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Antitrust and Consumer Protection Challenges for Technology Companies

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PANEL ONE

**Where Consumer Protection Regulators
Are Going And How To Stay Out Of Their
Crosshairs: Dark Patterns, Gig Economy,
Algorithms, And Subscription Products**

Amy Lally, Benjamin M. Mundel, and Sean Royall

Digital Dark Patterns


- A new area of antitrust and consumer protection concern
- Digital dark patterns are online design elements, software practices, and marketing tools that manipulate consumers and lead to unwanted purchases and privacy losses
 - Examples include hidden unauthorized charges, advertising masquerading as editorial content, and default settings that subvert preferred privacy choices
- On September 15, 2022, the FTC released a report discussing these issues and putting companies on notice that the agency is keeping a close eye on this type of conduct.
- Assistant Attorney General Jonathan Kanter of the DOJ Antitrust Division recently invoked many of the same consumer protection worries in a speech
 - He described how algorithms and digital services, without the presence of competition to promote more responsible behavior, manipulate consumer psychology to improperly influence and exploit consumers
- Antitrust and consumer protection enforcers increasingly view these issues as consequences of monopolization across the digital economy

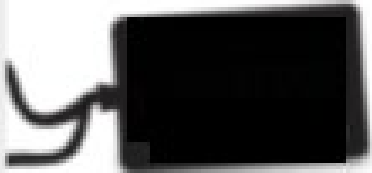
Categories of Dark Patterns

- **Sneaking:** Sneak Into Basket, Hidden Costs, Hidden Subscription
- **Urgency:** Countdown Timer, Limited-time Message
- **Misdirection:** Visual Interference, Trick Questions, Pressured Selling
- **Social Proof:** Activity Message, Testimonials
- **Scarcity:** Low-stock Message, High-demand Message
- **Obstruction:** Hard to Cancel
- **Forced Action:** Forced Enrollment

Dark Patterns: “Forced Enrollment”

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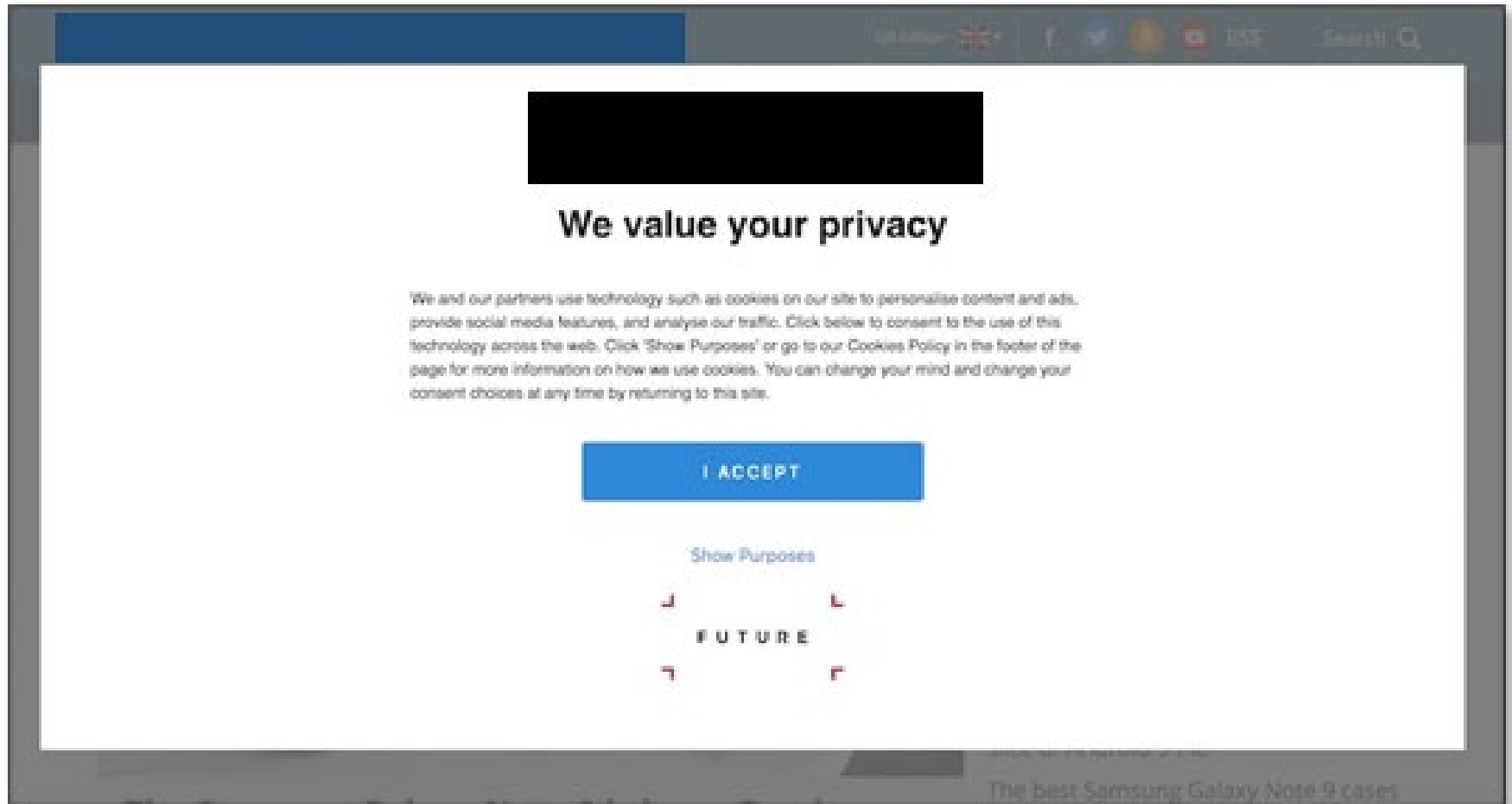


