Enforcers' Roundtable

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JONATHAN GLEKLEN: Welcome, everybody, to the Enforcers' Roundtable, always a highlight of the Spring Meeting, and this year is no exception. Today we are joined by leaders of some of the world's most important competition authorities who have agreed to share with us their enforcement priorities, their achievements and the setbacks from the past year, and, perhaps most importantly, where they see things going.

Let me start out by giving everybody on the panel a chance to provide any updates that they have on significant developments at your agencies, whether on matters or personnel or policy initiatives.

Jonathan, why don't we start with you?

JONATHAN KANTER: Sure. Thank you so much, Jonathan. I am disappointed that I can't be with all of you there in person today, but I'm delighted to have the opportunity to join you and my fellow enforcers by video.

Let me start by saying that we are firing on all cylinders at the Department of Justice Antitrust Division right now. There are some key take-aways that I want you to leave with.

First is we are not afraid to take on the big cases and we're not afraid to take on big companies, period, full stop.

Second, we are not afraid to litigate. We have more cases in litigation than in recent memory at the Department of Justice. On the civil side we have six ongoing civil litigations against Google, American Airlines, Penguin Random House, U.S. Sugar, United Health, and Verzatec; and that's just on the civil side. We have over twenty cases in active litigation on the criminal side, and let me just say on all fronts we are just getting started.

Third, we are expanding our reach beyond the Washington, DC Beltway. It is extremely important for us that we provide greater access to justice and greater access to the Justice Department. Antitrust affects citizens, it affects consumers, it affects workers, it affects small businesses, it affects our democracy. We are not being faithful to the goals of the antitrust laws, the plain text of the statutes, unless we are reaching out and seeking input from a broader range of stakeholders.

What does that mean? That means we are using plain language, we are changing the language of antitrust, to make it more accessible to more people so that it can be more participatory. We are going out and we are conducting as part of our work with the FTC listening sessions to hear from affected stakeholders, to open it up to the public. This is extremely important for us and it's something we are very excited to build on in the coming months.

Finally, we are not going to let up on our criminal enforcement program. We are going to hold individuals and companies accountable for violations of the law. Antitrust is a crime—we'll talk a little later about some changes to our leniency policy and some other initiatives—and we intend to vigorously enforce the antitrust laws. And, when criminal penalties are consistent with the facts and the law and the principles of criminal prosecution at the federal level, we will not hesitate one bit to seek the full slate of remedies under the law.

JONATHAN GLEKLEN: Thanks, Jonathan.

Lina?

LINA KHAN: Hi, everyone. Nice to be with you all albeit virtually. Also, before diving in let me give a big thanks to the DOJ team for livestreaming and to the ABA team for making this virtual format available given the spike in cases that we're seeing.

It's an incredibly busy and exciting time at the Commission. We have a historically high caseload on the antitrust side and enforcing the law is our top priority. We have a full docket and we are going to continue to prioritize litigation.

We have recently seen a great set of successes on both the merger and the conduct sides. On mergers we are coming off a string of strong victories. We saw three back-to-back merger abandonments in response to FTC challenges, as well as an extremely favorable holding at the Third Circuit on one of our hospital merger cases.

I think it's worth noting that two of those abandonments were in the context of vertical challenges, so to have parties abandon in the context of vertical challenges I think really speaks to the incredible talent at the agency as well as the real skill and muscle that the teams have built assessing vertical harms and bringing vertical challenges, and that will continue to be a priority.

On conduct we have had a couple of important developments in the last few months.

In the *Vyera* litigation we got an across-the-board win in our case against Martin Shkreli. The judge found him individually liable for an unreasonable restraint of trade and monopolization and, notably, the judge also banned him from the industry. The industry ban is a precedent-setting relief in the antitrust context, and we are going to be continuing to push both for individual liability and industry bans where we think they are appropriate.

In our major *Facebook* litigation we of course survived the motion to dismiss after we filed a revised complaint in August. I think in Judge Boasberg's opinion we see some important developments, including the recognition that privacy degradation and decline of data protection can constitute harms in the competitive process. I think this effort overall is part of our broader effort to really push the law and make sure that it is advancing to keep pace with some of these new market realities, especially in the context of digital markets.

I would say for some of our ongoing matters we are currently taking a very close look at the entire merger investigation process. I joined the Commission during a historic surge in merger filings with deal volume off the chart, and I think that experience in particular surfaced some of the particular strains that we face that make it challenging for us to fully investigate potentially unlawful deals and bring lawsuits within the Hart-Scott-Rodino (HSR) timelines. Some of those strains are a feature of the current legal regime; other strains are a feature of processes and decisions that are within the discretion of the antitrust agencies; and so, in lockstep with the DOJ, we are taking a close look and making sure we are making amendments where needed so that we can fully discharge our duty to investigate and enforce the law when we encounter unlawful deals.

We of course as part of that overall process are also currently reviewing the Merger Guidelines. We launched that revision process in tandem with DOJ in January. The goal there is really twofold. First is to ensure that the Guidelines are accurately reflecting the current market realities, the realities of how firms are acquiring and exercising market power through acquisitions in the modern economy. Second is really ensuring that the Guidelines are accurately reflecting the state of law. That's one additional project.

The second is we are taking a close look at the HSR form and assessing whether there are ways to collect on the front end information that is more probative of whether the parties are proposing an unlawful deal, the idea being that having a form that is more probative in this way can make our investigations far more timely and efficient.

I'd say across-the-board we are really looking to ensure that our enforcement work is seeking to promote deterrence. I see our goal as cracking down on illegal activity in the marketplace, including illegal deals. I think the degree to which proposing facially unlawful deals has become normalized is a serious problem for enforcers, and so addressing that is a top priority for us.

One step that we took last year was to reverse course and return the agency to its practice of using prior approvals in merger settlements, and we are continuing to consider additional ways to promote deterrence.

And then I would just echo the AAG. We are really trying to ensure that the Commission is engaging deeply with the public and creating opportunities for greater public participation to make sure that our work is really reflecting the actual challenges that people are facing in markets due to unlawful monopolization or mergers.

JONATHAN GLEKLEN: Thank you.

Gwendolyn?

GWENDOLYN COOLEY: With state AAGs from across the country on (by my count) fourteen panels at the Spring Meeting this year, you have spent much of the last three days hearing about all of our good work.

As you've heard, we are cooperating very well with our federal counterparts, like on the *Google* case, where some of us joined with the U.S. Department of Justice, and others joined the Colorado-Nebraska *Google* case, all of which are joined in the same court with a hearing this afternoon.

The states had been working well together with the FTC on the *Facebook* case and, as you all now know, the states are pursuing an appeal.

But there are other tech cases that the states are pursuing on their own. The *Google* in-app payments case that Utah and North Carolina are leading alleges that Google engaged in anticompetitive conduct related to the Google Play Store. The states recently amended their complaint, in part, as a response to last September's *Epic v. Apple* decision.

Also last fall the Judicial Panel on Multi-District Litigation moved the Texas ad tech case against Google to the Southern District of New York over the Attorneys Generals' protests. Although this case is moving swiftly, which is a good thing, whether joined to that case or not, fifty-two Attorneys General sent a letter to Congress discussing their support for the State Antitrust Enforcement Venue Act of 2021, which would allow the Attorneys General to choose our own venue when we file antitrust cases. Choosing our own venue puts us on a more equal footing with our federal counterparts and would potentially prevent the incredible delays inherent in being joined with class litigation, and helps reduce the costs associated with antitrust litigation for state taxpayers. Thank you, Chair Khan, for your kind letter endorsing this legislation.

There are also consumer tech cases, like the New Mexico settlement with Google over Children's Online Privacy Protection Act violations; and Attorneys General from D.C., Indiana, Texas, and Washington also have another litigation against Google for its location-tracking practices and—my favorite phrase—dark patterns.

Many of you know the pharmaceutical industry is a long-time target of state antitrust enforcement.

Obviously, I would be remiss if I did not mention the $26 billion opioid settlement signed by fifty-two states and territories with the nation's three largest pharmaceutical distributors, Cardinal, McKesson, and Amerisource Bergen. The agreement marks the culmination of three years of negotiations to resolve more than 4,000 claims of state and local governments across the country and is the second-largest settlement in U.S. history.

As we just heard from Chair Khan, the states really played an important role in the case against Vyera and Martin Shkreli. State law was very important with the precedent-setting rulings on disgorgement, joint and several liability, and injunctions, particularly that lifetime industry ban. The judge also, as you heard, banned Martin Shkreli for life from participating in the pharmaceutical industry in any capacity as a result of his flagrant and reckless conduct.

