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*Mercatus Center's
2nd Annual
Antitrust Forum*

**Policy in
Transition**



This year's Antitrust Forum had 80 in person attendees and over 70 virtual attendees. Comments by our speakers were covered by media including Law360, Global Competition Review, Bloomberg, and Politico. We are extremely privileged to have held an event with so many distinguished speakers and attendees. We hope that this summary brief will serve as a useful reference for the material covered throughout the day. If you would like to see the FULL recording of the event as it happened, please visit our [Mercatus webpage](#).

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Professor William Kovacic on Policymaking at the Federal Trade Commission and Lessons from Overseas

Bill Kovacic is a leading academic and author who leads the Competition Law Center at George Washington University and who wrote one of the leading textbooks in this area. He discussed the policymaking and enforcement process at the FTC. Kovacic emphasized the need for regulatory frameworks to remain adaptable and durably useful, and suggested reforms and lessons from his experiences overseas to make the FTC more effective. Some of these would require internal reform, others legislation by Congress.

KOVACIC ARGUED THAT THE FTC HAS anachronistic limits on its jurisdiction. For instance, common carriers and well-funded nonprofit institutions are exempt from FTC regulation of the banking sector. Some of these exclusions have resulted in responsibility shifting to other agencies. For instance, common carriers are now regulated by the Federal Communications Commission. A further anachronism is that competition regulation and antitrust enforcement is divided between the FTC and the Department of Justice (DoJ), while other major jurisdictions have moved towards simplification by reducing the number of competition agencies to one.

Another issue is the *Sunshine Act's* requirement that a quorum of FTC commissioners cannot meet privately. This prevents candid, informal meetings that promote synergy, goodwill and collegiality between commissioners. As a result, the FTC's deliberative process remains sterile and uninformative in comparison to agencies overseas.

A third criticism from Kovacic is that the wide-reaching responsibilities of the FTC prevent it from dedicating resources to antitrust enforcement. For example, its consumer protection role means that it will be increasingly tasked with enforcing consumer privacy rules that take up resources and require specialized expertise.

Kovacic also mentioned that the *Humphrey's Executor* decision is likely to be overturned at some point, which will allow members of the FTC board to be removed at the President's discretion. Transparency would also be promoted through more

frequent issuing of closing statements as part of FTC judgments. This would provide more guidance on the steps taken to make those judgments. Another pro-transparency overseas practice worth replicating is the issuance of "statements of priorities" by competition agencies for public comment.

Yet another concern is the ability of the FTC to deal effectively with the dynamic, evolving tech sector, given its current staffing. Analyzing these sectors involves enlisting specialized experts to formulate programs for identifying and analyzing trends and matters, not just lawyers and economists.

Regarding policy integration with other agencies in light of the Biden administration's official "whole of government" policy approach, Kovacic noted the development of common guidelines between agencies. Australia and New Zealand have working groups that bring together representatives of different agencies and jurisdictions to deliberate on matters of common concern. Without such working groups, and without engaging in cross-appointments of experts between agencies, issues of common concern aren't resolved efficiently and effective processes aren't identified. This would be especially important for addressing what to prosecute and which matters to prioritize given the agencies' limited resources.

Kovacic argued that the FTC must recognize that its objective of ensuring economic liberty overlaps with other policy objectives. He cited South Carolina, where a program fostering access to preventative dental care for mainly low-income African American public schoolchildren was



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successfully defended by the FTC following the South Carolina Dental Board's attempt to block it. The program abolished a mandate that a dentist must be present while dental hygienists provide key services. The FTC's victory against the Dental Board not only fostered economic liberty by reducing barriers to entry into the dental services market and lowering costs—it also promoted equity. Both objectives should have been recognized in the FTC's deliberations and statements during the case.

Finally, Kovacic argued that the FTC should also study past experiences of the agency to pass on institutional knowledge to future FTC staffers in order to better understand present matters and secure more victories.



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Diana Moss on the Progressive Vision for Antitrust in 2023

Dr. Diana Moss of the American Antitrust Institute (AAI) is an economist and academic who has worked for government agencies, testified on Capitol Hill, and provided commentary to the media on antitrust and regulatory topics. She articulated the progressive vision for antitrust enforcement reform in 2023 at the 2nd annual Mercatus Global Antitrust Forum.