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Dark Patterns: “Visual Interference”



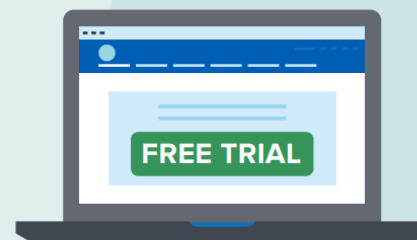
Negative Options

- FTC considers auto-renewing free trial or subscription services to be negative options
- Negative options are governed under the Restore Online Shoppers' Confidence Act and the FTC Act
- The FTC looks for two key things:
 - **Clear and conspicuous disclosure of negative option terms prior to obtaining billing information**
 - **A “simple” method for canceling the subscription service**

Negative Options: FTC Proposed Rule

Proposed Changes to the FTC's Negative Option Rule

Comments open soon at [Regulations.gov](https://www.regulations.gov)



What We Know:

People and sellers often like free trials and recurring subscriptions

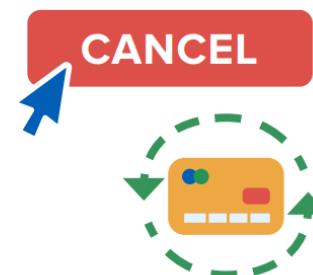
But they're **less** good for people when

- ▶ Marketers don't give them all the necessary information
- ▶ They get billed when they didn't agree to pay
- ▶ Sellers make it hard — or impossible — to cancel

Reports to the FTC say that these practices have hurt consumers for decades

- ▶ People have been stuck with recurring payments for things they never wanted or didn't want to keep getting

And the FTC's law enforcement cases and rules have only gotten part way to fixing the problems.



Negative Options: FTC Proposed Rule (cont.)

What We Propose:

The FTC proposes amending its Negative Option Rule to:

- ▶ Prohibit misrepresentations
- ▶ Give people important information in clear ways
- ▶ Make sure people know what they're agreeing to
- ▶ Let people cancel simply and easily
 - » Sign up online? Cancel online.