The states are also still working on a number of other pharmaceutical cases: the states' *Suboxone* product-hopping case that I lead and the price-fixing cases against the generic drugs industry led by a team from Connecticut, New York, and Florida, amongst others. We continue to try to hold that industry accountable.

Also, as many of you know, the states review a lot of healthcare transactions. Rhode Island recently blocked a proposed merger between Lifespan and Care New England under its state hospital conversion statute and Rhode Island ultimately joined with the FTC to sue to block that transaction.

Out in California, the AG recently conditionally approved a hospital merger case where Kaiser took a 30 percent stake in St. Mary's Medical Center, ordering price caps and another interesting behavioral remedy. On the structural side, Utah recently settled with Davita Total Renal Care, ordering a fourth clinic divested beyond that required by the FTC.

The states review everything that affects us, from broiler chicken cases in Washington State to airlines with the *Northeast Alliance* case. We have a lot going on, and if you're looking for a new job, we're hiring.

JONATHAN GLEKLEN: Thank you very much.

Margrethe?

MARGRETHE VESTAGER: We hope to keep you busy because we just started the evaluation of Regulation 1 in order to know if our enforcement tools are effective, if our processes are effective, and we will do a number of stakeholder reach-outs in order to learn how you see this. Of course this is a long process, but first things first, we need to know how this has worked for you.

We keep ourselves quite busy on the casework. We have two *Amazon* cases right now, one on third-party data collected by the Amazon Marketplace from third-party retailers for the benefit of Amazon Retail, as we see it and as we stated it in the Statement of Objection, enabling Amazon Retail to have much fewer products but to take the lion's share of the turnover of the Marketplace.

The second *Amazon* case is about the Buy Box, how to get in there, because people using Amazon will know that very often what is in the Buy Box is what you buy. We are figuring out how to get in there; is that related to whether or not you also subscribe to Amazon Fulfillment, or is it actually sort of a fair representation of what may be interesting for the customer?

We have a couple of *Apple* cases. We have the music streaming case. The Statement of Objections was sent last year almost to the day on the mandatory use of an in-app payment system with a 30 percent fee in combination with the "anti-steering provisions;" and of course in particular where there is competition between Apple services and the apps that are forced to use this mechanism is really interesting.

Second, we also have a more general *Apple* case on the App Store. The third *Apple* case concerns the near-field communication (NFC) technology. Since this access is restricted, this means that others who want to enable payments have huge difficulties if it is not possible for them to do that; so there is little competition when it comes to what kind of payment you would want to use on your phone.

We have a *Facebook* (or *Meta*) case based on dominance in social networks favoring their own classified app business using data from other classified app services. We are pushing forward on that as well.

A second advertising-related case is looking into the Google ad tech stack, seeing if that full vertical integration is actually beneficial. Here we combine this also with a look into the Privacy Sandbox.

Latest we have opened a case where we have the concern that Google and Meta have agreed to push out a competitor in header bidding. The code name for the agreement was "Jedi Blue." Here we followed the lead from the Attorney General of Texas. I really appreciate that one can have that kind of cooperation. I think it shows the benefit of enforcers coming together.

Last but not least, we are also busy in court. The *Google Shopping* case has been appealed to the Court of Justice of the European Union, so we will of course go there. That is not the only litigation we have, and I think that is one of the things that will keep us busy.

We have a different way of doing things than the U.S. enforcers: we make a decision first and eventually we go to court. Our colleagues here go to court first. I can tell you the litigation part of our work keeps us busy as well, and it will continue to do that since we will continue to push on with our decisions in the coming months and years.

Thank you.

JONATHAN GLEKLEN: Thank you.

Alex?

ALEXANDRE CORDEIRO MACEDO: Good morning, everyone.

CADE has conducted important antitrust investigations on competitive conduct practices by Big Techs. In 2011 CADE conducted an investigation in the *Google Shopping* case. Google was being accused of self-preferencing. It was the same case in Europe and also here in the United States. But Google, on the other hand, defended itself by claiming that the exhibition of Google Shopping was beneficial to the consumers and that it did not violate antitrust law in Brazil. CADE's Tribunal dismissed the case based on the lack of evidence of anticompetitive behavior and the alleged efficiencies which were verified by the Authority during the investigation.

CADE investigated this case for seven years, and during those seven years, under the rule of reason, it couldn't find any harm to the consumers. We are not defending companies that had complained about websites for comparison prices, and that market was also changing in Brazil. That discussion was all about the efficiency for consumers at the end of the day. We didn't see a rise in prices and we didn't see a decrease in the quality of the products, so we didn't find the harm, even though we had been investigating the case for seven years.

We have other investigations against Google, for example, the scraping case. The first investigation dismissed the case as well because we didn't have enough evidence. However, later in 2019 we opened the scraping case again, and now it is still under investigation and we are collecting more evidence.

We also have an investigation into *Android*.

We have an investigation in the food delivery market. That is an important investigation in Brazil—*Rappi v. iFood*. Rappi was claiming that iFood would have a big share of the market and also contracts with exclusivity clauses with restaurants. We used interim measures to stop the exclusivity at that time—iFood could not sign another exclusivity contract or even renew the contracts that were finishing. This was interesting because they didn't appeal, and the case is still under investigation right now. Let's see what will happen with the case in the Tribunal and with the General Superintendent as well.

We had another case, this time involving the Brazilian platform Gympass, which brought together consumers and big gyms in Brazil. With this platform, if you want to go to a gym, you pay the platform and you get access to certain gyms. They also had contracts with exclusivity clauses with those gyms, and CADE granted interim measures to stop the exclusivity.

We had also an *Uber* case a while ago. We dismissed the case because we didn't find any harm. At that time, the argument was that it could be a kind of cartel. We dismissed the case because we didn't find any evidence under the rule of reason that it could cause harm to the consumers.

MELANIE AITKEN: First of all, thank you for allowing me to part of this panel. It is a delight to be here.

For many years now, cooperation and collaboration have become routine among the agencies represented up here, and elsewhere of course. There has been a remarkable increase in trust and communication over the years as a reflection of the hard work of agencies around the world to try to build that trust.

It is of course in the execution in the particular cases that the opportunities, if you will, for convergence or divergence really do materialize.

A case in point: last week there was the abandonment of a deal by two shipping equipment manufacturers, Cargotec and Konecranes, in the face of opposition from the DOJ and the UK Competition and Markets Authority (CMA) notwithstanding they had secured the approval of the European Commission by offering certain conditions. Notably, in the announcement of the result the DOJ thanked its enforcement partners, including those at the Australian Competition and Consumer Commission (ACCC), the European Commission, and the CMA for their close and constructive collaboration on the matter.

So, close collaboration but different outcomes. I think as a former agency head and all of you who have worked in the agencies over the years would appreciate how those two dynamics can coexist.

I think it's interesting, and we'd love to hear from all of you about what impact that has going forward. Do you work closely together, build trust, and then end up going in different directions? Does it matter what kind of a case it was on, and does it impair in any way your ability to work together going forward?

Margrethe, if we could start with you that would be great.

MARGRETHE VESTAGER: This is a good place to start because as you say we just had a very recent example of very good cooperation and diverse outcomes.

We also have a quite recent example of the same outcomes in the Standard & Poor's case, *S&P Global/IHS Markit*, where the Commission, the CMA, and the DOJ had a similar view and we solved it in a similar way.

I think it's a really important discussion because it also enables everyone to see where we have similarities and where we have differences primarily in the legal framework in our obligations.

In the *Cargotec/Konecranes* merger we had quite a number of serious concerns about horizontal overlaps in equipment that is really essential for ports to work effectively. The parties said, "We will work with you to try to solve this."

When we have something that serious to deal with, of course I think we have the same reaction as everyone else: we really would not like to have a mix-and-match remedy because that may make the remedy difficult viability-wise and it may be difficult to find a suitable buyer. So it took some time for the parties to find relevant packages for the concerns that we had. And, we actually found that the remedy packages were good, a strong business proposition, a small reverse-carve-out, but otherwise two separate packages.

We don't do our work in splendid isolation. Not only do we work very closely with colleagues here at the DOJ and the CMA, but we also work very closely with the marketplace. In the process we had not one but two market tests and I think, give or take, sixty participants in each market test, so a really strong feedback from the market. Overall positive.

