCEMENT AGAINST MONOPOLIZATION: DEAD OR ALIVE?

Presented by the Federal Civil Enforcement, International, and Unilateral Conduct Committees

The past decade has seen few government cases brought under Sherman Act § 2 and abuse of dominance statutes. A panel of government enforcers and private practitioners discuss the reasons for this phenomenon and look ahead to whether an uptick in single firm conduct matters can be expected and, if so, for which kinds of practices.

Chair:
James B. Musgrove, McMillan LLP, Toronto, ON, Canada

Moderator:
Timothy J. Muris, Kirkland & Ellis LLP, Washington, DC

Debaters:
Cecilio Madero Villarejo, Deputy Director-General Antitrust, DG Competition, European Commission, Brussels, Belgium
Joseph Ostoyich, Baker Botts LLP, Washington, DC
Sonia K. Pfaffenroth, Chief of Staff, U.S. Department of Justice, Antitrust Division, Washington, DC
Stephen Weissman, Deputy Director, Bureau of Competition, Federal Trade Commission, Washington, DC

Summary:

- **U.S. enforcement.** Former FTC Chairman Muris opened the session noting the divergence in agency enforcement between the FTC and DOJ over the past 15 years. The FTC has continued to bring cases at the rate of one or so per year. The DOJ has been dormant since Dentsply and American Airlines in 1999 and the withdrawal of the Section 2 Report.

- **EU enforcement.** Mr. Madero Villarejo gave an overview of Article 102 enforcement in the EU. There have been about three abuse of dominance cases per year for the last 10 years, with 33 cases total and fines totaling over $2 billion. Behavioral remedies were also imposed in some cases. He noted that there are fewer abuse of dominance cases than other types of cases as the EC seeks to intervene only in exceptional circumstances. There are about 10-12 ongoing investigations right now. The other panelists agreed that monopolization enforcement is more “alive” than “dead” with recent high-profile cases including McWane. Both Ms. Pfaffenroth and Mr. Weissman stressed that both agencies currently have open investigations into Section 2 issues, and Mr. Weissman said he believes the FTC is “appropriately active” on enforcement. They all agreed that monopolization cases are more difficult cases to build because the same conduct can have both anticompetitive and procompetitive aspects. Ms. Pfaffenroth also noted that enforcement against monopolization is not necessarily limited to those cases brought under Section 2, as the issues can arise in the context of a Section 1 case (e.g., Blue Cross Blue Shield) or a merger (e.g., National Cinemedia).
• **McWane.** The panel discussed the recent 11th Circuit decision affirming the Commission’s ruling in *McWane*, in which it found that *McWane* unlawfully maintained a monopoly in ductile iron pipe fittings via a rebate program. Mr. Ostoyich (who defended McWane) commented that the decision conflated intent and effect, citing examples of McWane’s intent to drive out rivals as evidence of anticompetitive effect. Mr. Weissman and Ms. Pfaffenroth disagreed, commenting that intent evidence is relevant to a competitive effects analysis as it can shed light on the effect of a particular contract or program. Mr. Weissman commented that he was encouraged that the 11th Circuit looked at the practical effect of the program, much like the court in *Dentsply*.

• **Standard-essential patents.** The panelists briefly discussed standard essential patents and standard setting organizations. Ms. Pfaffenroth noted the recent IEEE business review letter that anticompetitive effects were unlikely to flow from the proposed change to the IEEE policies. Mr. Weisman commented that the “easier” cases related to standard setting involve fraud in the standard-setting process. The “harder” cases are those involving what comprises a FRAND commitment and whether a party must license technology to a competitor, as these are highly fact-specific cases.
HOW TO SETTLE A PATENT CASE AFTER ACTAVIS

Presented by the Health Care & Pharmaceuticals Committee

In the wake of the Supreme Court’s 2013 Actavis decision and other recent cases, pharmaceutical companies require practical guidance on whether and how to settle branded-generic patent disputes. Our panelists will provide such guidance as they discuss the antitrust ins and outs of settlement negotiations and the common issues that arise.

Chair and Moderator:
    Michael H. Knight, Jones Day, Washington, DC

Panelists:
    Bradley S. Albert, Deputy Assistant Director, Health Care Division, Bureau of Competition, Federal Trade Commission, Washington, DC
    Eric Grannon, White & Case LLP, Washington, DC
    Amanda P. Reeves, Latham & Watkins LLP, Washington, DC

Summary:

Bradley Albert said that the key antitrust question is whether the payment induced the generic to stay out of the market. Entry of an authorized generic will reduce the revenue of the brand. There are various ways companies orchestrate side deals: a license, a deal not to compete, or an exclusive distributorship. The more creative companies create an acceleration clause. When analyzing the evidence for an anticompetitive side deal, the FTC looks at the negotiation evidence.

Eric Grannon believes that if the FTC wants a hard and fast rule that companies can’t do any other business while negotiating settlement – they’ll have to get Congress to legislate because that’s not what the case said. There are safe harbors:

- Innovator and generic can settle on any entry date within the patent term without concern as long as no “payment”
- Innovator can pay generic the innovator’s avoided litigation expenses
- Parties can demonstrate independence of the settlement from business transactions by doing them at different times.

Outside of the safe harbors, what actions will get you into hot water? FTC thinks Actavis reflects a two part framework, but the reasoning seems irreconcilable. Cases that come after Actavis don’t provide guidance on what an acceptable side car is; they struggle with what constitutes a “payment.”

Parties have tools if they want to engage in contemporaneous business transaction, such as contemporaneous evidence of the fair market value, from comparable transactions and third party valuation opinions. Also an option is a fact finding from the patent judge; someone that’s familiar with the issues should make the
determination. Then obtain a consent decree from the patent judge blessing the settlement and any contemporaneous business transactions.

Amanda Reeves said that Actavis’ focus is on rule of reason, and that “large and unjustified” payments are a problem. Agreements for value are likely OK, where the fair market value is likely defensible. There is a lack of guidance however. Issues left unexplained from Actavis include what factors matter in the rule of reason analysis, and how to determine if a payment is “large and unjustified.” Also, how should courts evaluate the strength of the patent?

The Post-Actavis cases say that agreements in which the parties agree that the brand will not launch an authorized generic may be (but are not always) problematic. Also, payments are not the only factor that matter: the parties’ expectation regarding generic entry can be outcome determinative.

Ms. Reeves identified practical considerations going forward:

- Need to think about the risk for scrutiny and the risk for liability.
- Assess the rationale for and documents underlying the settlement at the time of the settlement.
- Be prepared to explain the parties’ belief regarding the likely outcome in the IP litigation. What is the trial narrative? How will the IP litigation interplay? Fair market value is critically important.
- Be prepared to explain and defend any ancillary agreement on the basis that it reflects fair market value at the time of the settlement.
- Separating the settlement agreement from any ancillary agreement can be key.
- Brand can compensate the generic for avoided litigation costs.
- If either side believes the deal poses risk that is chilling an otherwise competitively neutral or procompetitive settlement, consider talking to the FTC.
CHAIR’S SHOWCASE: RETHINKING ANTITRUST ECONOMICS FOR THE 21ST CENTURY

This session will reexamine what the goals of antitrust enforcement should be for the 21st Century – consumer welfare, total welfare, or consumer choice? It also will examine the role of economics and its use in setting evidentiary standards in antitrust cases outside the U.S. In addition, the program will explore whether the battle of economic experts is out of control in antitrust litigation.

Chair and Moderator:
Howard Feller, McGuireWoods LLP, Richmond, VA

Panelists:
The Honorable Susan Illston, U.S. District Judge, U.S. District Court Northern District California, San Francisco, CA
Jonathan M. Jacobson, Wilson Sonsini Goodrich & Rosati PC, New York, NY
Kai-Uwe Kuhn, University of Michigan, Ann Arbor, MI
Steven C. Salop, Georgetown University Law Center, Washington, DC
Megan Jones, Hausfeld LLP, San Francisco, CA
The Honorable Joshua D. Wright, Commissioner, Federal Trade Commission, Washington, DC

Summary:

What is the goal of antitrust law?

- Steven Salop said that courts have rejected total welfare as the goal of antitrust law and have resolved to focus on consumer welfare. This means, for instance, that courts do not take competitors’ welfare into account. Courts do sometimes pay attention to the competitive process, even where it conflicts with consumer welfare. The next step may be for courts to look at economic inequality within the consumer welfare standard. We should figure out, for instance, how to look at a merger that harms poor consumers and helps rich ones.

- Commissioner Josh Wright said that the courts’ settling on the consumer welfare standard is the big victory of antitrust law in the 20th century because it allows us to apply our economic tools to that standard. Antitrust law does not do well when it tries to serve too many goals. Injecting social goals into the analysis could jeopardize the gains we have realized.