ALTHOUGH MOSS WELCOMED GROWING support for Neo-Brandeisian antitrust among both Republicans and Democrats, she characterized herself and AAI as pragmatic, progressive, and center-left. Rather than rejecting the consumer welfare standard per the Neo-Brandeisian approach, she argued that it could be expanded to accommodate a broader range of concerns beyond price fluctuations—including innovation, market dynamism, choice, and quality. AAI also argues for a more critical analysis of purported merger efficiencies, claiming that supposed efficiencies from several mergers that the FTC permitted or challenged only to lose in court never materialized.

While politicians of the left and right might be warming up to this approach due to ideological concerns about the “monopoly

power” of corporate and tech giants, Moss noted that consumers are also sympathetic as they fear a loss of choice. In this regard, she cited a growing number of Google searches for “monopoly” and “market power,” as well as market concentration in some industries that effectively force individuals to deal with certain firms sans meaningful choice.

Despite the mixed literature on this, Moss claimed that the facts show increased concentration in certain vital sectors. For instance, the national telecommunications and biotech markets are dominated by fewer firms than they were two decades ago. She expressed especially strong concern about a decline in choice and quality in the healthcare sector due to vertical mergers and increased concentration. This reduces bargaining power for both consumers and other parties throughout the supply chain. Furthermore, the proliferation of large, vertically integrated firms and increased private equity investment in these sectors exacerbates these issues.

Moss asserted that the largest firms are accruing larger profit margins while wages are suppressed and labor mobility is reduced, as observed by labor economists. She cited emerging evidence of lost market dynamism, including lower rates of market entry, disparities in growth rates between large and small firms, and the declining contribution of small firms to productivity growth. For Moss, these metrics provide evidence of declining competition in the economy. She ultimately blames lax merger enforcement driven by agencies’ “excessive deference” to purported

efficiencies of mergers, especially vertical ones. This has led to a permissive policy toward mergers and pursuing settlements rather than fighting to achieve appropriate remedies in court.

Moss cited failure rates of 20 percent for FTC-driven divestitures as a merger remedy between 2006 and 2012 across all sectors, with double that rate for such sectors as

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pharmaceuticals. She also highlighted cases of failed mergers like the AT&T-Time Warner case as well as surveys of corporate executives who often cite overestimation of merger synergies as a primary cause of merger failure. Although Moss conceded that these anecdotal examples and surveys aren’t definitive, she asserted that they can’t be ignored and prove that regulators should be more skeptical of efficiency justifications for mergers they’d otherwise block or contest.

To remedy the above issues, Moss advised the FTC to (a) pursue rather than settle more cases, (b) aggressively prosecute potentially uncompetitive mergers, and (c) promulgate new guidelines, especially on vertical mergers, that are less permissive and more critical of efficiency justifications.

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International Developments Panel: Updates from Abroad

James Rill is Senior Counsel at Baker Botts and a former Assistant Attorney General at the US Department of Justice. Fiona Schaeffer is a Partner at Millbank and Chair-Elect of the American Bar Association's Antitrust Section. Bilal Sayyed is Senior Competition Counsel at TechFreedom. Aurelian Portuese is the Director of Antitrust and Innovation Policy at the Information Technology and Innovation Foundation.

SAYYED OPENED THE PANEL BY DISCUSSING the EU's Digital Markets Act (DMA), which took effect in November 2022 and classifies certain large companies as "gatekeepers" in the online platform economy based on tests for size, control, and entrenchment or durability. A similar law already existed in Germany, and US Senators Klobuchar and Blumenthal have made similar proposals domestically. "Gatekeepers" under the DMA must submit information to the European Commission and are prohibited from self-preferencing, non-consensually using third-party data, and from some forms of bundling and tying. They must implement a degree of interoperabil-

ity and data portability as well as certain "fair dealing" practices. The law is motivated by concerns about the weak bargaining positions of gatekeeper firms' customers, vertical integration, network effects, data dependence, and perceived weak contestability of markets these firms dominate. Sayyed criticized the law for its arbitrary definition of "gatekeepers," targeting of a small list of firms, lack of due process, and blanket prohibitions of potentially pro-competitive practices that benefit consumers. The law could be replicated by competition authorities elsewhere, and companies impacted may also change their practices outside Europe.