Still, sometimes one has to guard oneself in order to make sure that the remedy is taken by someone who can actually run with it and make sure that it is competition in the market to match for the competition lost; so we had even an up-front buyer approval as part of the commitment.

When we ourselves think that the commitments will actually work to remedy the competition concerns, we make sure that risks are being mitigated so that it will be a viable, strong competitor to make up for the competition lost. We have a market test that is posited with lots of participants—in this case two market tests.

Then, when we have to reach a decision, the scope of discretion on our side becomes more and more and more limited because the problem seems to be solved. This was why we ended up in a situation where we approved this merger with these important remedy packages.

I think if you look at the DOJ, there were differences in the market situation, they had some concerns that we didn't have, and I think that to some degree could explain the divergence.

With the CMA it's a bit different because here the market assessment was the same, but they have a fiercer stance when it comes to remedy packages that consist of what they saw as mix-and-match, but we did not and we think we could actually accept this; also the market accepted it because we had quite a lot of buyer interest in the different packages.

Long story short—close cooperation, diverse outcomes. What I think is important here is that this result should not let anyone believe that trust has deteriorated between us. I completely agree with Melanie's introduction to this part of our discussion that the trust between enforcers has been steadily increasing over the years. I think that is good because we are faced with global competition, and here I think we can only match that by working very closely together in respect of the differences that we have in our legal context.

MELANIE AITKEN: Thank you.

Jonathan, we would welcome your thoughts on it as well, please.

JONATHAN KANTER: Good.

In any event, I want to echo the comments of Madame Executive Vice President, which is that cooperation and trust among enforcers are extraordinarily high. I have been at the Department of Justice now just over four months, and I'm blown away by the level of cooperation, by the level of graciousness, and by the level of substantive input that we provide to one another. What I see is a global competition enforcement community that is working extraordinarily well together, that is cooperating with one another for the benefit of the global economy, and where differences, if any, are quite few.

For the merger that was mentioned (*Cargotec/Konecranes*), we did make sure not just to thank the CMA and the Australians who reached a similar outcome but also to thank the European Commission. Why? Because we were standing on their shoulders. We reached the same substantive conclusion regarding the problems with the merger. We have different systems; there were different effects on consumers; obviously supply chain issues in the United States are of acute importance; we have a different legal process. I have been quite clear since taking office that remedies are highly disfavored, even in mergers, and that divestiture remedies will be the rare exception rather than the norm.

But all of that being said, we are better together. I think the *Cargotec/Konecranes* merger is a reflection of that because we reached similar substantive outcomes, because attempts to engage in regulatory arbitrage didn't work. We were coordinating the entire way, the communication was extraordinary, and I can say, from my viewpoint, the level of trust is extraordinarily high and the level of respect is extraordinarily high. Even if we perhaps reach a different conclusion from time to time, that being again the exception, I see it as unlikely to disrupt the work that we are doing with one another because we respect our differences when they exist.

This holds true not just for international enforcers but also for state enforcers. Since coming into the Department of Justice the communication with our state enforcers has been extraordinarily valuable. We view them as equals. We are investing in building out more infrastructure to support our relationship with the State Attorneys General. In fact, recently joining our Front Office was someone who graced this stage not too long ago, Sarah Allen, who is working alongside Mac Conforti at the Department of Justice to build out a broad-range level of cooperation and collaboration with our state enforcers.

The message here is not one of divergence—the message here is one of convergence and cooperation, and it is sincere.

MELANIE AITKEN: Thank you, Jonathan.

Alex, we read that CADE has been entering into an increasing number of cooperation agreements with domestic colleagues in other agencies as well as internationally, and most recently perhaps of note an MOU with the Competition Commission of India. Could you share a few thoughts about how that has been impacting the cases that you are bringing and how you see that bearing fruit going forward?

ALEXANDRE CORDEIRO MACEDO: I agree with Margrethe and Jonathan Kanter. International cooperation is very important. We are in the same boat, we have to cooperate, and trust is always one thing that we need between agencies.

Cases are frequently multijurisdictional (in mergers and acquisitions and investigations), so Brazil has been signing MOUs with jurisdictions to try to exchange information, learn from them, and bring to Brazil the best practices.

We have a lot of good examples. With the European Commission, for example, the *Siemens/Alstom* case was a very good example of international cooperation. In the case, the biggest problem wasn't in Brazil. We had just a small market where we could apply a remedy, but if we applied this remedy before the European Commission, it would probably cause a problem in Brazil. We did a timing alignment and waited for the European Commission's decision. It is very important for this cooperation to occur between agencies.

With the other BRICS countries (Russia, India, China, and South Africa), we have to hold close cooperation because our economies are very similar. We face the same problems, so the international cooperation among the BRICS is very important.

One thing that Mr. Kanter highlighted here is that cooperation occurs not only with foreign agencies. Inside cooperation is important as well. We do have cooperation between institutions in Brazil. We signed MOUs with sector agencies and have a very good relationship with them. In our advocacy endeavors, we advise if the regulation is pro-competitive or anticompetitive. We also have a good relationship with the prosecution services in Brazil. We have a representative of the Federal Prosecutors' Office at the CADE Tribunal, so in every case he can give his opinion. He is very close to us and helps us to do the leniency program.

CADE, at least for for cartel cases, is a "one-stop shop." If you have a cartel, you don't have to go to the Prosecutors Office and later to CADE. Just go to CADE or call them and we will get together. We also offer immunity; if you sign a leniency agreement with CADE, you have criminal immunity and the Federal Prosecutors' Office cannot go on with the case.

These cooperations help us to increase our enforcement, give more transparency, and enable us to do our job.

MELANIE AITKEN: I just have one more question on this topic of cooperation. Last year a host of agencies—the FTC, the DOJ, the European Commission, the State AGs, the Canadian Competition Bureau, and the CMA—announced the formation of a Multilateral Pharmaceutical Merger Working Group.

Gwendolyn, I think you touched on this in your opening remarks, but I just wondered if you could share any updates, and any others can chime in afterwards if they'd like as well, please.

GWENDOLYN COOLEY: Absolutely. I will say, just to be boring and to echo everything that you've heard already, we really are getting along very well with our federal and international counterparts.

I would say this working group is a perfect example of that. As I said, healthcare is hugely important to the states. In fact, we have three different committees that address healthcare and pharmaceutical issues within the Antitrust Task Force at NAAG. Each of those committees had a delegate to the Multilateral Pharmaceutical Merger Task Force where we have learned a lot.

First, it was fascinating to hear from our counterparts across the globe and it is useful, even when we don't have the same law, to see how we approach problems differently.

We have also heard from a number of different stakeholders, including opinion leaders, industry, academics, and the ABA—and yes, we read your comments, thank you very much.

We are still learning about what works and what doesn't, and there are a lot of questions that we are still thinking about.

As for the immediate impact, I think this exercise has helped frame the states' approach to our comments on the Merger Guidelines, as you will likely see soon, and as we develop our thoughts on remedies and market definition amongst other things. The states are really looking forward to distilling and implementing the lessons we've learned going forward, and I hope to see more developments from this group soon.

JONATHAN GLEKLEN: Anybody else want to chime in, Lina or others, on the Multilateral Pharmaceutical Merger Working Group, or we can move on to the next topic?

LINA KHAN: I would just quickly echo everything Gwendolyn just shared. It has been a really fantastic past experience and I think a good example of an area where we are really trying to understand how to narrow the gap between how we might concurrently sometimes look at some of these pharma mergers in particular, and how industry analysts might be anticipating the effects of these transactions. So the more that we can be talking to market participants, the more we could be learning or figuring out how to make sure that new learning is informing our analysis.

It has been a great effort so far and I am looking forward to the continuation of it.

JONATHAN GLEKLEN: Thank you.

Why don't we move on to a very new topic of new legislation? Competition/consumer protection/privacy legislation is continuing to circulate in the U.S. legislatures, making even bolder strides in Europe and elsewhere.

Margrethe, why don't we start by talking about the recent developments involving the Digital Markets Act (DMA)? Can you give our participants here and the people watching on the streaming service an update on who is going to be covered by the DMA, what the prohibitions will be; and can you also talk more broadly about the problems that the DMA is really intending to address? For example, why is there a concern with data being used across services; why is there a concern with self-preferencing?

MARGRETHE VESTAGER: Well, how long do you have? [Laughter]

JONATHAN GLEKLEN: We have an hour and ten minutes.