- Judge Susan Illston said that judges and juries do not look at the goals of antitrust law, just the facts and theories pled and argued by the parties and the little guidance given by Congress and the Supreme Court. Jon Jacobson said in the vast majority of cases, it does not matter what standard is used, because they are not in conflict.

Role of economics in setting evidentiary standards

- Jon Jacobson said economics plays a role in informing courts’ presumptions (e.g., that horizontal price fixing is unreasonable and that justification evidence is not allowed). But it should be possible to have an
antitrust case without an economic expert. It makes sense that economic tools should be used less in court than in merger review because courts do not have the same resources as the agencies.

- Professor Kuhn said the dichotomy between facts and economic theory is false. Some economic theory is fact and we implicitly treat it as such. Economics should be used to structure evidence gathering and assess the quality of evidence. We need to use economic models that fit the particular case. In Europe and elsewhere, there is a problem that smaller agencies (e.g., Germany) try to use sophisticated economic models that they are not equipped to use well; often leading to terrible results. Steven Salop said it is impossible to regulate competition without using economic theory.

- Megan Jones said we need to discuss when economic theory comes into a case. It has become so that plaintiffs must plead economic theories before they even have the data to fit them. Commissioner Wright said that courts should take judicial notice of certain basic parts of economic theory. In his opinion, the FTC staff correctly use economic tools to illuminate the story shown by the evidence. The economic tools are not so complicated they cannot be understood. It is the data that is often complicated.

- Judge Illston said judges and juries care more about facts. Economics can help us understand those facts and sometimes allow us to draw inferences.

The battle of economic experts

- Judge Illston said that juries know that expert testimony is bought and paid for. However, a good expert can help the judge and jury understand the data. Judges get irritated by endless Daubert motions, many of which do not actually challenge a witness’s expertise.

- Megan Jones said that class certification fights have gotten out of hand. The record now often exceeds twenty-thousand pages. She recommended agreeing on the rules in advance, including a per side page limit, expert disclosures early in the process, a limit on deposition hours.

- Steven Salop asked why not just agree not to use experts? Professor Kuhn said there are very few cases so straightforward that experts are not required. They can be crucial, especially for damages analysis, which can mean millions of dollars in difference depending how it is done. Economic analysis in European courts, where there is no discovery and courts often do their own analysis, often goes very badly.

- Commissioner Wright said the problem is not with the theory but on the data and econometrics. Economists just need to get better at telling the story.
AROUND THE HORN: CONSUMER PROTECTION YEAR IN REVIEW

Presented by the Advertising Disputes & Litigation, Consumer Protection, and Privacy & Information Security Committees

A fast-and-furious analysis of consumer protection highlights from the FTC, CFPB, State AGs, and National Advertising Division with an emphasis on headline-grabbing developments in advertising, mobile marketing, privacy, and financial practices. A bonus lightning round features previews from the pundits about horizon issues we’ll be talking about next year.

Chair and Moderator:
Thomas F. Zych, Thompson Hine, Cleveland, OH

Panelists:
Lesley Fair, Senior Attorney, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC
Richard P. Lawson, Director, Consumer Protection Division, Florida Office of the Attorney General, Tallahassee, FL
Andrea Levine, Director, National Advertising Division, New York, NY

Summary:

Thomas Zych began the discussion by noting that each year is necessarily new by virtue of new investigations, but this year we wonder whether it is “not just different in content but in kind.” It is possible, Mr. Zych said, that we are at the point where consumer behavior is fundamentally changing, and we will have to account for that shift in the application of current policies.

Trends in investigations

Richard Lawson said that in his world of investigations, the investigations are not necessarily driven by consumer complaints but by consumer impact. Complaints are part of the equation when determining whether to begin an investigation, but they are not determinative. Mr. Lawson also highlighted the importance of states’ work with federal investigators. He said he is seeing more and more of this, and that he predicts it is a trend that will continue. Of the cases Mr. Lawson highlighted, the majority of joint investigations focused on issues involving marketing scams, or “free” offerings that included hidden, often recurring, fees.

A key concern, Mr. Lawson explained, is disclosure. Disclosure should find the consumers, Mr. Lawson said, and the consumers should not have to find the disclosure. Enforcers pay particular attention to whether the key information and disclaimers are conspicuously displayed. If a company can show that consumers found the disclosure because “they’ve been thrown at them,” it will be very beneficial to companies in the outcome of the investigations. Also, he said that investigators will pursue any party where they can establish liability. “Diffusion of activity is not going to diffuse any liability,” Mr. Lawson explained. If a third party is committing the bad act but there is a material connection to another company, investigators will investigate both actors.

Mr. Lawson also touched on a few particular areas of concern, including poor customer service, such as issues about auto-renewals or accounts or failure to provide a reasonable system for responding to customer complaints. He also discussed auto advertisements with insufficient disclosure about the leasing and sales
options, including the monthly costs, financing, interest rates, down payments, and any material points regarding qualifications for the loans. Finally he cautioned against data collection where the data is not really needed or is so old it is no longer useful to the company.

Leslie Fair said substantiation has been a major topic in the past year, Ms. Fair said. She said this interest is largely driven by the D.C. Circuit decision in *POM Wonderful*. The FTC has also indicated that it plans to challenge an increasing number of “cognition claims,” related to things like increasing test scores, treating childhood speech disorders, and improving memory. Similarly, claims related to boosting genetic abilities will have to be substantiated by objective proof regardless of the nature of the product itself. Ms. Fair also discussed the increasing focus on disclosure investigations and the need for companies to disclose the terms and conditions to consumers. As she stressed, it is not illegal for companies to charge fees to customers, but when they’re being charged in the context of guarantees, the must be conspicuous and they must fit the situation.

Technology is also becoming more of a focus, from issues about one-click purchases that children inadvertently make, to video game “take it with you on any device” technology, cramming and data throttling. Ms. Fair also cautioned companies to pay attention to the Restore Online Shoppers Confidence Act (ROSCA), which prohibits post-transaction charges by third party sellers unless the terms have been disclosed and consumers have expressly consented.

**Advertising decisions**

Andrea Levine said that defending an advertisement on the basis of “puffery” will not work when the commercial is absurd but the message boils down to a simple superiority claim. Also, do not be overbroad in claims, and when making comparison claims, be sure to provide testing that demonstrates a meaningful basis for judging the claim. Similarly, when relying on a disclosure, the disclosure must be a good fit between the evidence and the message conveyed to consumers. Also, for a claim related to “new” technology, the technology has to actually be new; the company cannot simply be playing catch-up with competitors’ technology. Finally, when encouraging consumers to “try for themselves,” and to share their experiences via social media, there is no standardization for the consumer “testing.” Therefore, the information provided by consumers should be separated from substantiated claims.

**Native ads**

Ms. Levine was asked if there is something inherently deceptive about native advertisements and a fundamental concern from a policy perspective? She said that NAD has monitoring authority, and it has been taking an increasing number of native advertising cases. The issue of disguising advertising as editorial content is not new, but there is still some question of whether the old fixes work in a new world. Editorial content theoretically has more power than advertisement content, so advertisements need to be labeled. Mr. Lawson said that from the state perspective, there are a few categories of online content that are raising concerns: age cream, health insurance, and the “green coffee bean.” The key question is whether there is an aspect of the advertisement that does not rely on deceiptiveness, and whether the claims can be disclaimed or disclosed. The difficulty for states, Mr. Lawson said, is that the majority of cases are against the “fly-by-night scammers,” who need to be shut down. Ms. Fair said that native advertising is advertising. Whether we call it sponsored content or native advertising, it is advertising. And when it is so difficult to communicate information disclosures in traditional advertisements, it is even more difficult to rely on disclaimers in this context.
The Internet of Things

Leslie Fair said the FTC has been very active in this arena, and it raises issues even more difficult than those seen when there is a television screen, online screen or print publication. The FTC does not want to stifle innovation, but it does want to make sure that consumer protection applies to all settings.

Mr. Lawson said that when it comes to the Internet of things, there are a lot of known unknowns. We still do not know the full potential for misuse, so if you are going to be in the business of collecting and storing data, make sure it has a purpose. Ms. Fair said collecting information “just because” is a bad idea these days: “Information that is not in your possession is information that cannot be hacked. That’s a guarantee, and that’s a key point we are all struggling with right now.” Zych agreed: there is a huge utility in the information, but with the granularity of the information, the analytics are not difficult to discover a huge amount of personal information, including the times when family members are at home and their daily routines.
INNOVATION: CAN IT EVER BE ANTICOMPETITIVE?