The amended rule would:

- ▶ Set clear, enforceable, performance-based requirements
- ▶ Apply to all subscription features in all media
- ▶ Make sure people understand and agree to what they're buying
- ▶ Make sure people can cancel without jumping through lots of hoops



**FEDERAL TRADE
COMMISSION**

State Auto-Renewal Laws

- California Business and Professions Code § 17600 et seq.
 - Clear and conspicuous disclosure of auto-renewal terms
 - Affirmative consent
 - Acknowledgment
 - Notice
 - One step on-line cancellation
- States with auto-renewal laws of general applicability – CT, DC, FL, GA, HI, IL, LA, MD, ND, NM, NC, OR, VA, VT

Aiming for truth, fairness, and equity in your company's use of AI

By: Elisa Jillson

April 19, 2021



Advances in artificial intelligence (AI) technology promise to revolutionize our approach to medicine, finance, business operations, media, and more. But research has highlighted how apparently “neutral” technology can produce troubling outcomes – including discrimination by race or other legally protected classes. For example, COVID-19 prediction models can help health systems combat the virus through efficient allocation of ICU beds, ventilators, and other resources. But as a [recent study](#) in the Journal of the American Medical Informatics Association suggests, if those models use data that reflect existing racial bias in healthcare delivery, AI that was meant to benefit all patients may worsen healthcare disparities for people of color.

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Algorithms (cont.)

According to the FTC:

- **Section 5 of the FTC Act.** The FTC Act prohibits unfair or deceptive practices. That would include the sale or use of – for example – racially biased algorithms.
- **Fair Credit Reporting Act.** The FCRA comes into play in certain circumstances where an algorithm is used to deny people employment, housing, credit, insurance, or other benefits.
- **Equal Credit Opportunity Act.** The ECOA makes it illegal for a company to use a biased algorithm that results in credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or because a person receives public assistance.

For Release

FTC to Crack Down on Companies Taking Advantage of Gig Workers

Agency Policy Statement Outlines Areas Where FTC Will Act to Protect Gig Workers from Unfair, Deceptive, and Anticompetitive Practices

September 15, 2022



Tags: [Consumer Protection](#) | [Competition](#) | [Midwest Region](#) | [Northeast Region](#) | [Bureau of Competition](#) | [Bureau of Consumer Protection](#) | [Western Region San Francisco](#) | [Government](#) | [Policy](#)