MARGRETHE VESTAGER: Here we are quite excited I must say—and not only us. One of the features of the Digital Markets Act is that the Commission will be the sole decision maker but we will work very closely with the national competition authorities in all Member States. This is going to be resource-intensive to get it right, so we are looking very much forward for the national competition authorities and for us to make the most of the market insights and of the resources we have available to make sure that we are effective on the ground because obviously the success of a piece of legislation is in its enforcement.

The aim is really, really simple—to have open, fair, contestable markets—and that is of course suggesting that may not be the case as we speak.

In the first mandate I had not one, not two, but three *Google* cases, a couple of *Amazon* cases, and what we saw was that within the specifics of the cases we could stop illegal behavior, we could see maybe markets starting to recover, but no sort of general learning. When we did the sector inquiry into the consumer Internet of Things, we saw exactly the same things that we had been going after before.

And now we just heard about another *Google Shopping* case with the Brazilian authority, and we here have the State AGs who are looking into a number of digital issues, so we realized by the end of the last mandate that we are onto something systemic here and that we needed something to enable the rigor of the specific case law and case enforcement to be more broadly useful.

So here comes the DMA. The European Parliament and the Council maintained the main structure of the proposal. The dynamics will be that if you meet a certain set of thresholds that are being shaped by our understanding of what is a dominant market position, then you will be a designated gatekeeper. Being a designated gatekeeper, you will have to live up to a set of do's and don'ts.

One do could be that you need to give people their own data. We have the specifics of the *Amazon* case right now where small retailers do not have access to high-quality, rich data about their business that they do on the platform. Amazon Retail may have that access to the benefit of Amazon Retail. Here obviously we find that the small retailers should have their data in order to improve their business. So that would be an obvious do.

An obvious don't would be a ban on self-preferencing. The *Google Shopping* case is the most obvious example, but we get a lot of people who are not really comfortable in other verticals. They say, "Well, it may be fine now, but we have the sense that we could basically be turned off like this [snaps fingers] if self-preferencing gets started." So I think this is an obvious ban in order to make sure that those who are in these marketplaces can be there safe and sound.

We consider this a pro-innovation piece of legislation because for some of these smaller businesses it should depend on their ideas, on their work ethics, on their access to funding, if they get to their customers; it should not depend on someone who is keeping the gates to their market. So it becomes much more attractive to invest because the gatekeeping is basically stopped and it depends on you whether you are or have a chance of being successful, not on some third party.

I think that is really an important takeaway that this is pro-innovation and it puts responsibility where responsibility is due. There is no ban of success in Europe, which is not on the do's and don'ts list, and you can be really successful; but with success comes market power and with that market power comes responsibility, and this is what we express in the do's and don'ts list.

We are really looking forward to getting started. Now the Council and Parliament will finalize the formalities, so it will be in our *Official Journal* around the 1st of October and come into effect 20–22 of October, and then the formalities are there.

But we have started talking already now with businesses who think that they might be in scope. I don't know as I speak who they will be. My guess is a number of U.S. companies, maybe a couple of Chinese companies, maybe a couple of European companies as well.

We have open doors. Come and talk to us to say what you think, how would you live up to this. We do think that compliance should be in place by early 2024.

JONATHAN GLEKLEN: Thank you.

Lina, what about in the United States? Do you think we need new legislation here?

LINA KHAN: There are a few areas that are top of mind.

I think for the FTC in particular we need a fix to Section 13(b) of the FTC Act to ensure that we can seek equitable monetary relief in federal court including restitution and disgorgement. This would really be addressing the fallout from the Supreme Court's *AMG Capital Management* decision last year, which has had serious ramifications for the FTC, effectively eliminating billions of dollars of relief that we would have been able to secure for Americans. So it's incredibly important that we get this.

Another area that to my mind seems ripe for revisiting is the Hart-Scott-Rodino Act (HSR Act). I think specifically the thirty-day timelines that we see in the HSR really reflect lawmakers anticipating a much smaller set of deals that the agencies would be reviewing. Interestingly, some of the House Reports from that time show that the lawmakers thought that HSR would really cover around 150 transactions annually, whereas the agencies now routinely get that number of filings every two weeks. I think when you add on top of that the degree to which the investigative process has become much more document-heavy and much more onerous and much more complex, that thirty-day timeline is oftentimes not enough for our staff to be able to thoroughly investigate those deals.

I think another aspect of HSR that is worth looking at is the filing fee. The law basically ensures that as we see an increase in the volume that the filing fees are also increasing, which would ensure that we are able to keep pace with the some of the cycles that we see in the deal volume. I think the absence of that was extremely acute for us over the last year.

More generally, I think it's no secret that the courts have narrowed the zone of liability, especially in the context of the Sherman Act, which I think has chilled enforcement in ways that lawmakers increasingly seem troubled by.

I think a whole host of the proposals that we've seen out of Congress are very interesting, and I think as a general matter greater reliance on presumptions and bright-line rules are important, and I think a shift away from them in a whole set of contexts has had serious costs.

I think in the context of the Sherman Act we see a whole set of decisions that have cabined the law in ways that may no longer be fit for purpose, be it in the context of tying, predatory pricing, efforts to collapse attempted monopolization into monopolization, or the growing expansion of *Trinko* in all sorts of domains even though the holding in *Trinko* was quite narrow. I think those are a set of areas where lawmakers already seem interested but I think additional attention is warranted.

Lastly, I would say that private enforcement of antitrust has been historically a key complement to public enforcement. One reason why there is a private right of action is because lawmakers imagined that there would be a symbiotic relationship between private and public enforcers. So

I think areas in which courts have made it very difficult for private plaintiffs to proceed could be another area worth revisiting. In particular, the kind of judge-made doctrine around antitrust injury has introduced requirements that I think in practice can just make it extremely onerous for private cases to proceed.

And then lastly, one area that we are also thinking about is opportunities to be expanding whistleblower protections in the antitrust context. Presently whistleblowing in the antitrust context is not fully protected at the FTC, and I think this could be especially crucial in the Section 2 context where dominant firms may have the ability to strike fear among business partners and their employees, and so allowing those types of whistleblower protections could be quite critical for us to be able to get information in a quick and timely way.

JONATHAN GLEKLEN: Thanks.

One pending piece of legislation is the American Innovation and Choice Online Act, which was reported out by the Judiciary Committee in January. That proposed bill would, among other things, prohibit Big Tech companies from self-preferencing their own products and services on their platforms.

The Wall Street Journal recently reported that the DOJ had submitted a letter to the House and Senate leadership backing the bill. Jonathan, is the legislation necessary; and what, if anything, would you suggest to improve it?

JONATHAN KANTER: Thank you for that.

First let me congratulate our colleagues in the European Commission on a heroic feat, which is passing the DMA. It was a tremendous effort, including by Executive Vice President Margrethe Vestager and her team to get that over the finish line. It was no small task, an extraordinary effort, and a significant step forward.

Before I answer your direct question, I also want to key off on one thing that Margrethe said that I really truly believe is so important to emphasize: what we are talking about here—competition policy, antitrust enforcement—is good for business. In my experience the only company that doesn't like antitrust enforcement or competition enforcement is the monopoly. What we're talking about is providing opportunity for competition, opportunity to succeed, opportunity to innovate, and that's what we're protecting. In my view—and this is something actually Robert Jackson himself emphasized when he was Assistant Attorney General for the Antitrust Division many decades ago—businesses should want enforcement, they should want the opportunity to compete.

Let me switch a little bit to your direct question. Yes, the DOJ did send a letter to the Senate and the House expressing our strong support for the American Innovation and Choice Online Act and the similar Act in the House of Representatives.

Digital markets have transformed our economy in ways that would have been almost unimaginable decades ago, even fifteen years ago. This important legislation in our view would clarify the legality of anticompetitive and exclusionary discrimination by dominant digital platforms. As more and more of our economy becomes digital, clear standards on anticompetitive discrimination are increasingly important, and this legislation will help us ensure that entrepreneurs and other innovators can access markets free from dominant incumbents that impede competition and innovation.

The legislation would also help enforcers prevent the harms from anticompetitive discrimination. The Antitrust Division is committed to using all the tools that Congress gives us to protect and promote competition, and it's our view in a full-throated way that this new legislation will supplement

our existing antitrust enforcement authority and serve as an important new tool for the Division and others to use to protect the dynamism of digital markets.