Presented by the Economics, International, and Unilateral Conduct Committees

Innovation is the life blood of many industries and constant change is necessary to keep up with evolving customer demand. But can innovation ever be anticompetitive? By what standard should we judge whether a product change is innovation or a predatory attempt at foreclosing competition? Do enforcers around the world evaluate this consistently or do standards diverge?

Chair: 
Jessica M. Hoke, Squire Patton Boggs LLP, Washington, DC

Moderator: 
Joseph J. Matelis, Sullivan & Cromwell LLP, Washington, DC

Panelists: 
Susan A. Creighton, Wilson Sonsini Goodrich & Rosati PC, Washington, DC
Richard J. Gilbert, University of California Berkley, Berkley, CA
Huang Yong, Chief Executive Officer, University of International Business & Economics, Beijing, China
The Honorable Terrell McSweeny, Commissioner, Federal Trade Commission, Washington, DC

Summary:

- Susan Creighton said that making antitrust enforcement too easy risks chilling competition. A screen is needed. Courts have had difficulty articulating a standard for predatory innovation, but the outcome in court cases is generally consistent. Courts ask if a supposed innovation is an actual innovation. The Allied court applied a kind of safe harbor approach for actual innovations. The Microsoft (JVM) court professed to use the Rule of Reason test but the analysis and result was very similar to Allied: no liability because the product was found to be an improvement. Ms. Creighton said that the burden is generally on the defendant to show the product is an improvement. Patentability should not be probative of whether an innovation is an improvement. They are two different inquiries. Also, an innovation can destroy an entire industry, which may influence agencies to intervene. However, regulators should generally defer to the market.

- Richard Gilbert identified a few different options for assessing innovations.
  - Per se legality for actual innovations: Innovation is good. But it is hard for a court to tell the value of an innovation, especially in terms of its spillover, incremental, and long term effects. And innovations may sustain monopolistic prices without corresponding benefits.
  - Economic sense test: Would the innovation in question make any economic sense if it did not harm competitors? A problem is that competitive advantage is the point of innovation. An innovation might cost very little and so pass the test, even if its primary purpose is anticompetitive.
  - Rule of Reason. Used in the Microsoft browser decision.

- Prof. Gilbert said that a lot of these cases are not about the innovation itself, but negative conduct that goes along with innovation; for instance, where firms remove an old product from the market or stop
supporting it. The problem is that there are a lot of legitimate reasons for companies to take old products off the market, and it is hard to craft a rule to govern this conduct.

- Huang Yong said that China has very similar issues as in the U.S., but the law and the innovation economy is not yet as developed there. Generic drugs will become a big issue in China in the near future. Also, the Chinese government fell behind in regulating the ICT sector as it first began, which contributed to its rapid development. Read the Tencent decision for a good idea of the Supreme People’s Court thinking re antitrust law. Chinese antitrust law favors efficiency and consumer welfare. The Supreme People’s Court uses a lot of economists and industry analysts in informing its opinions.

- Huang Yong said that one major difference in China is that it has a heavily regulated economy and the regulators for various industrial sectors play a complicating role. They may, however, also cut off anti-competitive behavior before a traditional antitrust enforcer would, due to their great authority. Ultimately, it is important to look at the long-term benefits of an innovation in assessing its use.

- Terrell McSweeney said she is pro-innovation and in favor of strong IP rights. Because of how complicated this issue is, the rule of reason is the appropriate approach.
INTERNATIONAL AGENCY COOPERATION: THE REAL STORY

Presented by the Mergers & Acquisitions and International Committees

We all know that there are often degrees of cooperation between agencies in different jurisdictions. But what does this really mean in practice? How extensive is cooperation? Can it be outcome determinative? What should the parties know about this process, including before they embark on their merger journey?

Chair and Moderator:
Elizabeth F. Kraus, Deputy Director for International Antitrust, Federal Trade Commission, Washington, DC

Panelists:
John Pecman, Commissioner of Competition, Competition Bureau Canada, Gatineau, Canada
Vanessa Turner, Allen & Overy LLP, Brussels, Belgium
Stanley Wong, Chief Executive Officer, Competition Commission of Hong Kong, Wanchai, Hong Kong

Summary:

The Importance of Cooperation

There are currently 130 antitrust regimes around the world operating in open markets characterized by varying degrees of regulation. With proliferation of competition laws across the globe come some negative effects for businesses such as increased compliance costs, inconsistent remedies, and duplication of resources. The panelists all contributed to the conversation an understanding of why cooperation among and between agencies is vital to help minimize these negative effects for clients and how such cooperation occurs in practice. The broad theme for the panel was that enforcement is more effective where cooperation occurs.

- Mr. Wong addressed the issue of capacity building as a focus of agency cooperation. He stressed that a problem arises when agencies do not spend enough time understanding another jurisdiction’s local laws in order to help facilitate the implementation and execution of the competition law in that jurisdiction. The objective of cooperation is not to export European or U.S. law to other jurisdictions. You have to interpret a jurisdiction’s competition law in the framework of the legal system in which that law is operating. Mr. Pecman added to this thought by noting that while Mr. Wong is correct that context is important, it is also important to bring international norms and approaches to new regimes.

- Ms. Turner noted a global trend of cooperation among agencies with greater frequency in the merger area, which makes sense since parties to merger transactions have a greater incentive and desire to facilitate such cooperation to get their deal done. A party to a cartel investigation, however, may have that incentive only when they are applying for immunity. Statistics show, however, that effective cooperation is lacking in other areas of the antitrust law. Agencies are much better at coordinating when it comes to executing dawn raids in investigations than they may be in constructing remedies.

- Mr. Wong added that in the area of abuse of dominance, the laws vary among jurisdictions, making it difficult to cooperate effectively. Add varying fair pricing laws, rights to do business, and unconscionable
conduct, and the problem becomes more evident. He believes agencies can still cooperate in discussions about theories of harm without necessarily getting into the questions about remedies and enforcement a.

Examples of How Agencies Cooperate

- Mr. Pecman cited the many ways in which the Canadian, the U.S., and the European agencies coordinate with one another, particularly in the merger area. Canada has worked with the United States to establish best practices on cooperation in order to try to drive alignment in timing of reviews of transactions. He noted he has not seen a great deal of cooperation on unilateral conduct issues across jurisdictions and cited the fact that most investigations are triggered by a complainant. Where no complaint is filed or filed years later in a jurisdiction, an agency may not be conducting a review of any kind. Parties dictate a great deal about how easy cooperation among agencies can be.

- Mr. Wong suggested that jurisdictions should become more aligned on timing. He believes it makes little sense and is not an issue of great national pride that one jurisdiction may have a 30-day review period, while another is 210 days. He believed much more could be done to reduce this burden for parties, but recognized in many jurisdictions, there is a political component to this that requires a change in the law. Mr. Pecman agreed and noted that confidentiality laws in jurisdictions such as the United States also make this more difficult and currently a soft convergence approach is the goal.

Practical Considerations

The panel discussed the practical consideration of information sharing and the use of waivers to share information. Many countries without legislation allowing such information sharing or countries with laws that expressly forbid it make cooperation more difficult in large global matters. Mr. Wong suggested that agencies can still find ways to share information, such as having discussions at a high level.

- Mr. Pecman noted that waivers are helpful in both merger reviews and in cartel investigations. He stressed that the working teams at the Canadian Competition Bureau have a close working relationship with their counterparts in the United States and a growing relationship with their European counterparts. He explained that his Bureau treats information shared by other agencies as “bags of gold,” which helps develop trust between the agencies. Ms. Turner explained that the level of information parties or agencies may choose to share depends on the type of proceeding. Clients must consider what kind of waivers are being sought to share information. Is the waiver simply procedural or substantive in scope? What stage of the investigation does it make the most sense to share information? Are there any data protection/privacy concerns?

- As to remedies and consistent outcomes, the panel all agreed early cooperation was vital to achieving consistent outcomes for the parties. Ms. Turner noted that parties should begin to think about remedies and identifying potential remedies that would require multi-jurisdictional approval and approach the agencies early to give them time to coordinate on those issues. She noted that this occurs a great deal when a remedy might involve an upfront buyer or the need to identify a trustee to ensure compliance.

- Mr. Wong concluded that if an agency is the last jurisdiction to review a transaction, the remedies become more difficult to construct if there was no alignment from the beginning and parties find themselves subjected more likely to behavioral remedies than structural ones that are difficult to
implement. Bringing everyone into the conversation early can lead to consistent outcomes among jurisdictions that will lessen the burden on the parties to get their deal through.
ANTITRUST AND IP IN CHINA: QUO VADIS?