Portuese followed up by noting reforms similar to the DMA elsewhere. The UK has contemplated similar reforms. Canada amended its competition laws to increase resources for regulators, target platforms, and crack down on "predatory pricing." South Korea has passed legislation forcing App stores like Google Play to "open up" by reducing their ability to restrict third-party access. And China has amended its antimonopoly laws to account for digital platforms. Although Europe, Asia, the UK, and Canada have seen new rules set for enforcement from 2023 onwards, it's still unlikely that antitrust bills will pass in the United States despite growing bipartisan support. There is also ongoing dialogue between competition authorities in the United States and Europe on regulating digital markets. However, the European Commission has been clear that the DMA won't be a part of these discussions, indicating that the dialogue may be limited to procedural aspects of enforcement and may not result in much coordinated substantive reform. To foster regulatory convergence, such dialogue should ideally include Canada and the UK due to mutual issues of concern, and shouldn't exclude the DMA or substantive discussion of antitrust law—especially on controversial and unsettled subjects like defining the scope of relevant digital markets.

Schaeffer noted some signs of interjurisdictional antitrust enforcement convergence, with fewer differences in the regulatory approaches of the United States, EU, and UK today than a decade ago. However, she also noted that fissures have arisen from differences in the procedure, treat-

ment, and remedies applied to mergers. Notably, US and EU antitrust courts had arrived at different conclusions on the same international mergers and the adequacy of remedies proposed by the parties. The United States could benefit from adopting the EU's practice of allowing parties to propose merger remedy packages that can be reviewed by the Commission and market-tested by customers. This practice promotes transparency and allows parties and courts to save time and costs. Discrepancies in merger and merger remedy review among these jurisdictions is likely to lead to increased conflicts, litigation, and less commercial certainty and confidence in potentially pro-competitive merger activity.

Rill highlighted the importance of international institutions like the International Competition Network (ICN) and the Organization for Economic Co-operation and Development (OECD) in promoting interjurisdictional convergence and cooperation. These institutions provide guiding principles for antitrust enforcement and tools to foster it. The ICN could benefit from adopting mechanisms for evaluating the enforcement templates of various antitrust agencies, including how useful they are for harmonizing laws across jurisdictions. The OECD, which is hosting a global forum in 2023 on antitrust enforcement trends, could benefit from adopting the ICN's relatively open membership standard of admitting any country with an antitrust statute.

From Top: Panel members Rill, Schaeffer, Sayyed Portuese, and moderator Doug Ginsburg





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Fireside Chat with FTC Commissioner Christine Wilson

Christine Wilson is a Commissioner at the FTC who recently announced her resignation after alleging that the FTC under current chair Lina Khan had been marred by dishonesty, subterfuge, and a lack of due process. She was interviewed by Mercatus Senior Research Fellow Alden Abbott weeks before announcing her exit.

WILSON CRITICIZED THE FTC'S NEW SECTION 5 policy statement on unfair methods of competition, characterizing it as a radical departure from 40 years of precedent in courts and FTC enforcement standards. She noted that it rejects the rule of reason, pro-competitive business justifications, and efficiencies arguments, effectively overriding the consumer welfare standard in favor of “nebulous interests” and more amorphous, arbitrary, and subjective standards. By failing to give businesses a predictable and clear idea of what actions will fall afoul of competition authorities, it violates the rule of law and is likely to result in less commercial certainty and confidence in pro-consumer deals. More subjective standards and pandering to stakeholder interests mean that antitrust enforcement will be fraught with issues around prioritizing competing interests and objectives, leaving these to the whims of individual enforcers. They will undermine the FTC’s credibility by preventing the application of consistent enforcement standards.

Wilson also criticized the FTC’s policy statement on non-compete clauses for overriding 700 years of common law precedents based on rule of reason and business justification considerations. She noted that unlike other areas, such as data privacy, the FTC has little in-house expertise on labor non-compete clauses. She also noted evidentiary record issues that undermine the FTC’s basis for attempting to ban such clauses outright. The FTC cites a limited body of evidence rather than a large body of literature that con-

siders all relevant aspects of the 47 different state laws on non-compete clauses. Unlike the top-down mandate proposed by the FTC, allowing states to develop their own approaches per the status quo allows for experimenting and lets the FTC learn from the expertise of different jurisdictions. She argued that the major questions doctrine and the non-delegation doctrine mean that the FTC’s proposed ban on non-compete clauses is unlikely to survive judicial review.

Wilson then elucidated her views on the FTC’s role in consumer protection. Her priority is to help secure monetary redress for aggrieved consumers. While she expressed sympathy for data privacy rules and rules addressing fraud, such as the government impersonation and earnings claim rules of the FTC, she criticized sweeping rules like the blanket ban on junk fees and commercial surveillance rule, against which she has dissented.