The fact remains that the rules of business are changing, the way business operates is changing, the economics of business is changing, and it is important for us to keep pace. Congress certainly has the prerogative to clarify what it believes the appropriate enforcement tools should look like, and it is our job to enforce the law as they write it.

That having been said, even with the laws that we have on the books today it is extremely important and imperative that the Department of Justice enforce the antitrust laws fully in a way that matches market realities, and it is extremely important that we recognize the fundamental ways in which the rules of business have changed, the technology has changed, the economics and incentives have changed, and to make sure we are keeping pace.

JONATHAN GLEKLEN: Thanks.

Lina, anything you'd care to add on that one?

LINA KHAN: I would just echo a lot of what Jonathan said. I think it has really been remarkable to see the set of important proposals coming out of the House and coming out of the Senate in the last few years.

In many instances these are bipartisan proposals. I think what we see more generally is a really critical reassertion of Congress in the domain of antitrust. I think there was a period of time when Congress ended up taking a backseat, and I think the fact that Congress is now reasserting itself really underscores the degree to which there is now wide bipartisan agreement that there are serious problems in the current narrowing of the law and some of the ways in which they might not be reaching new contexts, such as digital markets.

I would just say that it has been remarkable to see the progress in Congress in both the House and the Senate and it's an incredibly exciting time across the board.

JONATHAN GLEKLEN: Thanks.

Gwendolyn, there is also activity in state legislatures ranging from privacy and data protection statutes to state merger control statutes. At the risk of asking you to summarize the developments among fifty-two-plus enforcers, what should we know about what is happening on that front?

GWENDOLYN COOLEY: I think, as we've heard on this panel, where state legislatures see gaps in the enforcement scheme they are also passing laws.

The three-legged stool of antitrust enforcement is designed to provide some redundancy in the system, and that is a feature and not a bug. It provides consistency for business and consistency for the enforcement community.

Like I've said, we have a great partnership with our colleagues in the federal government and we work collaboratively whenever possible. However, the states are separate sovereigns, and so when something concerns our state interests we investigate or litigate as appropriate, as you can see in the *Generic Drugs* case, the *Suboxone* case, and as you could see from the states that litigate in the *T-Mobile* case, and this is especially true when we are enforcing our own laws.

On merger notification laws I hope you were able to attend the excellent "Drinking from the Legislative Firehose" panel yesterday because I think that's what's going on, and they talked about this a lot in great depth.

Just to summarize at a high level, a number of states have enacted laws that make HSR notice more straightforward, particularly on healthcare-related transactions, including Washington State, Nevada, Oregon, Connecticut, and Massachusetts; and more state legislatures are considering HSR notice statutes beyond just healthcare.

If you practice merger work, you need to pay attention to which states are affected by your transaction as the fines in some states for noncompliance are severe and calculated by day. A best practice for deal lawyers is contact the AG in your affected state and let them know about your transaction. We're not going anywhere, so ignoring us doesn't work anymore.

As for privacy, Utah recently joined California, Virginia, and Colorado in creating a consumer privacy act. Utah's bill takes a slightly narrower approach to earlier laws. By contrast, the little more stringent Virginia act provides consumer data privacy rights, including a right of access amongst other things. This was covered on the "Hot Topics" panel yesterday, which I hope you saw.

A third debate among state legislators across the country is about the scope of the law. A number of states continue to take a look at those issues, including my home state of Wisconsin, so you will likely need to watch this space if you are practicing privacy law as well.

JONATHAN GLEKLEN: Thanks.

Alex, any developments in Brazil we should know about?

ALEXANDRE CORDEIRO MACEDO: Yes. Our law is just turning ten years old right now. I think we have in our toolkit the necessary instruments to handle and enforce antitrust, but for sure we do have room for changes to improve the law, and some are in Congress.

For example, there is a big discussion in Brazil in the way we apply fines—the amount, if we do or do not have enforcement, and if our fine is lower than it should be. The law says we have to consider the damage, and we have discussions about the methodology employed to calculate the damage. We are trying to change this in Congress, so more transparency and security is given to society, becoming clearer how CADE judges and applies fines.

In terms of Big Techs and the digital market, the structure of CADE is a little bit different. CADE handles only mergers and acquisitions, cartels, and abuse of dominance; we do not handle consumer protection or data protection.

A new data protection law and authority have recently been created in Brazil, giving directions on Big Techs and other companies in those kinds of environments.

What CADE has tried to do is to have a very good relationship with them, because there is a very big intersection between competition and data protection. We don't want to get in their role, but we also need their collaboration to run our cases here.

MELANIE AITKEN: Shifting a little bit, what is being called the Neo-Brandeisian movement seems to be moving beyond the circles of academia and thinktanks to take a real hold at the U.S. enforcers. You can see I get the easy questions.

Jonathan, I was hoping you could give us some sense of whether there are cases that you have brought or the Division is in the course of bringing that you think are a good fit for the focus on the competitive process as opposed to the immediate consumer harm that some would consider to be the hallmark of this movement.

JONATHAN KANTER: Let me start by saying that I think the use of labels is often designed to divide rather than unite. I want to be very clear here that what we are talking about is antitrust

enforcement in a way that is consistent with the statute as written by Congress here in the United States.

To answer your question, Melanie: all of them. What we're talking about here is making sure that we are protecting competition. Why? Because competition yields a wide range of benefits—it benefits workers, it benefits consumers, it benefits small business growth, it benefits innovation, it benefits democracy—and so all the cases we are bringing are designed to protect competition and designed to protect the competitive process.

And all the cases that we will bring will be designed to achieve the same result. Why? Because that's what Congress wrote in its law and our job is to enforce the law as it is written and follow the facts and the law wherever they may lead.

MELANIE AITKEN: That's a very compelling answer to me.

If we drill down maybe a little bit, Lina, I'm hoping maybe you could help us understand maybe a little bit more on the particulars.

In the United States—and I can say this as a Canadian, Switzerland, whatever I might be, so please take it in the spirit it's intended, which is genuine curiosity—even if you want to bring cases that are based on the tenets of the movement, to the extent that you accept that there is one, what can you do given the state of the case law?

Is Section 5 a big part of the answer either through adjudication or rule-making? And what do you do given some of the precedents you have from your Supreme Court about exclusive dealing standards, predatory pricing standards, or even the *Philadelphia National Bank* standard in the context of mergers?

LINA KHAN: Thanks for the question. I would echo a lot of what Jonathan noted around this effort really being around protecting competition and, in the context of the FTC, protecting fair competition given that our statute prohibits unfair methods of competition.

It's an important question. I think the reality is that case law is not meant to be static; it's meant to evolve as the facts and the underlying realities require. It's reasonable to think that standards introduced in the 1970s or 1980s might not stand the test of time if the ways that firms are doing business, if the underlying features of how certain markets are functioning, if their core characteristics and the capabilities and incentives that they create have dramatically changed.

I think that the challenge that enforcers face in particular today is really making sure that we are taking steps to push the law so that it is actually reflecting the underlying market realities and so that we are not seeing a gap between what the law is requiring and the business practices that we are seeing in the marketplace.

I would also say more generally I think there is a full set of instances in which certain cases remain good controlling law that the agencies have an opportunity and actually a mandate to follow, and that's something that both the DOJ and the FTC plan to do very closely.

I think one of the areas where we see this potential gap is predatory pricing analysis. I think *Matsushita* and *Brooke Group* offer a fairly dim view of the likelihood that firms will engage in predatory pricing. The courts in those cases effectively say predatory pricing is an irrational business practice because you are losing money without any guarantee of recouping it; the moment you attempt to raise prices you will see a flood of new entrants that come and discipline the firm; and so it's a high-cost strategy with the low probability of success. That skepticism has led courts to impose a recoupment element, which in practice has led successful predatory pricing cases to plummet.

What we have here is a doctrine that has baked within it a particular descriptive account of how markets work in a business strategy. In the digital context, for example, we have seen the way in which network externalities, data feedback loops, and other specific features of digital markets in particular reward certain business strategies designed to capture the market as quickly as possible.

We also see there can be significant entry barriers such that once the market gets tipped, once a firm is captured, the market entry that the doctrine assumes will come and discipline the firm might not occur.

I think that's just one example of where we might see that type of gap such that it is incumbent on the agencies to really be showing to the courts ways in which we may need the law to evolve to better match some of the realities that we're seeing.

MELANIE AITKEN: Gwendolyn, can the states do anything under state law to expand or change the substantive reach of antitrust and competition law?