Presented by the Intellectual Property Committee and International Task Force

Chinese courts and regulators have been active in the IP space, including by bringing a number of investigations against Qualcomm, InterDigital, Microsoft, and others, and issuing a number of measures related to standard setting and patent-assertion entity activities. Panelists from China’s antitrust agencies and private practice will discuss these and related issues.

Chair:
H. Stephen Harris Jr, Winston & Strawn LLP, Washington, DC

Moderator:
Koren W. Wong-Ervin, Counsel for Intellectual Property & International Antitrust, Office of International Affairs, Federal Trade Commission, Washington, DC

Panelists:
Liu Jian, Deputy Director, Price Supervision and Anti-Monopoly Bureau, National Development and Reform Commission, Beijing, China
Song Yue, Official, State Administration for Industry and Commerce, Beijing, China
Elizabeth Wang, Charles River Associates, Boston, MA
Mark Whitener, Senior Counsel, Competition Law & Policy, General Electric Co, Washington, DC

Summary:

- Liu Jian (NDRC) provided his perspective on the NDRC policy on antitrust and IP. He believes competition is very important, and that abuse of intellectual property rights violates the China Anti Monopoly Law. He said the AML covered “very specific behavior” involving IP that may harm competition includes anticompetitive agreements, abuse of dominance, and mergers. He said an “area of focus” is the topic of standard essential patents, which have a “public utility value.” Later, he described his view that the proper process for identifying abuse focused on “fair competition” and “certain behaviors,” not specific licensing rates, because setting the right IP price is “detached from antitrust analysis.” He said the NDRC may not set prices, including license fees, but instead may prove a price is unfair. In particular, the recent Qualcomm decision was not an order for a specific price, it was “changing conduct.”

- Song Yue (SAIC) discussed her agency’s policy on antitrust and IP. She was a primary drafter of the SAIC guidelines, and her view is that patent rights have a “boundary,” and should “yield to the public interest” when competition is effected. The SAIC applies the rule of reason to abuse of intellectual property rights, and the agency is “very cautious” in her opinion. Finally, in response to a question on the inclusion of the essential facilities doctrine in their guidelines, she noted that even though U.S. commentators criticized the doctrine, commentators outside the U.S. did not.

- Mark Whitener (GE) agreed it is a complicated area, and complimented the significant work by the Chinese enforcers in just a few years. His view is that standards incorporation can accelerate the risk of abuse and the latest guidelines are helpful to make clearer that antitrust applies to IP and that the rule of...
reason will be generally applied. He also noted that some U.S. decisions and policies which have been criticized here are being relied by China and other countries in developing their policies.

- Elizabeth Wang (CRA) added that the issues are evolving: this is a global debate and China is part of it. Also, the economy is in transition, from a planned to a market economy, and from an IP user to an IP creator.

- An audience question on whether China was more concerned with over deterrence or under deterrence was answered by Song Yue. She noted that her agency had far fewer staff than counterparts in the U.S. and E.U., and also that her agency did not have as broad an authority as Korean and Japanese enforcers. More broadly, however, China is promoting the AML with advocacy and awareness at all levels of government.
HOT TOPICS

Antitrust and consumer protection policy, enforcement, and litigation change every day with vital issues constantly surfacing. The Hot Topics session will focus on today’s news and tomorrow’s trends, and a review of how the past year has set the stage.

Spring Meeting Co-Chairs and Moderators:
Sharis A. Pozen, Vice President, Global Competition and Antitrust, General Electric Co, Washington, DC
Hartmut Schneider, WilmerHale, Washington, DC

Panelists:
Kevin Arquit, Simpson Thacher & Bartlett LLP, New York, NY
The Honorable Julie Brill, Commissioner, Federal Trade Commission, Washington, DC
Alexander Italianer, Director-General, European Commission, Brussels, Belgium
Carl Shapiro, University of California, Berkeley, CA

Summary:

Reverse Payments

- Julie Brill said the Actavis decision was a complete victory for the FTC. The FTC is continuing to investigate reverse payments and file amicus briefs. Just yesterday, a judge in the District of New Jersey ruled in the Cephalon case that the FTC can go ahead with a disgorgement claim. In interpreting the “large and unexplained payment” standard, the FTC is focused on what payments are for and how they relate to litigation costs. The FTC looks at it from the perspective of the Hatch Waxman Act and congressional policy promoting generics. Carl Shapiro said the “unexplained” part is not that complicated. It just asks what the company got for their money.

- Alexander Italianer said the EC looks at whether the generic and brand name company are competitors and whether the payment is an incentive to stay out of the market. In the Lundbeck case, there was a clear agreement to stay out of the market that went beyond the brand name manufacturer’s patent. It also lacked any explanation of what would happen when the patent expired.

Product Hopping

- Kevin Arquit discussed “product hopping,” where a brand name drug company moves patients to a new drug just before the patent on the old drug expires. It is meant to avoid the equivalence listing between their drugs and generics since many states require use of equivalent generics. The real problem occurs where the branded company discontinues the old drug immediately so patients must switch to the new one. Carl Shapiro said this is a problem because it is gaming the FDA system. It should be resolved by fixing that system, rather than through antitrust law.

Merger Efficiencies

- Carl Shapiro said agencies look at efficiencies, which are part of the merger guidelines, but courts do not, and have said they do not since the 1960s. Most deals get done because of efficiencies. The St. Luke’s
Idaho case is a good example. The district court judge recognized efficiencies from the merger, but found them not to be merger specific. The 9th Circuit said it is skeptical of an efficiencies defense in general. Julie Brill said that St. Luke's was not a big departure from prior case law. The merger resulted in high concentration with high barriers to entry. The dicta on the merging parties’ good intentions were not meant to be a substantive part of the decision. According to Ms. Brill, the merger guidelines are more permissive than case law when it comes to efficiencies. Kevin Arquit said that efficiencies cannot be used as a defense. By the time you need a defense, it is too late to rely on efficiencies.

- Alexander Italiener said that after losing several cases in the early 2000s, the EC instituted a new test. Efficiencies can be taken into account but must be verifiable, merger-specific, and passed through to consumers. The EC considered and recognized efficiencies in the TNT/UPS and Deutsche Borse/NYSE deals, although the efficiencies did not change the ultimate outcome.

Litigation

- Alexander Italiener also said it is different in Europe because the EC need not go to court to stop a merger. Conversely, if the EC blocks a merger, another party can go to court to stop it. Publication of EC decisions makes its rules predictable and allows parties to proactively propose remedies and get quick approval, just as with the Holcim/Lafarge deal.

- Julie Brill noted that the FTC conducted a retrospective on its hospital merger enforcement and realized the customer flow model it used was wrong and that a willingness to pay model is preferable. That change had a lot to do with its success in St. Luke’s and ProMedica.

Standard Essential Patents

- Alexander Italiener said that companies have been moving to jurisdictions within Europe where judges are more favorable to injunctions. The EC is trying to adopt guidance to avoid this kind of divergence. The guidance will make clear that companies cannot get injunctions against willing licensees.

- Julie Brill is also worried about injunctions against willing licensees (e.g., Google, Bosch). Determining who is a willing licensee can be difficult, she said. The Europeans focus on dominance, whereas the U.S. focuses on the standard setting organizations and the process of setting up standard essential patents in the first place. Carl Shapiro said antitrust law is not the ideal tool here. It should be on the standard setting organizations to define FRAND.

Civil Enforcement

- American Express. Arquit said Amex is an unusual case because court found liability even though Amex has less than 30% market share. But the court found combination with customer insistence and barriers to entry created market power. The court also looked at Amex’s ability to increase prices after the implementation of its Anti-Steering Rules. Although somewhat novel, the decision stands a good chance of being affirmed, as it is very thorough and makes strong use of the Second Circuit’s Visa decision, which Amex, at the time, supported. Carl Shapiro was working at DOJ when they decided to sue Amex. He said the Visa opinion played a large part in DOJ’s decision.
• **EC.** Alexander Italiener said the EC has a safe harbor provision for market share of less than 30%; however, it has some exceptions. He is not sure how the Amex case would have played out in Europe. The EC put forward legislation to cap credit card merchant fees and prohibit anti-steering rules rather than pursuing those things through litigation.