In a foreshadowing of her recent announcement that she intends to leave the FTC, Wilson noted that FTC employees’ faith in the agency leadership’s honesty and integrity had declined as evinced by surveys of its employees across the political divide undertaken in 2020 and 2023. She also noted that despite being a commissioner, she hadn’t been kept “in-the-loop” with regard to the draft of new Horizontal Merger Guidelines intended to replace the 2010 guidelines currently in effect. Wilson argued that the new guidelines should be grounded in precedent, legal developments, and sound theoretical and empirical economic work so that

they can be embraced by courts, the public, and legal practitioners. She expressed concern about the agency’s recent statements rejecting the importance of business efficiency justifications for mergers. She concluded by stressing that the FTC’s approach toward all of the issues addressed in her interview threaten the Commission’s legitimacy.

The major questions doctrine and the non-delegation doctrine mean that the FTC’s proposed ban on non-compete clauses is unlikely to stand in court



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FTC: Rulemaking, Guidelines, and More

William Blumenthal is a Partner at Sidley Austin LLP. Koren Wong-Ervin is an Antitrust Partner at Axinn, Veltrop & Harkrider LLP. Barry Nigro is a Partner and the Chair of the Global Competition Department at Fried Frank. Taylor Owings is a Partner at Baker Botts and a former Chief of Staff at the Department of Justice's Antitrust Division.

WONG-ERVIN SPOKE ON THE FTC'S NEW UNFAIR METHODS OF COMPETITION new policy statement on unfair methods of competition. She argued that little of it would survive in court because it is based on outdated precedents favoring per se rules that have since been overturned in the modern antitrust era in favor of an economically-grounded, consumer welfare-centric rule of reason. For instance, courts and most economists today recognize that pursuit of monopoly profits can be an incentive for innovation and reward for competing effectively to meet consumer wants. Despite this, however, she noted that FTC enforcement actions based on the policy statement would take time to challenge in court. The statement would hence still act as a "tax" on businesses, increasing the costs of potentially pro-competitive conduct. She especially criticized the statement's references to "abusive" or "exploitative" conduct, and to conduct undermining "competitive conditions"—amorphous terms that are ill-defined and may be

used to shield ineffective competitors from competition rather than to benefit consumers. The FTC's shift towards addressing labor conditions is also influenced by theories beyond classic monopsony, including the increase in bargaining power of companies relative to workers as market concentration increases. In addition, Wong-Ervin expressed shock at the FTC's proposed blanket ban on non-compete clauses, noting that their effect on worker wages is mixed, that they may lower prices for consumers even though they reduce labor mobility, and that their negative impact is clearer in low-wage labor markets than in high-wage labor markets, where they may be crucial for ensuring pro-competitive acquisitions and investment in training.

Nigro addressed the FTC's upcoming new merger guidelines, expressing shock that their draft hadn't been shown to Commissioner Wilson. He expected them to loosen enforcement standards, rely more on structural presumptions, eschew strict rules for defining market share, and differentiate less between vertical and horizontal mergers. He also expected a lesser role for remedies that could make otherwise illegal mergers salvageable, and noted that the chilling effect of such guidelines on mergers will be high even if they fail in court, since it will take a decade for precedents around them to be established and since the FTC's recruitment of more lawyers with litigation experience shows the Commission's dedication to litigating more mergers based on interventionist theories.

Blumenthal argued that the new guidelines would need to be operational and



reconcilable with existing case law to avoid being mere political statements that courts will reject. He noted that precedents relied upon by the FTC to support their paradigm shift, such as *Brown Shoe* and *Philadelphia National Bank*, were based on outdated economic theories around "structure, conduct, and performance" and are unlikely to hold up today. He criticized the FTC's plan to more strictly enforce the Robinson Patman Act, since even government reports dating back decades have found that doing so may protect competitors, but would raise consumer prices and undermine the consumer welfare promotion goal of antitrust. Blumenthal noted that prior FTC rulemakings has been based on clear statutory delegation of authority and that it is disputable whether courts will recognize FTC authority to make substantive rules with regard to unfair competition methods based on prior precedent. The FTC's blanket ban on non-compete clauses is also unlikely to survive in court in light of the Supreme Court's *Addiston Pipe* holding. That decision deemed non-competes ancillary to a business's sale as presumptively illegal, but simultaneously recognized other

The FTC's recruitment of more lawyers with litigation experience shows that they're keen to litigate their way to a new paradigm.

categories of non-competes such as partial restraints preventing employees from competing with their employer upon their employment's cessation.

