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7A Competition, Two Concurrent Sessions & Trademark Law. Antitrust: Developments and Trends

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SESSION 7: Competition, Two Concurrent Sessions & Trademark Law
7A. ***Antitrust: Developments and Trends***

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Panelists:

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DARYL LIM: Welcome, everybody. This is the Antitrust panel, and we have lots to discuss, and as always, not enough time but I think that's a good thing. I'm going to start with a short quote by Cheryl Sandberg from Meta, where she said, "The progress we make is directly proportional to the number of hard conversations we're willing to have," which is good marital advice, but I think also good advice for Antitrust policy making in general. I'm looking forward to having hard conversations in the name of progress today.

The format will be a series of questions. The panelists can be the first to answer and others can weigh in. We'll be talking about wide range of topics, the Digital Markets Act. I'm going to invite Damien Geradin from Geradin Partners to start us off. We'll also be talking about Antitrust, the Chinese characteristics, in particular, what's been happening over the last 12 months since we last met Angela. Angela Zhang is from The University of Hong Kong.

We'll be also considering a very important question of whether or not regulating big tech hurts or harms innovation, and to tell us more about that. At least, to lead us off on that topic is Eleanor Fox from New York University. We are also pleased to have William Kovacic from The George Washington University to tell us about what he means by the root and branch reconstruction of antitrust law.

Tom Nachbar from the University of Virginia. He will be talking to us about qualitative market definition, and Thibault Schrepel from VU Amsterdam University, about blockchain and computational antitrust, so really a broad survey of everything that's exciting. You've probably seen the last month or so and even today. The New York Times, the new proposed legislation that's going to be taking place, the digital services act. We'll be talking a little bit about that as well.

Panelists, please feel free to chime in, follow up at various points so we don't have to wait 40 minutes to hear from you. And audience too, please feel free to come in with your questions. We'll be taking questions throughout. Damien, let's start with you, the Digital Markets Act made the news most recently about months ago, targets gatekeepers like Facebook and Google. Thierry Breton, a high-ranking official, says, "Europe has put its foot down on the issue on big online platforms because they were behaving like they were too big to care." Will the Digital Markets Act really allow the European authorities to say they have reclaimed power?

DAMIEN GERADIN: Thank you very much, Daryl, and thank you to the organizers. I think, first of all, I'd like to explain how the Digital Markets Act or the DMA came about. Over the past four or five years, you've had reports from various porters in the US, in the UK, in Australia and Europe suggesting that antitrust was not the best tool to control the market power of digital platform, and it's for various reasons. The main one is that antitrust proceedings tend to be slow. It took about 10 years for the European Commission to adopt three decisions against Google.

The remedies tend to be very narrow, and antitrust intervenes after the fact when the harm has already occurred and the markets may have dipped. There is a growing consensus that it is better to have some form of eccentric legislation that would prevent harm from occurring, rather than using antitrust on an exposed

basis. The DMA is a piece of legislation that was adopted extremely quickly. It was proposed by the European Commission mid-December 2020, and you had a political agreement on the legislation by mid-March.

It was adopted at an incredible speed because there was a very broad consensus amongst the commission member states and the parliament that something needed to be done about big tech. Now, it's a different approach than another equally famous legislation which is the GDPR in at least two respects. The first one is that it's an asymmetric legislation in the sense that it will apply to a small subset of companies that will be designated on the basis essentially of quantitative criteria as gatekeepers.

Once you are designated as a gatekeeper, you have to comply with a list of about 20 obligations which are found in Article 5 and 6 of the DMA. Since time is limited, I will not cover all these obligations. Just take an example which is the regulation of app stores. There are two main app stores, the Apple App Store and the Google Play Store.

These obligations will fundamentally modify the way these app stores are run. For example, Apple will be obliged to allow, say for security reasons, users to download their apps directly from the internet. Third-party app stores will also be allowed on the app store, which is something that is not the case right now. App developers will be able to use the in-app payment method of their choice, and the app store will be subject to friend obligations, which is a bit like in the context of items. The second difference with the GDPR is-

DARYL LIM: We'll get to the GDPR, Damien.

DAMIEN GERADIN: Okay, fine.