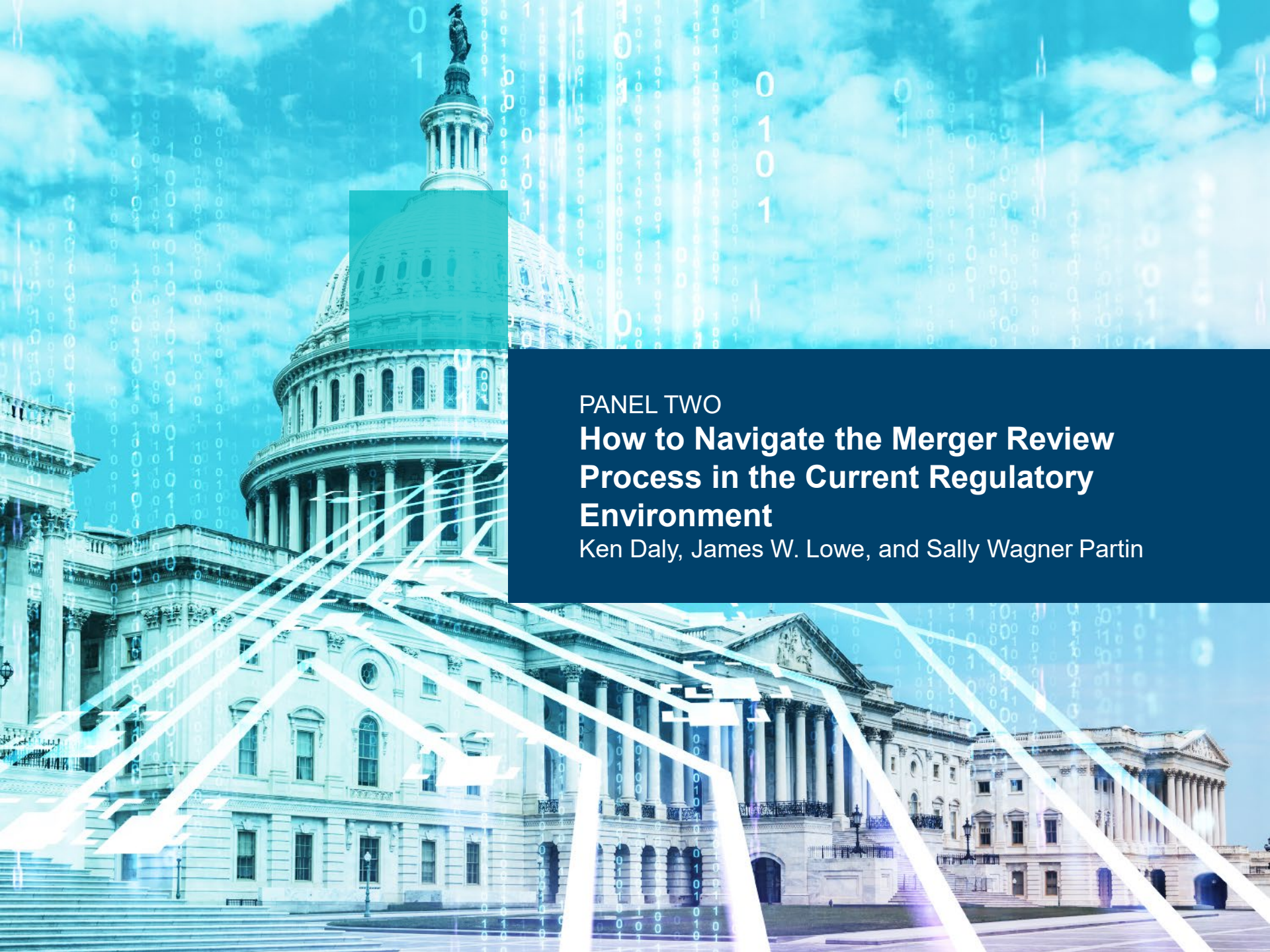
Related actions

[Policy Statement on Enforcement Related to Gig Work](#)

Gig Economy (cont.)

In the statement, the Commission notes multiple areas where there is potential for harm to workers in the gig economy, including:

- **Misrepresentations about the nature of gig work:** While gig companies promote independence to potential workers, in practice these firms may tightly prescribe and control their workers' tasks in ways that run counter to the promise of independence and an alternative to traditional jobs.
- **Diminished bargaining power:** Workers have little leverage to demand transparency from gig companies, even in the face of unclear information about when work will be available, where they will have to perform it, or how they will be evaluated.
- **Concentrated markets:** Markets populated by gig companies are often concentrated, resulting in reduced choice for workers, customers, and businesses. These companies may be more likely to exert their market power in anticompetitive ways that harm workers' wages, job quality, and other aspects of gig work.