GWENDOLYN COOLEY: I would say from a litigation perspective, short of a legislative change or a shift in how courts think about our cases, we recognize that we need to prove what courts want us to prove.

While state law is largely implemented and interpreted consistently with federal antitrust law, there is some variation and has been for decades. Those of you who are familiar with *Illinois Brick* repealers—those allow indirect purchasers to seek damages in states like Wisconsin and many others. On labor issues, some states make non-competes presumptively unlawful or strongly disfavor them.

And then, of course there are the proposed amendments to the Donnelly Act, the 21st Century Antitrust Act, which would, as Chair Khan was talking about, really modify and expand to what some might argue address some of the issues that New York is seeing, including creating comprehensive merger notification requirements for all mergers over the very precise $9.2 million figure; as well as some other issues including prohibiting abuse of dominance for companies with high market shares, which Margrethe is familiar with; and the bill would not allow procompetitive benefits to be used to offset harm where there is an abuse of dominance.

So we'll all be watching what happens there.

MELANIE AITKEN: Alex, is any of this really taking hold outside the United States either through this paradigm or otherwise?

ALEXANDRE CORDEIRO MACEDO: Yes. This is the big discussion right now, and you can feel this in Brazil.

It is undeniable that the Neo-Brandeisian approach has been gaining a lot of importance these days. The idea of expanding the objectives of the antitrust policies beyond the consumer welfare standard toward the reduction of, for example, poverty, inequality, environment, sustainability, and other considerations is not something entirely new, but it is again being defended by some practitioners, scholars, and politicians, and especially in developing countries, because they have a lot of social problems as well. This is actually a very important issue that we are discussing.

But CADE has a different approach due to its structure and the competencies given to us by the law. We are a bit more conservative in the sense that we are watching what is happening around

the world. We know that we are not leading the world, but we can be here sitting and watching what the United States and Europe are doing, to learn the best practices and also from the mistakes.

But we know the importance of dynamic markets right now and we do analyze them in Brazil case-by-case. We have a lot of cases that are very similar to what you have here in the United States—for example, no-poaching agreements and wage fixing—but we are still looking to the consumer and to the welfare standard.

We think that if we open the objectives of competition policy, we are going to have decisions that are more abstract in terms of antitrust.

What I'm saying is not that inequality, poverty, and sustainability are not important—they are very important—but I think that there are better professionals to analyze them than antitrust enforcers. It is very hard to take care of the two kids that we already have without putting inside of our analysis sustainability, for example.

I want to give an important example that happened in Brazil. We had a case that involved a big mining company. I don't know if you followed this in the newspaper, but three years ago that was a complete tragedy in Brazil. The company had a dam full of rejects, and suddenly this dam broke and it went all over the city and destroyed the city. One week later that same company notified CADE about buying another company that had another dam in the same city.

The discussion was: Is this company complying with the environment? Should CADE take this into account and block the deal, or just look at the competition matter? The competition matter was a fast-track merger at CADE. What CADE did was stay in the mainstream analysis and tell society that this was an important matter, but there were other institutions that were entitled to take care of the issue, so CADE approved the merger. This is the way that we have been analyzing mergers and acquisitions in Brazil.

Another example is of a case where a bank was buying another financial institution and the discussion was about the efficiencies; and at the end of the day, the efficiency was to fire thousands of people. This is an argument that we take into consideration in analyzing the deal.

JONATHAN KANTER: Melanie, may I also add one note here? The consumer welfare standard is something that gets a lot of discussion in narrow antitrust circles, and I think it's important and something I'd like to address.

In my experience, if you ask five antitrust lawyers "What does the consumer welfare standard mean?" you will get six different answers.

The whole idea of something being a standard is for there to be agreement as to what it means, and I think we are sitting here now, thirty or forty years later, and there's still no agreement as to what it means.

I was just looking on Twitter—forgive me for doing that—the other day, and a number of well-respected antitrust scholars were still debating this. Is it total welfare, is it total surplus, is it consumer surplus? What does consumer welfare mean, what's the economic definition, what's the legal definition? That is not a standard, right?

So I think we have to go back to first principles. Let's look at the language of the statute; let's look at the intent of the statute. If the goal is to protect competition and the competitive process, that's what we ought to do; and the benefits of competition and the harms from corporate concentration can be widespread. That's the goal of the antitrust laws, that's how it's written on its face by our Congress here in the United States, and that should be our guiding principle.

We can have this broader conversation, this academic discussion, about consumer welfare, but I'd like to point out that something is not a standard unless there is broad-based agreement as to what it means.

MELANIE AITKEN: Appreciating that there are different philosophical histories, and as you say, Jonathan, even interpretations within one—different rules and different processes depending on your jurisdiction, and different models—Margrethe, I was hoping you could share with us how this discussion is taking shape in Europe.

MARGRETHE VESTAGER: I really like, like you, the approach here in our roundtable because it's pragmatic, it's hands-on, it's getting things done; not being captured in sort of a labeling discussion, because I think that Jonathan is really right to say that very often labeling discussions are divisive discussions—"You have this belief so you're not with me."

And you know we have things to do. We are in a hurry. I think the cases that I just mentioned show that it is really, really important to focus our resources on what we have in front of us.

From the European perspective, for decades the European competition law enforcements have been focusing on protecting an effective competitive process—"competition on the merits" is sort of our mantra, this is what we do—and the courts have consistently confirmed that this is what we are supposed to do.

In *Continental Can,* the Court maintained that the purpose of enforcement of Article 102 was not only aimed at protecting consumers from direct harm but also indirect harm that could stem from conducts that have an impact on the competitive structure of the market.

I think it has been clear for us that protecting consumer welfare can be achieved by enabling and protecting the process of competition. That has led us to have some quite for us interesting discussions about when that is our fundamental objective, then how can we make sure that we are relevant in the digital age?

I had special advisers coming up with their report and we had a number of public consultations, and that led to the process of the Digital Markets Act—to remain relevant, because as Lina just said, if the market has tipped, do we see new entrants? No, actually we don't. It has changed the market reality, and that is a reality of digital markets.

So that was one consideration: how with our fundamental objectives to remain relevant in the digital age? We answered that with the Digital Markets Act, and of course with our enforcement practices, getting new competences onboard, being more data savvy, working with other agencies that can bring their competences, for us to fully understand what goes on in the market.

Most recently we have been working with stakeholders and very intensely with national competition authorities on how to remain relevant with our fundamental objectives in mind in an era where we have to fight climate change, where sustainability in the broadest meaning of the word is really, really essential.

I really agree that antitrust and competition law enforcement is not sort of the silver bullet in fighting climate change—then we would not be sitting here because the planet is burning—but it could play a role. The reason why I agree is that very often just for the legislator to regulate, to say, "This is how to deal with it," that would be the obvious way to go.

But maybe there are some things that we can do, so we have been discussing that intensively among ourselves with the national competition authorities bringing a lot to the table.

Now we are ready for businesses to come forward because what has been difficult in our discussion and in what we want to do to enable businesses to do more for sustainability, is lack of

cases; the lack of companies coming forward saying: "We would like to do more. Can you give us comfort that you will not come knocking and say this was all wrong?" So, if you know someone, then give them my number.

JONATHAN GLEKLEN: Thank you.

In the United States there is a sense that there are some new sheriffs in town, but maybe nobody is really very sure what the new rules are. The FTC has withdrawn the Vertical Merger Guidelines and, while the DOJ hasn't, people kind of think that DOJ doesn't think that the Vertical Merger Guidelines are really an accurate reflection of the way they think about vertical mergers now.

The Horizontal Merger Guidelines will be revised, but nobody is quite sure where they are headed either.

The Treasury Department came out with a report on labor markets that notes that the guidance for human resources professionals is being revised and that what the DOJ and the FTC previously said about information exchanges may no longer reflect current thinking.

There has been talk of criminal enforcement of Section 2, but we really don't know what kinds of conduct might be targeted criminally.

So there are lots of unknowns, and I wanted to give you a chance to break some news here if you'd be willing to. Can you provide any guidance on what we should expect?

Lina, maybe we'll start with you.

LINA KHAN: I'm happy to.

Obviously, up front I think it's fair to say that we presently see broad reassessment of the antitrust laws and their efficacy. This is bigger than the antitrust enforcers; this is a national conversation, it's in many ways a global conversation.