Owings noted the increased prevalence of questions focused on Environmental and Social Goals (ESG) in second requests sent to merging parties. Those questions, covering such issues as worker layoffs, plane closures, et cetera, are a marked departure from the FTC's longstanding enforcement paradigm focused on harm to consumers. She also noted the FTC's newfound skepticism of whether reductions in excess capacity from proposed mergers are a cognizable efficiency, and observed that the FTC's two-factor test applied to unfair competition methods would capture conduct that merely harms rival firms and other market participants. Finally, she referenced the *Axon* case, in which the right of administrative litigants to challenge the constitutionality of the FTC's enforcement process was raised. The Supreme Court's decision in *Axon*, expected shortly, could set the stage for future challenges to the FTC's very existence as an antitrust enforcement agency.

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DOJ: Is Enforcement Policy Really Being Transformed?/Litigation Track Record

Juan Arteaga is a Partner at Crowell & Moring and former Deputy Assistant Attorney General for the US Department of Justice's Antitrust Division during the Obama administration. Thomas Barnett is a Partner and co-chair of the Antitrust and Competition Law Practice Group at Covington. He served as Assistant Attorney General for Antitrust in the George W. Bush Administration. Andrew Finch is a co-chair of the Antitrust Practice Group at Paul Weiss and a former Principal Deputy Assistant Attorney General for Antitrust. Eric Grannon is a Partner at White & Case and a former Counsel to the Assistant Attorney General for Antitrust.

GRANNON DISCUSSED THE DOJ'S CURRENT "all or nothing" approach to merger enforcement, which prioritizes litigation over seeking settlements through consent decrees that utilize remedies such as divestiture to "cure" problematic mergers. This shift in approach upends decades of antitrust enforcement history and has resulted in a string of losses for the agency in court, such as in the *US Sugar* and *Booz Allen Hamilton* cases. A notable exception was the Penguin Random House-Simon Schuster merger, which was successfully defeated in court after the DoJ presented a creative theory of harm based

around compelling testimony from authors like Stephen King on the importance of competition in the publishing house sector to ensure author advances. While this constitutes a labor monopsony argument, it also aligns with the consumer welfare standard since enhanced incentives for authors confer greater consumer choice.

Arteaga concurred that the DoJ had taken significant risks by using non-traditional and creative theories of harm in merger enforcement cases. He also noted the reinvigoration of Section 2 enforcement and increased focus on conduct cases.

Barnett emphasized that the DoJ had to be able to explain to judges why remedies such as divestitures proposed by merging parties would be an insufficient cure for challenged mergers.

Finch opined that a positive consequence of the DoJ's new enforcement paradigm focused on litigating cases to their conclusion would be more precedent-setting, providing clarity around what mergers and remedies courts are willing to accept.

Barnett also noted that courts demand economic evidence in antitrust cases and won't be moved by cases backed primarily on ideological theories of harm or perceived antipathy towards large companies, rather than by facts and concrete evidence. Judiciary and public confidence in the enforcement agencies will decline if ideologically driven cases are consistently brought or if enforcement paradigms shift radically between administrations. Grannon added that the consumer welfare standard favored by decades of precedents affords little room for other competing interests, such as employment or ESG objectives.

Finch noted Assistant Attorney General Kanter's inaugural speech, in which he expressed a desire to seek full-stop injunctions against Clayton Act violations, rather than seeking alternative remedies through consent decree settlements, such as divestitures where clear buyers can be shown. He argued that the DoJ would be better off using statutory processes for discussing remedies with merging parties to achieve consent decrees. He warned that the current DoJ approach would have a chilling effect on pro-competitive mergers, while diverting

DoJ resources away from matters where it might have had more success.

Arteaga suggested that merging parties may benefit from approaching the DoJ with remedy proposals prior to challenges being issued. Grannon instead suggested that parties engage in unilateral divestitures prior to making Hart-Scott-Rodino Act pre-merger filings with the agencies, as a potentially wise strategy for avoiding costly lawsuits challenging mergers. He argued that potential consequences of the new enforcement paradigm would be an incremental change in legal precedents, and an increase in unilateral divestiture prior to mergers. He also emphasized the importance of the agencies acting even-handedly to avoid the perception of inconsistent and arbitrary enforcement standards between different US administrations.