• **McWane.** Julie Brill also noted that in McWane, the 11th Circuit affirmed the FTC decision against a vertical arrangement between McWane and distributors, preventing distribution of competitors’ ductile iron piping. The main issue was whether there was a separate market for domestically produced ductile iron pipe. The court said it could find one based on qualitative economic evidence, looking at the effect on competition rather than a formulaic rule. According to Brill, it shows that courts do not necessarily need economic evidence.
SHIFTING SANDS: MERGERS IN CHANGING MARKETS

Presented by the Federal Civil Enforcement, Mergers & Acquisitions, and State Enforcement Committees

Merger analysis has evolved from an emphasis on market structure to a more holistic approach. But what matters more: the analytical framework or the markets we are analyzing? Mergers such as Promedica/St. Luke’s, Ardagh/St. Gobain, Office Depot/Office Max and Comcast/Time Warner provide a focus as we explore answers and anticipate the future.

Chair:
Randall M. Weinsten, Attorney, Federal Trade Commission, Washington, DC

Moderator:
Peter Boberg, Charles River Associates, Boston, MA

Panelists:
Harry First, New York University School of Law, New York, NY
Kevin Hahm, Deputy Assistant Director, Mergers IV, Federal Trade Commission, Washington, DC
Kristina Nordlander, Sidley Austin LLP, Brussels, Belgium
Matthew J. Reilly, Simpson Thacher & Bartlett LLP, Washington, DC

Summary:

Hospital mergers

Kevin Hahm discussed the history of the FTC’s challenges to hospital mergers. He noted that the government challenged 7 hospital mergers from 1994-2001, and lost every single time. The common theme in these reviews was the use of the Elzinga-Hogarty test to define the geographic market. Under this test, the courts would look at how far people would travel for medical services with any sort of regularity. This was in spite of testimony from Professor Elzinga (designer of the Elzinga-Hogarty test) that this was not a useful analysis for the hospital market, in part because of the issue that the patients were generally not the payors.

Hahn then explained that in 2002 the FTC undertook a study to understand the issue better. In particular, it focused on the importance of bargaining dynamics, and studied the actual observed effect on prices seen after the prior losses. This study led to more success for the FTC in challenging hospital mergers, including wins in ProMedica, St. Luke’s, and others. Additionally, the court in St. Luke’s formally abandoned the Elzinga-Hogarty test for hospital mergers. The 9th Circuit in St. Luke’s explained that it viewed the only acceptable remedy as being divestitures, because the healthcare market is evolving so quickly. The Court did not think they could craft sufficiently flexible conduct remedies.

Office superstores

Matthew Reilly discussed the OfficeMax/Office Depot merger that was approved in 2013, and the rejected Staples/Office Depot merger that was rejected in 1997. In Staples/Office Depot, the parties attempted to argue that they were competing against lots of office suppliers, not just office superstores. However, the business documents did not support these claims. They priced specifically against other office superstores, and were not
concerned about local office suppliers or internet yet. Additionally, the pricing was extremely regional in nature. He contrasted this to OfficeMax/Office Depot, by which time the market had changed. The same sort of business documents which led to the rejection of Staples/Office Depot now showed that the stores barely looked at each other as competitors. Rather, they looked at the broader, national market for all sources of office supplies as being their competitors. This included Amazon, Wal-Mart, as well as local competitors, like WB Mason. Additionally, the evidence about entry and exit into the market was favorable, given they were mostly just exiting. Matthew Reilly summed up by saying nothing had really changed about the agencies analysis of these deals; rather it was the result of changing market dynamics.

**Merger review**

Harry First laid out the history of the *Philadelphia National Bank* case, where the Supreme Court adopted certain tenets of merger review, which were concerned with economic theory, as well as administrative efficiency. The Court did not want to complicate merger analysis, so parties could not argue that anticompetitive effects in one market could be offset by procompetitive effects in other markets. Likewise, the Court rejected any sort of “public interest” analysis, whereby one could argue that a deal should be approved for employment reasons, or public concerns. Finally, the Court rejected behavioral remedies, as such remedies were too difficult to adjudicate effectively. Only structural remedies would do.

Mr. First then explained that things are now changing in response to new economic theories. We’ve had no new vertical merger guidelines since 1984, but the agencies are now more okay with behavioral remedies in certain vertical contexts. Additionally, it is becoming more difficult to challenge even open 2-1 style mergers, for which he cited the narrow defeat of the Sysco/US Foods deal by a 3-2 margin in the FTC. That deal would have created a player with a 75% market share, and yet two commissioners voted to approve it. As another example of these difficulties, he cited the Comcast/TWC merger, which is subject to FCC review and a broader “public interest” analysis. This makes it more like merger analysis in the rest of the world. For instance, South Africa imposed serious conditions on the Wal-Mart/Massmart merger, even though Wal-Mart had no market share in South Africa prior to the deal. They cared about issues like product diversity, employment, local suppliers, and training.

**Merger efficiencies**

Kristina Nordlander discussed the role that efficiencies play in merger analysis. She opened by asking the room whether anyone was familiar with any merger in any jurisdiction which had been approved because of the efficiencies. She said there were none of the EU, and from asking around, nobody was able to suggest a U.S. case. Nordlander said this perhaps meant that the standard for giving credit for efficiencies was too high. For the Aardagh/Saint Gobain deal from 2014, the FTC required Aardagh to sell off six of their nine U.S. facilities. The parties in Aardagh/Saint Gobain argued that among the efficiencies that would be generated by the deal was that Aardagh had better and more efficient management than Saint Gobain, and the merger would lead to cost savings through the merged firm by bringing the Aardagh management team to Saint Gobain. The FTC majority however rejected this as not being merger specific.

For the Deutsche Boerse/NYSE deal, the EC conceded that there were efficiencies that would result from the deal. However, the EC said this would lead to creation of a monopolist, which would prevent these efficiencies from being passed on to consumers. The EC also used those efficiencies in an offensive manner, by saying the new firm would be so efficient that it would foreclose new entry. So the efficiencies from a deal can be used to block it, but not approve it. The EC spent 60 pages of their decision discussing efficiencies.
AGENCY UPDATE WITH THE FTC BUREAU DIRECTORS

Presented by the Federal Civil Enforcement Committee

Hear directly from the Federal Trade Commission Directors of the Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics about the latest in antitrust and consumer protection enforcement and policy initiatives.

Chair and Moderator:
William C. Macleod, Kelley Drye & Warren LLP, Washington, DC

Panelists:
Deborah L. Feinstein, Director, Bureau of Competition, Federal Trade Commission, Washington, DC
Francine Lafontaine, Director, Bureau of Economics, Federal Trade Commission, Washington, DC

Summary:
The session was structured as a Q&A, with panelists fielding questions from both the moderator and the audience.

- Francine Lafontaine described the role that the Bureau of Economics plays when interacting with each of the Bureau of Competition and the Bureau of Consumer Protection. In the merger context, which currently comprises a larger portion of the bureau’s involvement, the economic team expects to be informed of the parties’ rationale for the proposed transaction, particularly if the parties are big players. If the transaction is potentially problematic, the economic team needs to understand the context for the deal and whether there are particularities for the industry. The team then looks to evidence behind those statements: what are the numbers and how did the parties get to them? The Bureau will then try to replicate the information that the parties provided, and if they run into issues, they will return to the parties with questions. To approve a transaction, the Commission must confirm efficiency arguments.

With anticompetitive behavior allegations or consumer protection cases, the burden is a bit higher. The Commission will want to know why certain theories of harm should apply, and will engage in a cost-benefit analysis. Again, they will be tested, and if the Commission’s results conflict with the parties’, the theory will fail. The Commissioners will need to know why consumers won’t be harmed, or if arguing a competitor is engaging in anticompetitive behavior, the Commission will need to know how it harms consumers, not just the competitor. Jessica Rich noted that, while Commission economists are often involved from the outset, inviting outside economists to attend bureau meetings may not be the best allocation of their time because it is rare that her bureau is digging into the data during those discussions. Outside analyses presented through materials are more effective.

- Deborah Feinstein explained that efficiency arguments are alive and well in merger analysis. Despite a popular reading of the St. Luke’s opinions, the Commission examines efficiencies in every case. Even in St. Luke’s the Commission conducted extensive analysis but found the efficiencies were not merger specific. The agency consistently follows the Horizontal Merger Guidelines in every matter, and they test the transactional rationale, just as Ms. Lafontaine does. Marginal cost savings are important, and will
behavior or merger allow a better product to come to market. Ms. Rich added that “efficiencies” arise in consumer protection cases as well, though as a balancing factor against any perceived consumer harm. Ms. Rich’s teams typically solicit views from both consumers and the marketplace, including through workshops.

- Ms. Feinstein, in responding to a question from the audience regarding the interaction between regional offices and Headquarters, stated that regional offices will likely handle more merger cases in the future as a result of the increase in the Commission’s workflow. And with the regional teams reporting up through Ms. Feinstein, the offices are able to apply consistent processes to their reviews. Ms. Feinstein also noted that in addition to cross-office collaboration, we are also likely to see more cross-practice collaboration with the agency’s four different shops reviewing mergers in industries that, traditionally, they do not.