Anytime you have these moments of reassessment there could be feelings of uncertainty, which is very understandable. But to my mind I think these types of reassessments are a good thing, it's healthy, and I would argue necessary, to periodically reassess what is working, what isn't working, and to keep what is working and think about how to improve what isn't. I think this type of exercise is really critical to ensuring that our legal regimes are effective and retain credibility.

Overall, as we undertake some of these reassessments, one key goal is actually to provide more certainty over the long term. I think outside of the per se context it is very fair to say that antitrust law in the United States is not currently a model of certainty and predictability. To my mind there are at least two ways to respond to that.

One is to say, "Okay, some of the ambiguity in the law compels in favor of underenforcement, with the goal being you create certainty by doing less or only going after the worst of the worst offenders or just small players."

The other is to say, "The way forward is instead to attempt to proactively clarify the law," and that's the route that we are taking.

I think our efforts to revisit the Merger Guidelines is one example of this, where certain aspects of the Guidelines can be quite ambiguous in ways that can create uncertainty in the business community and can risk inconsistent enforcement. One of the key lines of inquiry for us, for example in the Merger RFI, is to consider whether we need to be relying more on presumptions, which can create some of that certainty.

We are also trying to get a better sense of areas where there might be gaps between the Guidelines and what controlling law is, such that we can make sure that we are hewing to that law and can provide greater certainty in that way.

I think the goals of providing more certainty and predictability are very much central to a lot of these efforts. I think it's only natural that in some of these interim periods there can be uncertainty, but I think the effective enforcement of the law over the long term requires that uncertainty.

JONATHAN GLEKLEN: Thanks.

Jonathan, anything to add?

JONATHAN KANTER: Sure.

Let me start by saying I echo everything that Lina just said. There is a global conversation and you are witnessing it here in front of you in real time. Change sometimes means things have to change and sometimes that means there will be some uncertainty. We are going about the process in my view with radical transparency. Let me give you some examples.

I have been at the Department of Justice now a little over four months. In that time I gave a speech to the New York State Bar Association, remarks at a Merger Guidelines conference, remarks at a labor conference, remarks last week in Brussels. Earlier this week the FTC and the DOJ hosted an international antitrust enforcement summit which we livestreamed to the public for free. Today, at our insistence, we are livestreaming this panel to make sure that our views that we're expressing are available widely to the public, not just to a small set of practitioners. That's transparency in the real sense.

In terms of guidance, my suggestion is to at look at what we're saying and look what we're writing. We filed a number of important amicus briefs, including in *New York v. Facebook* and at the National Labor Relations Board (NLRB) relating to worker misclassification. We also filed statements of interest relating to non-solicit/no-poach agreements. We are out there talking about our views in real time.

We are also expanding the scope of the people to whom we are talking. This is something that I think is getting overlooked and certainly may not be a welcome development for certain folks in the antitrust bar. What we are doing is we are not providing special access for folks who can afford it or who can hire expensive lawyers. We are out there talking to the public. We are expanding the scope of our conversation. We are talking to affected stakeholders.

The FTC is holding open public meetings and inviting anybody to show up to offer their concerns.

We have solicited comments on the Merger Guidelines and we have already over 400, I'm sure many of which have come from folks in the room, which are welcome. We are going to review them. We are reviewing them.

We are doing comments on our Bank Merger Guidelines. We are doing comments relating to intellectual property.

We are out there having a conversation, but it is extremely important for us to have that conversation in a way that provides access to justice for all interested stakeholders.

JONATHAN GLEKLEN: Thanks very much.

Anybody else want to chime in? Or, otherwise I'll hand it over to Melanie.

MELANIE AITKEN: Alrighty then.

The DOJ, the FTC, CADE, and the states have been focused, as we've all been reading a lot about, on labor-related issues—from no-poach agreements, to a focus on employee non-competes, to the impact of mergers on labor markets.

In a sense, one could question whether it's really a new way of thinking about antitrust law. Certainly, there are ways in which these initiatives were taking shape in those terms under the Obama Administration with the High Tech cases, and then it expanded in the Trump Administration into the criminal and merger enforcement areas.

Maybe I'll start with you, Lina. What do you think about whether this animated interest in labor markets is becoming an international trend?

LINA KHAN: I can say that at the FTC this is certainly something that we are looking at very closely. Thinking about the ways in which monopolization and unlawful deals hurt all sorts of market participants, including workers, is something that we have been prioritizing, and it's something that our teams are already beginning to look at in the context of merger investigations.

Recently in our challenge to the *Lifespan/Care New England* hospital transaction, Commissioner Slaughter and I wrote separately to note that we would have also supported a labor cap in the complaint, and that was in part because our staff did a fantastic job investigating that part of the market as well.

So I think it's something that is well underway at the FTC and something that we are continuing to explore.

I think more generally there is an international conversation. We held, along with the DOJ in partnership, an enforcers' summit earlier this week that ended up being a really great vehicle for some of these conversations.

I think in many ways there is a whole set of shared challenges and shared questions that we are facing globally, and I think having these types of conversations with international enforcers as well as state enforcers is a really important way for us to be sharing collective learning and making sure that the whole is greater than the sum of the parts.

I think more generally the set of empirical research that we have seen has really helped catalyze this conversation. There has been incredibly important economic research surfacing the ways in which labor monopsony and monopsony power across markets can really have a detrimental effect. There was a really terrific report issued by the Treasury Department earlier this year showing that it can have a substantial material impact leading wages to decline by up to 20 percent.

I think it's really incumbent upon us as enforcers to be learning from that new evidence and making sure that we are enforcing the law so that workers are not at the short end when we are seeing monopolization or unlawful conduct.

JONATHAN KANTER: Let me say that labor issues are foundational to the work that we are doing at the Department of Justice and at the Antitrust Division. We are, right as we speak, litigating cases involving collusion to suppress wages and opportunities for workers to benefit from competition.

We have multiple criminal cases that were started in the last Administration and that we are continuing in this Administration that address criminal conduct that suppresses wages and opportunities to compete.

We have many investigations underway—they're on the criminal side, they're on the civil side, and they're on the merger side. We are also filing policy statements—I mentioned earlier the statement we filed with the NLRB relating to worker misclassification. We are filing statements of interest—I mentioned the case in Nevada where we filed in support of non-competes regarding anesthesiologists.

These are issues that are so fundamental. Competition benefits workers—period, full stop. Reduction in competition, anticompetitive agreements, or anticompetitive practices that impact the ability of a worker to find higher pay or a better job—there is nothing more important that we are

doing. Depriving through an anticompetitive agreement, merger, or other conduct the ability for a worker to move to another job, to get better pay, to get better working conditions is the equivalent of stealing. We are going to pursue that vigorously over and over and over again and it is foundational to the work that we are doing.

MELANIE AITKEN: Gwendolyn, what's the view from the states?

GWENDOLYN COOLEY: I will say first of all—I neglected to mention it earlier—thank you, AAG Kanter, for your wonderful amicus brief in the *Facebook* case. We have really appreciated that.

Thinking about labor issues, the states have been taking a comprehensive look at labor for a while now: from New York's agreement with title insurer Old Republic in the last year, one of the nation's four largest title insurance companies, to pay $1 million and terminate any existing no-poach agreements; to Washington State's 225 commitments from corporate chains to eliminate no-poach clauses from all franchise agreements nationwide.

But we're not just in litigation. Pennsylvania has recently filed an amicus brief that successfully encouraged its highest court to strike down a business-to-business no-poach or restrictive covenant agreement which prohibited one business from agreeing with another to not poach each other's employees—I know the Department of Justice has done those in the past—without informing those employees or getting their consent. So, success there.

I have talked about our NAAG structure. We have a labor committee that is chaired by Maryland, Pennsylvania, and New York. This group has had productive conversations with some federal and international enforcers both from the European Union and from Canada amongst others, and we continue to actively monitor this issue.

To what Chair Khan was saying, many states are really considering new thinking in how we look at mergers. This is something that resonates a lot with the Attorneys General because both in the evolution about the way that some states think about mergers and labor states are concerned about job losses because those are citizens, and frankly voters, in our states.

We are considering—and not all states are of the same mind—whether job losses would be considered an efficiency or whether they are in fact a harm, so I expect you will see some comments from the states in the upcoming comments on the Merger Guidelines on this developing area of law.

MELANIE AITKEN: Alex, do you think there is a need to address labor markets with new laws in Brazil?

ALEXANDRE CORDEIRO MACEDO: Yes. As we have expressed in other forums and debates, such as at the OECD for example, labor markets are becoming an emerging trend within the global competition agenda, and we can expect the antitrust authority to take a closer look at this domain.