On criminal enforcement, Grannon criticized the DoJ for failing before courts and juries in most of its recent criminal cases, with the exception of the "Pilgrim's Plea" case. This indicates poor evidence or weak theories of harm. Barnett criticized the revival of Sherman Act Section 2 cases. The standards under different circumstances under Section 2 have been debated for decades. This makes it difficult to prove criminal violations and could subject the agencies to losses. Finch expressed doubt that the DoJ will bring unilateral conduct cases under Section 2 due to the difficulty of securing criminal convictions. He also expected more non-merger cases to be taken up by the DoJ even though they will take longer to litigate.

From Top: Arteaga, Barnett, Finch and Grannon, and moderator Suzanne Munck



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Government Representative Presentation by Doha Mekki

Doha Mekki is the Principal Deputy Assistant Attorney General in the Department of Justice's Antitrust Division.

MEKKI NOTED THE PROMINENCE OF COMPETITION ISSUES IN THE national dialogue today. She stressed that those holding differing antitrust enforcement philosophies nevertheless agree that competition and rivalry between firms can produce benefits, regardless of the potentially suspect nature of corporate motives. She noted that Congress, in passing legislation, has consistently praised free and unfettered economic competition for producing prosperity. Mekki asserted that the notion that market concentration due to mergers could imperil the competitiveness of markets is noncontroversial. She asserted that a failure by courts to uphold this principle led to markets characterized by inferior resource allocation and a failure to yield the lowest prices relative to quality. She claimed that historic under-enforcement of antitrust laws by administrative fiat has usurped the will of Congress and implemented a higher enforcement standard than Congress stipulated.

She stated that the inability to predict the future with certainty does not justify under-enforcement of antitrust laws, especially since the latter can also produce negative competitive outcomes. She underscored the Supreme Court's teaching that in drafting the Clayton Act's merger provision, Congress was concerned with probabilities, not certainties.

Taking Congress's will seriously thus means that if a potential or likely consequence in changes in market concentration is to substantially lessen competition, then it is worth opposing even if that is not the most likely consequence. She noted that the FTC's failure to prosecute Google's acquisition of Double Click in the ad tech industry, for example, led to Google's dominance in this sector with attendant anticompetitive outcomes. In particular, she observed that Google followed the acquisition by forging an exclusive link between its Google Ads home-grown product and the two products it acquired from Double Click, tilting the industry in favor of Google's efforts to force publishers to stay with Google to use all these products. She stressed that despite the potential entry of new competitors, Google was able to establish a durable monopoly in the publisher ad server market. Mekki similarly criticized the DoJ's failure to seek to block Google's acquisition of Ad Meld, despite the reasonable likelihood that anticompetitive harm would result. This led to a decline in the ability of publishers to multi-home with different ad exchanges, creating a monopoly for Google's AdEx in the adver-



tising exchange sector that has persisted for several years. She also criticized courts for failing to predict the anticompetitive consequences of the AT&T-Time Warner merger, with a blackout of Time Warner content resulting, contrary to testimony of the merging parties' executives that the court accepted. Finally, she criticized the DoJ Antitrust Division for declining to prosecute the Coors-Miller brewery merger in 2008, due to embracing cost efficiency arguments while rejecting the likelihood of anticompetitive effects. That merger was followed by price increases for the merged entity's products.

Mekki then outlined her lessons from the above enforcement record.

First, the enforcement agencies must honor Congress's statutory intent to avert concentration or trends in concentration at their incipency, without evidence of

Congress's statutory intent must be upheld by enforcement agencies to avert trends in concentration at their incipency

total certainty that mergers will be harmful. Structural evidence must thus be emphasized as grounds for prosecution.

Second, if a merger may increase a firm's market power, then we should assume the firm will exercise that power, regardless of professed reputational concerns or executive testimony or corporate promises to continue competing.

Third, the structural presumption of is an important indicator of market power. Embracing it will also give businesses confidence in modifying their conduct, based on a greater predictability of what mergers will trigger agency prosecution.

Fourth, we should be skeptical of efficiencies that don't increase competition. Congress wanted to preserve competition, not efficiency. Mekki cited literature describing failed mergers where efficiencies didn't materialize.

Finally, Mekki closes with some optimistic comments about current enforcement. She cited as a positive development the DoJ's recent victory in opposing the Penguin-Random House merger on the basis of a labor monopsony theory of anti-competitive effects. She also praised the agency for pressuring other merging parties to change their plans after bringing cases without an absolute certainty of anticompetitive outcomes under the new enforcement paradigm. She opined that even bringing losing cases sharpens the DoJ's advocacy and clarifies the law, and is thus worth the resources spent.



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