“[Y]ou also will be totally flummoxed about why you’re getting a call from Merger II on an oil merger.”

- Next Ms. Feinstein discussed the importance of market shares and concentration effects in a merger review following the St. Luke’s opinions. She noted that one of the first cases cited in the FTC’s complaint against St. Luke’s was Philadelphia National Bank, a case where the Supreme Court itself underscored the importance of market shares in the analysis of a proposed merger. She reiterated that the Bureau of Competition does think about concentration and market definition, and most agree that it is a helpful framing device to answer the question of what might help constrain the parties’ anticompetitive behavior. Market definition is so intertwined in the competitive effects analysis that it might not be as obvious. But Philadelphia National Bank remains good case law, and Ms. Feinstein’s staff will continue to cite it.

- Ms. Feinstein acknowledged that the Commission does have a current study pending on remedies and will soon solicit third party comments. She stated that the study will look at certain industries differently: pharmaceuticals, with the industry’s particularities, will be looked at separately; routine industries, such as supermarkets and funeral homes, will be addressed by questionnaires; and for many others, the Commission will schedule interviews and solicit data from the divestiture acquirer, customers, and competitors. It is too early to analyze the data at this point, she noted, but the Commission is looking, in particular at whether the use of monitors and up front buyers has been effective. Ms. Lafontaine added that the Bureau of Economics will be requiring buyers and competitors to provide sales and revenue data and quantity over time in order to help the Commission understand the market dynamics.

- Ms. Feinstein also offered that, having seen the process from both sides, the Commission needs ample information in order to conduct a proper analysis, and because of the way incredible volumes of information can be stored in the current day, that creates a large burden on companies under merger review. The Bureau of Competition appreciates it when parties to a potentially problematic transaction approach the Commission in advance of a Second Request – or even an HSR filing – willing to negotiate at the outset. A Second Request is not inevitable; neither is compliance with a Second Request. The Commission is trying to make the process easier and to provide additional guidance by way of best practices. At the same time, the Commission is making sure to communicate among its large staff and different divisions to ensure the Commission’s policies are applied consistently.

- Ms. Rich was asked about the Bureau of Consumer Protection’s shared jurisdiction with sister agencies like the FCC and the CFPB, and she said that shared jurisdiction has long been a part of the FTC’s practice. The bureau continues regular communication with both the CFPB and the FCC and is guided by the terms of individual memoranda of understanding on various issues.
DOWNLOADING THE FUTURE: MEDIA Mergers AND CONTENT DISTRIBUTION

Presented by the Distribution & Franchising, Media & Technology, and Mergers & Acquisitions Committees

A wave of large and almost simultaneous mergers, including Comcast-TWC-Charter and AT&T-DirecTV, are among the factors changing media distribution. The combination of multiple transactions under review, convergence between industries, technological changes, and a regulatory environment in flux raises unique challenges for regulators, the merging parties, and other industry participants.

Chair and Moderator:

Celeste C. Saravia, Cornerstone Research, San Francisco, CA

Panelists:

C. Scott Hemphill, Columbia Law School, New York, NY
William J. Kolasky, Hughes Hubbard & Reed LLP, Washington, DC
Jeane A. Thomas, Crowell & Moring LLP, Washington, DC
Michael L. Weiner, Dechert LLP, New York, NY

Summary:

Why Media Mergers are Different

Jeane Thomas discussed why media mergers are different from mergers in other industries. There are fundamental policy objectives regarding media ownership to consider, including a competitive and open marketplace of ideas that is necessary to serve the democratic process. Media merger review not only focuses on competition but also localism, diversity, and high-quality information. However antitrust is focused on economically efficient outcomes and not designed to address social goals. FCC regulation tries to serve the policy objective of the open flow of information.

Early FCC regulations presumed that it would not be in public interest for a single entity to hold more than one broadcast license in the same community; diverse array of owners would lead to diverse array of program and service viewpoints. After the Telecommunications Act of 1996, the FCC modified and partially repealed media ownership and market concentration regulations as no longer necessary to serve policy objectives of competition, localism and diversity. Recent trends towards large-scale consolidation: deregulation of ownership rules has lead to the creation of big media conglomerates: Comcast/NBCU, Disney, News Corporation, Time Warner, Viacom, CBS. There has also been vertical consolidation, with the Comcast/NBCUniversal deal. This has happened at the same time there is the explosion of information and content available via Internet. It is hard to argue that the Big 6 conglomerates “control” available content. But the availability of that information is dependent on efficient distribution. From a purely competition standpoint, we have very dynamic markets and it is difficult to assess market definition and competitive effects of new players, such as online video distributors.

Media Mergers in the Digital Age

William Kolasky discussed the changing media landscape and how this should inform antitrust analysis. The shift in audience and advertisers has been significant over the last 10 years. TV viewers have shifted dramatically from...
broadcast to cable. Also, newspapers have lost more than half of their advertising revenues in 10 years. Digital is now the largest medium for advertising, and the shift is continuing. All media platforms now compete with one another for both advertisers and audience. You cannot break the internet, pay TV, and newspapers into separate markets. Nonetheless, DOJ still treats each medium as a separate market.

Mr. Kolasky also noted that advertising inventory has increased dramatically, with a corresponding decrease in price. New media has enormous benefits for consumers and advertisers: Consumers get more choice and content, while advertisers get lower costs and can target advertisements more effectively. Ms. Thomas and Mr. Weiner agreed that although different types of media or channels within a single medium can be complements, they are, generally speaking, substitutes.

**Two-sided Markets**

Mr. Weiner discussed the changing role of television in a multiscreen world. Media is different from recent antitrust challenges to two-sided markets. Assessing the competitive computer from the Zillow/Trulia merger, the FTC looked at comparative advertising ROI. Adapting to changing technology and consumer behavior is important, for example, in Nielsen/Arbitron cross platform conduct was important. The panel also noted the difficulty in determining whether products in the market were complements or substitutes:

- Advertising opportunities are highly differentiated between content and media
- As complements, advertisers rarely limit their purchases to a single medium or type of content (each has distinct attributes and advantages)
- Such attributes may be unique to each advertiser
- As substitutes, advertisers care about impact, as measured through ROI
- Alternative combinations of purchases can produce the desired ROI

Mr. Hemphill discussed multi-sided markets. Media platforms are multi-sided markets. Their owners want to drive participation by both advertisers and audience. In some cases, there are additional parties involved; e.g., content providers. In multi-sided markets, regulators cannot just look at total cost, as a merger might pose cost increases for certain players and decreases for others. For example, with the Comcast-Time Warner merger there were three relevant constituencies: subscribers, programmers, and online video distributors. It is not a horizontal merger with regard to subscribers, because there is no overlap in coverage between Comcast and TWC. As to programmers, there could be some horizontal concerns with regard to monopsony and bargaining power. And as to OVDs, there is a potential concern for foreclosure or extraction. Ms. Thomas noted that the Comcast/NBCU review focused heavily on the effects on online video distributors and whether a company with control over internet access would have an incentive to slow their product or otherwise limit access to consumers. That is likely to be the same concern with the Comcast/TWC deal. Generally, however, the multi-sided market dynamic will check incentives to engage in anticompetitive behavior, as the platform owner has an incentive to drive participation on all sides. Mr. Hemphill also noted that having many subscribers might not give a cable company bargaining power vis-à-vis content providers if those subscribers demand that content. Overall, Mr. Hemphill said he had trouble finding an economic rationale for an anticompetitive effect from this merger. Mr. Kolasky countered that it would have an anticompetitive effect on local broadcast stations, for whom the merger will have horizontal effects.

Ms. Thomas noted that the net neutrality order could play a positive role regulating an area of conduct the antitrust law is not suited to regulate.
IS FALSE ADVERTISING ANTICOMPETITIVE?

Presented by the Consumer Protection Committee

Should antitrust laws ever consider a firm’s deceptive practices towards consumers? This panel will discuss whether and when false advertising can be the basis of a Sherman Act §2 claim and how brand power plays into this consideration. Learn about recent litigation trends and the economics behind the potential anticompetitive effects of false advertising.

