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Session 601

ANTITRUST

Patrick A. Bradford
Bradford Edwards & Varlack LLP

John Gibson
DLA Piper LLP (US)

Marcel S. Pratt
Ballard Spahr LLP

Lloyd Johnson
Chief Legal Executive, LLC

EXECUTIVE SUMMARY

Antitrust

MODERATOR:

Lloyd Johnson, *CEO,* **Chief Legal Executive, LLC**

PANELISTS:

- **Patrick A. Bradford,** *Founding Partner,* **Bradford Edwards & Varlack LLP**
- **John Gibson,** *Partner,* **DLA Piper LLP (US)**
- **Marcel Pratt,** *Managing Partner,* **Ballard Spahr LLP**

OVERVIEW

This panel of leading antitrust litigators explained how principles of antitrust enforcement are being scrutinized. Leading voices, such as the chair of the Federal Trade Commission and members of Congress, believe that longstanding antitrust legal doctrines no longer address the most pressing threats in the digital economy. The result is increased attention to enforcement, legislative proposals, and litigation under state law. While big tech commands most of today's antitrust attention, companies across all sectors may feel the implications of this trend.

KEY TAKEAWAYS

Recent scrutiny of big tech firms is prompting a reexamination of the purpose of antitrust law.

Historically, the purpose of antitrust was to preserve free enterprise through robust competition. In recent years, however, the scrutiny of big tech firms like Facebook, Google, Amazon, and Apple has intensified in Congress and popularly, leading to calls for sweeping changes to antitrust laws. In October 2020, the House, after a comprehensive review, released a report that recommended numerous changes. Another driver has been the perception that enforcement in the EU is more rigorous than in the United States. Earlier this year, President Biden issued an Executive Order encouraging antitrust enforcement agencies to take an aggressive posture and look for areas to engage.

BIG IDEAS

- Attention to big tech platforms is driving a push to reassess longstanding antitrust laws, especially the principle that lower prices are the proper metric.
- Congress has shown bipartisan interest in strengthening antitrust laws, as have some states.
- The antitrust enforcement agencies, with the encouragement from an Executive Order by President Biden, are striking a more aggressive posture, which extends beyond big tech.

"It's bipartisan, based on constituents, that the antitrust enforcement in the United States just isn't as forceful as it needs to be."

— Patrick Bradford, Bradford Edwards & Varlack LLP

Antitrust leaders, such as at the Federal Trade Commission, are looking to take a more significant role in the modern economy.

One school of thought, led by FTC chair Lena Khan, is that the role of antitrust in society needs to change and move beyond traditional standards of consumer welfare and economics. Her view, which she first put forth in law school, is that the current model of antitrust analysis fails to protect free enterprise from big tech. Her position is that these companies are incentivized to collect and leverage data and control digital platforms, enabling growth without short-term profits; and that current antitrust laws, which tend to focus on pricing, fail to address this danger.

"Her view was that these 100-year-old antitrust laws we've been using that treat efficiency and low pricing as proxies for healthy competition have become ineffectual in the digital age."

— John Samuel Gibson, DLA Piper LLP US

Khan has signaled a new era of more aggressive FTC enforcement through actions like the repeal of Trump Administration vertical merger guidelines, stating that the efficiency justifications for those guidelines were antithetical to the statutory language. The FTC is also likely to revisit the use of Section 5 of the FTC Act, which theoretically provides separate authority in addition to the other antitrust statutes (The Sherman Act and The Clayton Act), but which has not been effectively developed by the FTC and the courts as a viable path.

"I believe there will be a more fervent use of Section 5 independently to try to get at conduct."

— Patrick Bradford, Bradford Edwards & Varlack LLP

Congress is considering legislation to make substantive changes to antitrust laws.

There is bipartisan interest in the U.S. Congress in legislation to rein in tech companies, with several bills pending, but this legislation could have implications far beyond big tech.

- **The American Innovation and Choice Online Act.** Without naming them explicitly, this bill targets the big tech platform companies, namely Facebook, Amazon, Google, and Apple. The bill explicitly prohibits certain conduct, such as advantaging the platform's products or services or preferential terms for access to platform software for the platform's services over other businesses. Enforcement would be by the FTC, DOJ, and state attorneys general, in addition to a private right of action with treble damages.
- **Ending Platform Monopolies Act.** This bill focuses on the same covered platforms, but aims for structural separation across lines of business and prevents the platforms from entering new lines of business. It would also prevent the platforms from requiring the use of a product or service as a condition of accessing the platform. This significant departure from existing antitrust law is contested by the tech firms, who claim that whenever a big tech firm enters a new market it benefits competition and new ideas.
- **Platform Competition and Opportunity Act.** The focus of this bill is directed at mergers and acquisitions, with the intent to make it more difficult for big tech companies to acquire smaller competing companies.
- **The Access Act.** This legislation aims to facilitate switching between platforms by consumers. A consumer, for example, would be able to take their data with them when switching to a competitor.

"There's a huge appetite in Congress in this area to address some of these issues. Just because current antitrust concepts hadn't been enough, the proposals are very aggressive."

— Marcel Pratt, Ballard Spahr LLP

State antitrust law is taking on increased importance.

State antitrust law is evolving alongside federal law, both through proposed statutes and greater prominence in enforcement actions. A few examples are:

- **New York State.** New York is considering sweeping changes to its antitrust law. The proposal would make many changes, most notably adopting a European-style abuse of dominance standard for firms that puts special responsibilities on a dominant player, even when the market power is attained lawfully. It would also eliminate efficiency defenses.
- **Litigation.** Whereas state claims have primarily been a fallback in private litigation in the past, they are coming more to the fore. For example, the Supreme Court has said that federal antitrust law limits claims to only the direct purchaser. A majority of states, however, have passed statutes to remove this requirement. Thus, in a major pharmaceutical pricing case in California, when the federal antitrust claims were tossed out because the judge ruled that only the pharmacy benefit manager was the direct purchaser, many plaintiffs continue to pursue state antitrust claims.