I understand that the premises of assessment centered on monopsonies instead of monopolies and the market power of buyers instead of the power of sellers do not change either the scope of antitrust analysis or its core objective, which is the welfare of final consumers.

We have a case in Brazil exactly like this. There was a no-poach agreement and wage fixing. We know that if you protect competition and protect the consumers, you will protect also a lot of ancillary things—for example, protect the workers. But the idea at the end of the day is not protect the workers; the idea in Brazil is to protect the consumers. We have another institution that protects workers in Brazil, which is the Ministry of Workers, or the Federal Prosecutors' Office.

I think it is more effective if we protect competition, protect the consumers, and ancillarily also we will be benefitting the workers as well as we can do with other areas, as Margrethe just said.

If we protect consumers, we protect other matters ancilarilly. But those ancillary issues are not not the main goal of antitrust.

JONATHAN GLEKLEN: Jonathan, the Division recently announced updates to its leniency policy and new FAQs. Can you let the folks here and watching streaming know what we should take away from those changes?

JONATHAN KANTER: Sure, and I thank you for the question.

Yes, we are really pleased and proud of the work we are doing in this area. To build on my theme of transparency and access to justice, we are out there trying to take rules that have often been unwritten rules or kind of insider rules and making sure that we are being very clear in plain language to the entire public about what our position is on leniency.

I think it's also important when we are talking about leniency. We are starting from the premise that somebody has come in and they have committed a crime. Then we are saying, "Okay, you can avoid going to prison or being a convicted felon if you cooperate and if you satisfy very high standards." Those standards have existed for a very long time and now we are being very open about those standards.

But the fact of the matter remains that the leniency program is alive and well. It's an important part of what we do.

Type A leniency provides a tremendous range of benefits. Type A leniency is when we are not aware of a crime that has been committed.

We have clarified what is necessary for Type B leniency, which is when we are already investigating a crime and someone comes in. What we are saying is, "We are going to need to make sure that you are owning up to your end of the bargain. We need to make sure that you are not just giving back the money that you took through illegal behavior, criminal behavior, but that you are remediating, that you are ensuring that this doesn't happen again, that you are cooperating fully to make sure that others are brought to justice."

This is fundamental. It is consistent with the Justice Manual, it is consistent with other areas of the Department of Justice, and we are pleased to have brought that into focus.

I have heard some criticisms. Folks say, "Well, the carrot now is not as sweet." I'll say this. First, it is extremely sweet if you come bring us a leniency application in a matter where we are not currently aware of criminal behavior, and we want to strengthen that incentive. In fact, the incentive is even greater now to make sure that you are going ahead and detecting conduct in your company and bringing it to us early on.

In addition, again we are talking about a crime that has been committed, so what is the carrot? The carrot is not going to prison; the carrot is not having the company be debarred because it is convicted of a crime. The carrot is quite significant.

What we are saying is (1) that the rules need to be clear, they need to be express, they need to be equally available whether you can hire a fancy law firm like many in the audience, or whether you are not part of the antitrust establishment. And (2) if you want to get this substantial benefit you have to own up to your end of the bargain.

We are making that clear, and it's a choice: if you don't want to come in for leniency, you don't have to; but you should be very well aware that the consequences of not coming in and seeking leniency might mean prison time, massive fines and follow-on liability, conviction of a crime,

debarment. The consequences for engaging in a crime are substantial and we are going to treat them as such.

JONATHAN GLEKLEN: Thank you.

Moving beyond traditional cartel cases, last month Richard Powers created, I think it's fair to say, quite a stir by indicating that criminal charges under Section 2 were among what he called "tools in the toolbox" that the Division would be considering employing.

Is there anything more you can tell us? Is the Division really thinking about criminal Section 2 cases? And why now? The Division has not brought a large number of civil Section 2 cases, so why invoke criminal liability? Will there be guidelines? What more can you tell us?

JONATHAN KANTER: Thank you for the question.

Let me start by saying you're absolutely right that the Division has not in the last twenty or thirty years brought major Section 2 cases. Before *United States v. Google*, the last major Section 2 case that was brought and litigated to a decision by the Department of Justice was *United States v. Microsoft*, and that was filed in 1998.

We have seen Section 2 essentially get to a point where it was on life support. We are changing that on the civil side; but let's not forget Section 2, as Congress wrote it, was written as a criminal statute. It was a criminal statute starting in 1890, it was a felony starting in the 1970s, and the penalties have been updated as recently as in the 2000s. This is the will of Congress; this is how Congress wrote it.

In terms of guidance, what I would say right now is there are a lot of talented lawyers out in the audience—I know many of them—my guidance is to read the cases. There's over a century of case law relating to criminal antitrust enforcement of Section 1 and Section 2. We will pursue criminal violations when the facts and the law suggest it's appropriate and consistent with the principles of federal criminal prosecution.

JONATHAN GLEKLEN: Thanks, Jonathan.

Margrethe?

MARGRETHE VESTAGER: I was just considering adding something in answer to this question on leniency.

In Denmark, the youngsters who are in the final year of their high school all have to write a giant essay. A question reached me from a young man writing about the *Trucks* cartel. He wanted to ask me this question: "How can it be fair that a cartelist who has been cartelizing for such a long time with others got away scot-free?"

For me it was important to reply to him and to say, "Well, leniency is a way of spreading and sowing distrust among cartelists. It's part of the mechanism. It's not a question about fairness. It is just to make sure that they can never trust one another. Eventually one will turn in the others in order to get rid of the fine while the others will have to pay it. This is why it is important to work on this being effective."

In the important piece of legislation that we passed a couple of years ago to strengthen the national competition authorities, also enabling employers to know that they can come forward without responsibility, the whistleblower facility that we have established in a digital manner for people to come forward to us—all that is important in order for leniency to work better.

Also maybe showing people that this is not only in tech markets, that this is also in traditional markets and, as we just discussed, it is also in labor markets. We also see the increased interest, and I think this is really good, but it is not a new thing. For us it's completely "plain vanilla" also to look at labor markets.

I am really proud of the efforts done by the national competition authorities. The Hungarians have taken an important decision. The Finnish have taken a decision on a local boycott of a Finnish hockey league against one of the clubs not to hire or not to lend players. We have investigations in Lithuania, the Netherlands, Poland, Portugal, and Romania. I'm really proud of that work because it's close to people and they can see the effects on the ground.

I think that is exactly what we are talking about here, that transparency is not only in our processes; transparency is also in the cases that we pick, in order for people to see and to understand for real that we are here to serve.

I don't know in what way this event may be a super-spreader of COVID-19, but I hope that you can feel that we are trying to spread a common message. You wouldn't believe I planned this.

It is quite interesting to see the level of trust between enforcers at all the different levels that we represent that competition law enforcement serves business—not the cartelists, not the monopolists—but that the enforcement that we do is pro-business. The huge majority of businesses are honest; they just work really hard to make a profit and they want to have a fair chance out there, and the good news for all these honest businesses is that we work together and coordinate as closely as possible to make it happen.

JONATHAN GLEKLEN: Thank you.

Alex, we have only a few minutes left, but let me let you finish up our program by talking about cartel enforcement in Brazil. Last year seems to have been an incredibly busy year. Is that the new normal? What should we be expecting in Brazil?

ALEXANDRE CORDEIRO MACEDO: We have been facing an increased number of cases. Numbers decreased in 2020, but in 2021, even with the pandemic, we opened a bunch of cases. We charged nineteen cartel cases in Brazil, and mergers and acquisitions are going up as well.

We can see also the downward move of leniency applications around the world. We have the same numbers, and I think that it's because there is this kind of trusting environment between the private sector and the antitrust agency about the quality of the program.

I think that one thing that is changing a lot is the way to investigate the cartels. They don't do cartels like they used to, sending an email saying, "Okay, let's meet somewhere and the price is going to be that." We don't have this evidence anymore. We have algorithms, we have a lot of technology behind that, we have tacit collusion, and the challenge is how to deal with that, how to investigate and bring evidence to the cases and increase our enforcement. I think that is going to be the challenge for the next years.

JONATHAN GLEKLEN: Thank you so much.

We had a large list of other topics to talk about—Section 5 rulemaking, privacy legislation in the states—but unfortunately we are out of time.

I hope all of you will join me in thanking all of our panelists for the insights that they so gracefully shared with us. ●