Chair and Moderator:
Svetlana S. Gans, Staff Attorney, Division of Marketing Practices, Federal Trade Commission, Washington, DC

Panelists:
Robert A. Atkins, Paul Weiss Rifkind Wharton & Garrison LLP, New York, NY
Rebecca Kirk Fair, Analysis Group, Boston, MA
Maurice E. Stucke, University of Tennessee College of Law, Knoxville, TN
Spencer Weber Waller, Loyola University Chicago School of Law, Chicago, IL

Summary:
The panelists presented their discussion in the form of a fictitious case study, loosely inspired by a 2014 jury verdict in *Retractable Technologies, Inc. v. Becton, Dickinson and Co.*, finding the defendant liable for $340 million in trebled damages based on an attempt to monopolize the market for safety syringes through deception and false advertising. That case is currently pending before the Fifth Circuit.

Plaintiff Retractable Technologies

- Spencer Weber Waller said that the law is relatively easy to understand, and the facts are more difficult. According to Mr. Waller, every circuit that has addressed deceptive advertising as a form of anticompetitive conduct, aside from the Seventh Circuit, has said that false advertising and disparagement can be anticompetitive. Plaintiffs can win Sherman Act claims if they demonstrate that the false advertisements or disparagements were a material cause of the harm. This issue is a matter of causation, and it is very similar to the burden of causation that any antitrust plaintiff must prove.

- Maurice Stucke said it is not a question of whether disparagement falls within Section 2 of the Sherman Act, but what standard to apply. Deception, he said, is a “no-brainer.” Unlike other forms of exclusionary or deceptive behavior where there is the possibility of pro-competitive effects, “deception is inherently a vice,” and there are no likely efficiencies to be gained by deceptive behavior. The key question is whether the monopolist’s deceit appears reasonably capable of making a significant contribution to its attainment or maintenance of monopoly power. If the answer is yes, the plaintiff has established a prima facie violation of Section 2.

- In the hypothetical scenario, Mr. Stucke said that false claims “went to key quality attributes” of the product, and “falsity was not obvious upon reasonable inspection.” One problem with false claims, he said, is that they are not readily susceptible to being neutralized or otherwise offset by rivals.
Additionally, forcing competitors to spend money on responding to false advertisements raises the cost of business for the competitor and decreases revenue for innovation. Mr. Waller said one of the key concerns with false advertisements is that it is impossible to know who has been reached by the advertisements and how to counter the advertisements. As consumers tweet and retweet and post messages online, competitors do not know who to target.

Defendant Becton Dickinson

- The Sherman Act is not a panacea for all of the bad conduct that affects competition, Mr. Atkins said. Furthermore, there are several features of advertisements that make them different from other potentially anticompetitive conduct, including:

  1) Advertisements are constitutionally protected commercial speech. Applying the Sherman Act to this speech would effectively criminalize speech through treble damages. We should be particularly wary of developing a body of law that institutionalizes putative damages.

  2) There are several channels of regulation for commercial conduct, from state and federal regulators to consumer class action lawsuits. There are also other many mechanisms for remediation if there is harm to a competitor or to consumers.

  3) Advertising is competitive. Advertising may be aggressive and unfair, and it may even cross the line into being false or misleading, but advertisements are competitive. Not only is it not anticompetitive, but also it can be pro-competitive.

  4) False advertisements are not indicative of conduct that has any known propensity to do something that is prohibited by antitrust law.

  5) False advertising is ubiquitous in America.

  6) There is no economic analysis that exaggerating the powers of a product has the ability to destroy competition as opposed to potentially harming a competitor.

  7) It is very difficult to show that false advertising has had a negative impact on competitors, let alone a negative impact on competition.

“To convert an ordinary business tort into a treble damage claim will chill and deter the very conduct that the Sherman Act is designed to promote,” Mr. Atkins said. There is a concern about applying the Sherman Act and Lanham Act in the same proceeding; there are different standards of proof. Under the Lanham Act, plaintiffs do not need to prove intent or materiality. By trying both types of claims in the same proceedings, it will be very difficult for defendants to craft jury instructions that guard against looping Sherman Act claims into the same, and lower, standards of proof.

- Ms. Kirk Fair said that there is a question of disaggregation. How do we rule out that it is the presence of the false advertising that is affecting the competitor and competition? In the hypothetical case study, there were multiple factors at play. At the same time that the defendant was advertising, there were also new competitors entering the market. It is unclear, Ms. Kirk Fair said, how to determine that the advertisements cause a slump in sales for the competitor and not the entrance of new firms.

- For plaintiffs, Mr. Stucke said that deception has always constituted an unfair type of trade, and that court precedent from the D.C. Circuit said that we cannot require plaintiffs to recreate a world absent the defendant’s anticompetitive conduct. Causation, he said, is the filter that distinguishes run-of-the-mill false advertisements from anticompetitive false advertisements.
• Asked if this mean that we will see competition where anything is fine so long as it leads to more profits, Mr. Atkins said the short answer is that there are people like Ms. Gans and agencies who police marketing and advertisements. There are many avenues to police marketing, and it is bad policy to allow the Sherman Act to police advertisements when it has such a chilling effect.

• Mr. Stucke said we began with Common Law, and Congress recognized that the Common Law was not effective. Deception is not competition on the merits, and although there are other means for combating deception, we should still retain the right to use the Sherman Act. We are at risk of a race to the bottom, where companies compete on deceptive terms, and consumers and competition are harmed.
THE FUTURE OF PATENT PRIVATEERING

Presented by the Intellectual Property Committee

Lots of ink has been spilled on whether ‘patent privateering’ is an antitrust problem, with little resolution to date. Will the FTC’s pending 6b study decide the issue? Will the antitrust agencies take any action before then? In the meantime, what strategies are companies employing to deal with privateers?

Chair and Moderator:

Logan M. Breed, Hogan Lovells, Washington, DC

Panelists:

Michael Carrier, Rutgers Law School, Camden, NJ
Anne Layne-Farrar, Charles River Associates, Chicago, IL
Tero Louko, Senior Competition Counsel, Google Inc, Brussels, Belgium
Jenni Lukander, Director, Global Competition Law, Nokia, Helsinki, Finland

Summary:

Patent privateering refers to an intellectual property rights (IPR) holder authorizing a third party, typically a patent assertion entity (PAE), to monetize the IPR, often with infringement litigation. Prof. Michael Carrier (Rutgers) opened the panel with background, and he said that PAEs were an area of heightened public attention recently, including statements by President Obama and an ongoing FTC 6(b) study. Jenni Lukander (Nokia) discussed the potential value of privateering: patents can be sold, transferred, and licensed like any other assets. She compared the practice to using a debt collection agency, which can lower costs and speed recovery. Anne Layne-Farrar (CRA) agreed that economics supports this type of specialization and division of labor. She noted there may be potential cost savings with specialized IPR enforcement by a PAE, as opposed to an operating company.

Tero Louko (Google) commented that non-practicing entities can be very aggressive, because their goal is to get as much money as possible. In his view, the entities don’t have the same reputation incentives, or cross licensing needs, as practicing companies. Also, non-practicing entities can make it more difficult to get the necessary information for negotiations or litigation, including prior rates. Jenni Lukander noted that appropriately rewarding innovation is the way the system should work. For certain companies, she said, their real issue with privateers is that they just don’t want to pay for intellectual property.

Tero Luoko said it would raise antitrust concerns for a privateering agreement to foster collusion between horizontal competitors, which was Google’s basis for its complaint to the EC against Nokia and Microsoft. Prof. Carrier said that privateering could raise antitrust problems, including under Sherman Act Sections 1 and 2, Clayton Section 7, and also the FTC Act Section 5. In his view, the primary antitrust problem is raised when a privateer is used to do something that company could not otherwise do, which was how he characterized what Microsoft was agreeing to with Nokia. Jenni Lukander responded that the deal is about fair compensation for innovation. Prof. Carrier said there was a possibility of collusion, as privateers often have revenue targets by agreement, and Nokia and Microsoft agreed on ongoing percentage shares.

In conclusion, Luoko identified several efforts to properly aggregate and disaggregate patents. He noted that Google has joined a license on transfer network with other licensors, whereby the members agree to a license if
transferred to others outside the group. He also cited RPX, as well as patent pools, as useful mechanisms for efficiently aggregating patents and improve information. Jenni Lukander agreed these efforts could be effective, particularly to the extent they increase transparency in licensing. Prof. Carrier and Anne Layne-Farrar agreed that improving transparency would have positive effects on the market.
ENFORCERS’ ROUNDTABLE

Please join us for an in-depth conversation with leading competition authorities about their enforcement priorities and the transactions, investigations and cases that are making headlines. The Roundtable is always a concluding highlight of the Spring Meeting.