"We're seeing the rise of this in private litigation. And I think we're going to see more and more of it as plaintiffs' lawyers and their clients realize that these state law antitrust claims can be very interesting."

— John Samuel Gibson, DLA Piper LLP US

Notwithstanding the popular focus on big tech, antitrust developments have implications and present opportunities across all sectors.

The evolving concepts in antitrust law impact businesses beyond big tech, calling into question some of the basics of antitrust law. Mergers and exclusionary conduct are among the areas to reconsider. Companies may see opportunities as well as potential threats.

One area already seeing increased assertiveness of antitrust enforcement is the labor market. The Biden Executive Order encourages the FTC to use rulemaking authority to limit the use of non-competes. The Department of Justice has already taken aggressive action by bringing its first case involving "no-poach" agreements and its first wage-fixing prosecution. In addition, there is increased interest in protecting whistleblowers. This focus on labor reflects the new point of view that antitrust should address broader social issues than before.

Changes in how authorities view mergers pose implications across sectors. Completing the transaction is no longer necessarily perceived as the end. While previously firms may have felt there was a safe harbor, they now should be aware that the government may review the transaction at a later time. Firms might consider proactively making changes after combining, holding off enforcement later.

As an opportunity, companies facing a dominant competitor in their market may find the authorities more receptive to hearing about problems—both problems that have been encountered and problems that may be anticipated. Additionally, firms that find their conduct under scrutiny may find it advantageous to proactively engage with the enforcement agencies.

"Now is a great time to either create antitrust compliance policies or revisit what they look like."

— Marcel Pratt, Ballard Spahr LLP

BIOGRAPHIES

Patrick A. Bradford

Founding Partner, Bradford Edwards & Varlack LLP

Patrick's practice is focused on complex commercial litigation in federal and state courts, corporate investigations and representing clients before governmental regulators, including the SEC and FINRA. He leads his firm's antitrust practice and is an adjunct professor of antitrust law at Fordham Law School.Prior to Bradford Edwards, he worked as a Partner with Davis Polk & Wardwell LLP; Chief Litigation Counsel for the New York City Council; and a Partner with Pierce Bainbridge Beck Price & Hecht LP. He represents corporations before the FTC and the Antitrust Division of DOJ in all aspects of merger review. In over thirty years of practice, he has worked in many industries, including accounting, securities, financial services, pharma, manufacturing, freight forwarding, real property, oil & gas, non-profits, employment, media, entertainment and sports. Earlier this year Patrick led a group of African American antitrust lawyers in filing an amicus brief in the U.S. Supreme Court in support of Division I college athletes, NCAA v. Alston, Case Nos. 20-512, 20-520, 954 U.S. ___ (2021). Their brief was cited by Justice Kavanaugh in his concurring opinion. Patrick earned a JD from the New York University School of Law and a BA from Harvard College. He is admitted to practice in New York, New Jersey and the District of Columbia.

Patrick A. Bradford
Bradford Edwards & Varlack LLP
pbradford@bradfordedwards.com

John Gibson

Partner, **DLA Piper LLP (US)**

John Gibson focuses on antitrust and other complex commercial litigation, including class action and multi-district litigation defense. He has won high-profile trials and cases in California and around the nation for industry-leading technology and healthcare companies, professional sports teams, and *pro bono* clients. These range from winning the "Trial of the Decade" in Los Angeles to winning the nation's first mandatory federal court injunction requiring a school district to accommodate the service dog of a student with autism. His accolades include being named one of *The Best Lawyers in America* and being rated *AV Preeminent 5.0 out of 5.0* by Martindale-Hubbell. John won the Burton Award for being one of the "finest law firm writers of 2019" and was honored as the 2019 "Attorney of the Year" by the Thurgood Marshall Bar Association. He chairs the United Nation's *AI for Good* Law Track and has served on a number of charitable boards. John graduated from Harvard College, where he was a *John Harvard Scholar* (top 5% of undergraduate students), and earned his J.D. from the University of Michigan Law School, where he was a member of the *Michigan Law Review*.

John Gibson
DLA Piper LLP (US)
john.gibson@dlapiper.com

Marcel Pratt

Managing Partner, **Ballard Spahr LLP**

Marcel Pratt represents clients in high-stakes litigation and investigations and serves as the Managing Partner of the firm's Philadelphia office. He is the immediate past City Solicitor of Philadelphia, where he was the City's highest-ranking lawyer and leader of its 330-member Law Department, which represented the city in all litigation, transactional, regulatory, social services, and legislative matters. In that role, Marcel acted as general counsel to the Mayor, City Council, and all city departments, commissions, and agencies and personally represented the City in highly publicized appellate and trial court matters. Marcel's practice includes complex commercial litigation, antitrust and competition law, products liability, internal and government investigations, class actions, and First Amendment law. He also brings high-value affirmative and loss recovery litigation on behalf of corporations and governments. In his antitrust practice, Marcel has litigated several high-exposure matters involving claims of monopolization, price discrimination, and other forms of anticompetitive conduct. He advises private and public companies on the antitrust issues arising in mergers and acquisitions, including obtaining pre-merger clearance from the U.S. Department of Justice and Federal Trade Commission under the Hart-Scott-Rodino Act.

Marcel Pratt
Ballard Spahr LLP
prattm@ballardspahr.com