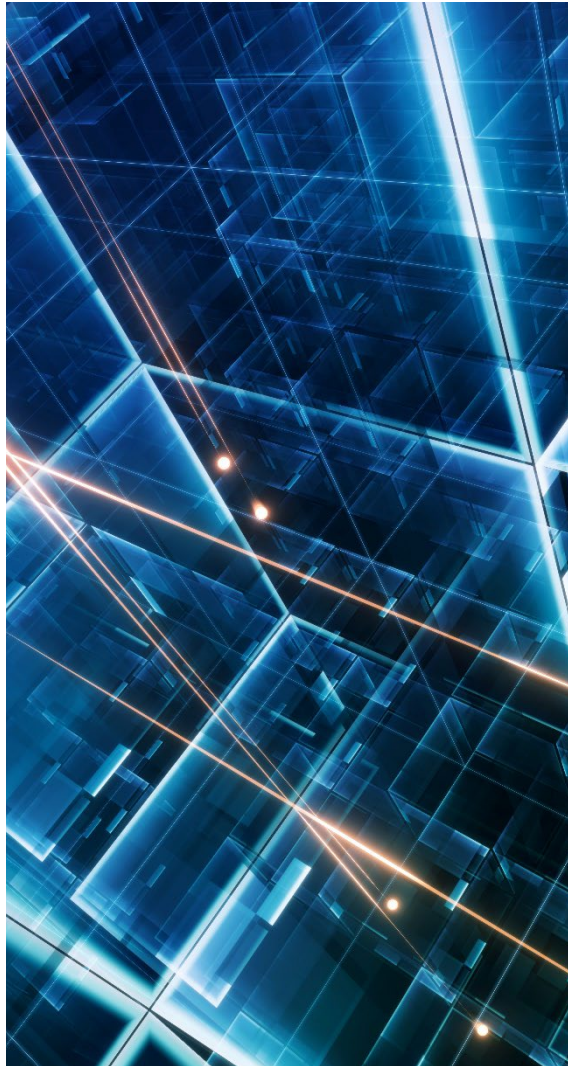


PANEL TWO

How to Navigate the Merger Review Process in the Current Regulatory Environment

Ken Daly, James W. Lowe, and Sally Wagner Partin

Introduction



- There is increasing scrutiny (globally) of transactions in digital and technology markets:
 - Regulators are **expanding their ability** to review transactions by departing from traditional jurisdictional thresholds
 - Legislative reform is giving rise to new **regulatory reporting requirements** for transactions involving digital platforms
 - There is **increasing enforcement** for technology-related transactions
- Risks increasing for those doing deals

U.S. Antitrust Today

- Antitrust has become a topic of political debate for the first time in 40 years
 - Intense focus primarily on high tech, health care, agriculture, pharma, and financial services
- Aggressive enforcers in place at DOJ and FTC
 - Intend to “reinvigorate” antitrust enforcement
- Merger reviews have become more frequent, intensive, and lengthy
 - Investigations run across many industries, not just “hot” ones
- Some in Congress (both parties) pushing for significant changes in the law
 - Would make it easier to challenge mergers and activities of companies with high shares
- Some increased funding coming for both agencies
- Also, increased interest in antitrust by state attorneys general
 - States bringing cases even when federal agencies do not
 - Aggressive state law changes proposed in numerous states, including CA, MA, and NY
- Legal changes, if they occur, will increase private as well as government cases
 - Likely to be a large increase in private antitrust suits in concentrated industries
- These changes will affect all industries, not just those in the press

U.S. – Main Enforcement Topics

- Mergers in “critical” and concentrated industries
 - “Critical” industries include tech, agriculture, health, and infrastructure
 - Concentrated industries are those with few significant players or an existing dominant firm
 - Agencies less willing to accept divestiture remedies unless whole businesses are sold
 - Better to have pre-existing divestiture agreement in place
 - Will not accept non-structural remedies except in very rare circumstances
 - Interlocking directorates
 - Illegal for a person or entity to have board members or officers at competing companies
 - Significant enforcement effort underway with nearly 20 board members forced to resign
 - Information exchanges
 - Focus on direct or indirect exchanges of information between competitors
 - Agencies withdrew “safe harbors” on gathering and exchanging price and wage information
 - Labor
 - Concerned about impact of mergers on employees perhaps reducing labor competition
 - Continuing attack on employee non-competes and no poach/no hire/non-solicit agreements
 - No poach agreements can be challenged as criminal
 - Exclusive dealing
 - Challenge to agreements by major providers that limit access of competitors to customers
-

CFIUS Enforcement

- Separately, CFIUS enforcement has increased
 - Focus on “critical industries”
 - Concern not limited solely to Chinese ownership
 - Even “friendly country” ownership can raise issues if key assets are at issue
-