Chair and Moderator:
Howard Feller, McGuireWoods LLP, Richmond, VA

Questioners:
Sharis A. Pozen, Vice President, Global Competition and Antitrust, General Electric Co, Washington, DC
Hartmut Schneider, WilmerHale, Washington, DC

Panelists:
The Honorable William J. Baer, Assistant Attorney General, U.S. Department of Justice, Antitrust Division, Washington, DC
Lord David Currie, Chairman, Competition and Markets Authority, London, United Kingdom
Kathleen E. Foote, Senior Assistant Attorney General, Office of the Attorney General, San Francisco, CA
The Honorable Edith Ramirez, Chairwoman, Federal Trade Commission, Washington, DC
Margrethe Vestager, Commissioner for Competition, European Commission, Brussels, Belgium

Summary:

U.S. Attorney General Eric Holder discussed the Department of Justice’s achievements over the last six years, since he took office as Attorney General, and its commitment to promoting competition. He acknowledged the Antitrust Section as a “vital channel” for fostering dialogue between practitioners and scholars. One of Attorney General Holder’s main priorities when he took office in 2009 was to bring strength and fairness to the rules by which commercial enterprises operate, and a core focus of his was to protect U.S. citizens and ensure fair competition. He believes that the enforcement of antitrust laws is in the interest of all those who believe in free markets.

On the criminal side, the DOJ has obtained a record number of fines and penalties over the last fiscal year, $1.3 billion, and more than $5 billion over the course of the Obama Administration. The Auto Parts investigation into price fixing and bid rigging was the largest criminal investigation in antitrust history. The Department has pursued all forms of criminal conduct (and has sent a clear and consistent message to anyone who would take advantage of American consumers. Attorney General Holder stated that he expects that there will be “more significant” news on the criminal side within the next few weeks.

The civil side has kept up to the criminal program in all aspects: the Department has challenged numerous mergers that would have reduced competition in critical sectors, challenged non-merger business practices that distorted the competitive process, including Apple e-books and American Express. More important than the victories is the message they send to businesses—the Department will never shrink from litigation or shirk its responsibility to uphold the laws of the nation and to protect the consumer. There is no unlawful conduct too complicated, and no company or individual too large or powerful to be held accountable for actions that harm the American people.
Bill Baer (DOJ) explained that cartel enforcement is up to 40 percent of what the Antitrust Division does. The Department is committed to fair and effective enforcement and committed to going after local bad behavior (e.g., homeowners in foreclosure auctions). Relief that the Department seeks includes disgorgement of ill-gotten gain; if you do wrong, you shouldn’t be able to pocket the dollars from your wrongdoing.

Edith Ramirez (FTC) mentioned that the FTC celebrated centennial anniversary over the last year and had a phenomenal centennial year. She described the recent litigation and court decisions where courts found in favor of the FTC, including the Supreme Court’s affirmation in North Carolina State Board of Dental Examiners v. Federal Trade Commission (regarding the state action doctrine). The FTC also stepped up its efforts for consumer protection in the mobile sector (fraudulent charges, deceptive advertising, etc.).

Margrethe Vestager (EC) indicated that it has been a challenge for law enforcement to protect citizens and customers where businesses are now global. Law enforcement across jurisdictions are sending one message to businesses, and working as closely together as possible. Ms. Vestager stated that she will be promoting that cooperation.

Lord David Currie (UK) said that the Competition and Markets Authority, established under the Enterprise and Regulatory Reform Act in the UK. The UK is determined to engage in more enforcement. There is a general duty under the reforms; the CMA must seek to increase competition both inside and outside the UK. The Reform Act gives license to work internationally, and international cooperation with the U.S. and EC is working effectively.

Kathleen Foote (CA/NAAG) explained that the multistate Antitrust Task Force engages in joint investigations across states, and advocacy in amicus briefs. She believes that state antitrust enforcement goes hand-in-hand with consumer protection. In many states, the consumer protection law is also the antitrust law. Also, the Affordable Care Act relies on antitrust enforcement to achieve the cost-savings anticipated by the law.

International enforcement

Mr. Baer explained that when the DOJ assesses fines, it does so based on the volume of affected commerce and an international cartel will be the result of a larger volume and a larger fine. Of the Fortune 500 companies, 75 percent of them are foreign-based. There are some restrictions as to what the enforcers can share, but that in situations where they are dealing with an international cartel, the enforcers are able to work together using the information from the leniency applicant to coordinate with other jurisdictions. Coordination is most effective when done at the front end; it encourages self-reporting by people and companies who are recognizing the benefit. Ms. Ramirez explained that cooperation is a top priority in multi-jurisdictional matters. Ms. Ramirez said that, together with the DOJ, the FTC has a memorandum of understanding with China. There is formal dialogue and considerable informal dialogue, as well as particular cooperation on particular matters. There has been overall development of the Chinese enforcement program, but the agencies are small and have only been doing business for a few years. She added that it is “remarkable” what we are seeing being done in China. She discussed the importance of 1) procedural fairness, 2) economic evidence, and 3) consumer protection. Lord Currie stated that enforcers need to do whatever they can to further the developments in China, because there are differences that remain.

Regulation and technological change

Ms. Foote explained that there needs to be continued deference to the states. She referenced the NC Dental decision, and added that states will have to weigh more carefully how those interests play out. Imposing a regulatory apparatus is going to be more expensive and more directly borne by state and local governments. Ms.
Ramirez also noted *NC Dental*, and added that the FTC plans to issue guidance on that decision in the near future. She advised sharing competition policy expertise with the rulemakers so that the regulations are tailored to the agency’s particular concerns and not overbroad. She noted that the FTC is holding a workshop on June 9 on the sharing economy, looking at businesses that are developing using the Internet’s peer-to-peer platforms. Mr. Baer explained that innovation is key to a growing economy. Enforcers need to make sure they understand the facts in order to sort out a legitimate claim. Lord Currie agreed that enforcers need to deepen their understanding to make sure markets remain open to innovation and change.

**Mergers**

Asked about mega-mergers, Mr. Baer believes that some merger ideas should never get out of corporate headquarters. If there is a prior transaction, even a modest increase in market share would lead to a tipping point. Ms. Ramirez advised that enforcers look at each transation on its own merits, as well as what is going on in the past. Ms. Vestager acknowledged that mega-mergers suggest that the global economy is finally looking up. She agreed that enforcers have to address these cases one-by-one because otherwise it is possible to misunderstand market developments and risk sending the wrong message. Lord Currie explained that the current regime has carried over from the old regime in the UK. The UK regime is a voluntary one, but enforcers are diligent in looking at cases that should have been referred, but weren’t. This is for companies considering mergers that involve the UK. Mr. Baer added that it is an “embarrassment” for companies if they have to pull out at the last minute, so people need to take merger guidelines seriously. It is not worth anyone’s time to challenge things that are patently problematic. Ms. Foote stated that states are looking to be selective in merger review. There are key industries for states, including health care, waste hauling, and land fills.

**Reverse-payment settlements**

Ms. Ramirez explained that there are a number of issues post-Actavis that courts are dealing with, in FTC lawsuits, and the FTC is also submitting amicus briefs in areas where the FTC is hoping to develop the law. Ms. Foote explored the question as to whether these can be litigated under state antitrust law, noting an upcoming argument on this in California. This is something that could be very significant if those cases are to be heard under state antitrust laws, which in some cases would be more stringent.

**Consumer claims**

Ms. Foote explained that states have utilized consumer claims using *parens patriae*. If the class action bar is effectively representing consumers’ claims, there is less reason for the state to be involved, but the state interest increased when class certification was more and more difficult. Lord Currie described that the UK’s collective action system is similar to the United States, but the UK has retained loser pays cost rules, which should deter unmeritorious cases. Additionally, damages are determined by the judge, not a jury, and contingency fees are not allowed, so Lord Currie doesn’t think it will lead to a flood of follow-on civil litigation.

**Closing remarks**

Mr. Baer advised that the audience value this ABA conference, to use it as an opportunity to engage in a dialogue with enforcers and to challenge the enforcers’ assumptions and to understand enforcement priorities. Ms. Ramirez stated that it is an “incredible time” for antitrust, and mentioned to conference attendees that the FTC had released its 2014 Annual Highlights ([https://www.ftc.gov/reports/annual-highlights-2014](https://www.ftc.gov/reports/annual-highlights-2014)). Ms. Vestager
added that although a number of the debates will not be resolved, we are still moving in the right direction. Lord Currie was struck by the real community of interest of competition authorities, and with legal professionals working in this area who really care. The UK’s reforms are going to be significant but the UK has to show the results of those reforms; the UK has “a lot of things to prove.” Ms. Foote enjoyed learning more about the development of the ECN and ICN which have any number of things in common with multistate Antitrust Task Force. She is looking forward to further dialogue regarding global antitrust issues. She added that she will be replaced later this year in her position as chair of the task force.