Ex-U.S. – Trend #1: Expanding jurisdiction

- Regulators are seeking to expand their scope of jurisdiction to review transactions in digital and technology markets. In order to capture acquisitions of innovative start-ups, there is less reliance on traditional turnover-based jurisdictional thresholds:
 - Below-threshold review – e.g., EU (Article 22 EUMR), China, Italy
 - Transaction value thresholds – e.g., Germany and Austria
 - Sector-specific thresholds – e.g., Germany and Turkey
- In the EU, regulators are able to conduct *ex-post* reviews of below-threshold transactions under abuse of dominance rules (see CJEU *Towercast* judgment of March 16, 2023)

“In the last few years, the scrutiny of tech mergers has certainly increased, as has the frequency of interventions, definitely signalling a new posture towards such deals [...] [W]e will remain vigilant on deals that involve large platforms with market power.”

– *Margrethe Vestager, EC Commissioner for Competition, March 2, 2023*

“I am clear that the CMA will continue to give careful scrutiny to acquisitions in the digital, tech or other rapidly evolving sectors [...] And that applies to our consideration both of whether we have jurisdiction to review the deal and to our substantive assessment if we do.”

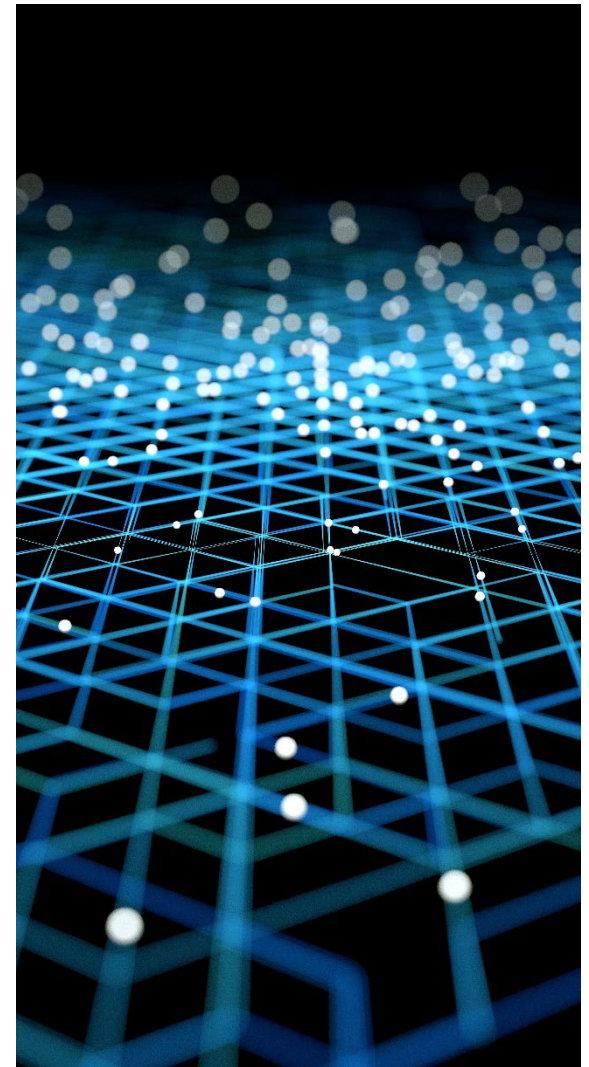
– *Sarah Cardell, Chief Executive of the CMA, February 27, 2023*

Ex-U.S. – Trend #2: Regulatory reporting requirements

- A number of jurisdictions have been in place or are in the process of developing sector-specific regulation for digital markets
- Among other obligations, these regimes may include reporting requirements for acquisitions by digital platforms, for example:
 - **EU – Digital Markets Act (DMA)**
 - “Gatekeepers” will be required to notify the EC of any transactions in the digital sector or that enable the collection of data
 - **UK – Proposed Digital Markets, Competition and Consumer Bill (DMCCB)**
 - Firms with “strategic market status” will be required to notify certain transactions to the CMA
 - **Australia – Proposed Merger Control Regime**
 - The ACCC has proposed a bespoke merger control regime for digital platforms, including a requirement for digital platforms to notify any transaction where the target is active in Australia

Ex-U.S. – Trend #3: Increasing FDI enforcement

- There has been a proliferation of foreign direct investment (FDI) screening legislation across Europe
- The EU has adopted a regulation on coordinating investment screening reviews being conducted at Member State level and has encouraged Member States to adopt their own investment screening tools
- Regulators are taking an increasing interest in transactions that relate to technology, particularly where there are applications in the defence and military sectors
- FDI review can take a long time and be less predictable than merger control
- Companies should be conscious of information exchange between merger control and FDI regulators and take care to coordinate any interactions



Practical Considerations

- **Early engagement**
 - Parties should conduct a thorough legal and economic analysis at the outset of a transaction to identify any competition issues
 - For complex transactions, early and frequent interaction with regulators may be appropriate
 - Ensure advocacy is consistent across jurisdictions
- **Practice good deal hygiene**
 - Prepare for close scrutiny of internal documents
 - Electronic data room – clean room/clean team process

Practical Considerations (cont.)

- **Transaction documents**

- Ensure that transaction documents include all necessary conditions precedent and provide for sufficient time for merger control and FDI review
- Consider the risk of Article 22 referral, in-depth review, and differing remedies and outcomes from various regulators
- Key antitrust provisions in definitive agreements
 - Hell or High Water/No Other Transactions
 - Reverse Break Fees
 - End Date formulations
 - Covenant compliance

Practical Considerations (cont.)

- **Transaction documents (cont.)**

- Remember deals may be in limbo for a long time and parties may be looking for ways to walk away from transactions
 - Sellers should focus on needed flexibility during extended interim operating period
 - Acquisition agreements typically provide that the buyer is not obligated to close the transaction unless the seller has performed, in all material respects, its pre-closing covenants
 - When the “no Material Adverse Effect” condition precedent is nearly always satisfied, this may be a buyer’s only escape hatch
 - Sellers should ensure no interim operating covenant breaches



PANEL THREE

Developing Trends in Antitrust Affecting Tech Companies: Views of Former FTC Leaders

William Blumenthal, Timothy J. Muris, and Sean Royall

Substantive Changes

- The overarching standard – beyond consumer welfare
- Scope of Section 5 of the FTC Act
 - Replacement of unfair methods statement
 - Breadth of margin beyond the Sherman and Clayton Acts
 - Reduction in protection of ancillary restraints doctrine
- Increased focus on labor markets
 - Rulemaking on employee non-competes
 - Inquiries in merger investigations
- Backward into the future
 - Erasure of 40 years of bipartisan policy
 - “Chicago” and “Bork” as epithets
 - Advocacy of vintage 1960 horizontal merger standards
 - Hostility toward vertical and conglomerate mergers
 - Revival of long-obsolete prohibitions on differential pricing
 - Despite seven decades of bipartisan criticism of Robinson-Patman
- Novel, edgy theories
 - Challenges to data collection
 - Liability of third-party business partners and affiliates

Procedural Changes

- Centralization of authority and increased politicization
 - Late-springing questions during review process
 - Suppression of internal expressions of dissent
 - Negative effect on staff morale
 - Departures
 - Lasting implications that could take many years to repair
 - Alignment with Biden Administration policy statement
 - Reduction of agency independence
- Introduction of competition rulemaking
- Return of Magnuson-Moss rulemaking
 - But stripped of certain safeguards, such as independent hearing officers
- Removal of procedural protections
 - Withdrawal of policy against merger challenges in redundant venues
 - Return of merger prior notice provisions
 - Breadth of burden on third parties
 - Workarounds to Supreme Court *AMG* decision
 - Strategic leaks and reduced confidentiality protection
 - Zombie voting



Closing Remarks and Litigation Forecast

Benjamin Nagin



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