DARYL LIM: I want to ask you about the immediate impact our audience, our IP practitioners. Let's focus on that and we'll come back to some of these issues which you hopefully laid out, but what are one or two things that IP practitioners, policymakers need to think about?

DAMIEN GERADIN: I mean, look, this is a legislation which is not about IP. Let's be clear about it. The contact points with intellectual property are quite limited. Now I think that, of course, IP practitioners and antitrust practitioners very often are involved in complex cases, covering a wide range of matters. I think it's just helpful to know that in the EU, you have this piece of legislation which is imposing quite strict obligations on digital gatekeepers. The idea is to promote competition, contestability as it is suggested, but also fairness which is a concept that is a bit distinct of what you find from antitrust.

DARYL LIM: You bring out an important point about fairness too, which I want to come back to because that's been something that almost every senior official has said, "This is going to be a fairer regime." Angela, I'm going to ask you, from the Chinese perspective, and you can do your best to channel Chinese authorities, but you've got a good pulse on what's going on there.

Are you looking at this and saying, "This is a great thing. We should think about it because commissioner, now executive vice president investigators saying this is a global movement. We hope to take out digital markets and we'll inspire others all over the planet." How does China look at this?

ANGELA ZHANG: We did see that China moved in tandem in the past 12 months since I saw you last time. There's a lot going on, probably more going on than the previous five years. When Damien mentioned that the DMA move incredibly fast, things in China move even faster. China speed is like a rocket. In the past 12 months, we have new antitrust skyline promulgated in February last year. Two big antitrust cases, one against Alibaba, the other against Meituan, which is a food delivery giants.

These cases come with facts you've never seen before. By the way, before, there was hardly any abuse big antitrust investigation into this big tech company. There is 180 degree shift in terms of China's attitude towards big tech since we spoke last time. Whether that was inspired by the EU, probably not, I have to say that what's happening in Europe and the United States did enhance the legitimacy of the Chinese authority to go after these companies.

However, I don't think that they have inspired the Chinese regulators or Chinese top leadership to do that. I think it's more out of an internal governance reason that they decided that now it's a good time to do something about it. The story is very long. I'm peculiar where I'm only allocated two minutes, so I wouldn't down to the detail. Obviously, these tensions have long been overdue, and I think some of the actions are long overdue. They should have done something about it, but they didn't, and there was really lacks enforcement in the past.

There are good reasons for them to do that, but however, the Chinese approach is a bit too clumsy, I have to say, and too dramatic, too volatile, and that have given rise to a lot of volatilities in the market and to some extent has backfired because very recently the Chinese Vice Premier convened a meeting sending a very strong signal.

Look, we might need to taper up a little bit about regulatory intensity because we want to ensure social and economic stability. These tech firms are laying off people, and Chinese tech companies, some of them lost 90% of the market valuations. We need to care about the economic fundamentals before we move on to talk about regulation. I'll stop there first.

DARYL LIM: Thank you. I have one follow-up question. There was an op-ed last year which had featured you, and there was a headline about how a potato farmer is now the head of the Antitrust Agency. How much experience does he have, and what should we be expecting from an agency that's headed by a former potato farmer? We had our share here about a potato farmer becoming president, so that's not unprecedented, shall we say?

ANGELA ZHANG: Oh, no. The current lady that is heading the Antitrust Bureau - Gan Lin and she had vast experience in this area. She has been heading this bureau for a really long time, but, I guess, the journalist is trying to make a big deal out of it because they're trying to make a news hotline by talking about her past history as an academic who study agriculture and specialize in potato. She's a veteran regulator in market regulations.

What is really the news here, it is a very important point, is that China's Antitrust Authority, for a really long time, have very little capacity because they have just, for the simple fact that they have very few people and they have tried

very hard to claim for more resources but they fell. However, the recent law enforcement campaign gave them a very good excuse to expand their personnel force. The bureau was elevated. Its bureaucratic status was elevated from a bureau to now a vice-ministerial status.

That's why this potato scientist is now heading the bureau because she's a vice minister. In China, if she hacks it, that means the whole bureau of status is elevated, and that will mean this bureau will see more personnel, more regulatory resources, bigger budgets, and that's a big deal. That's why I'm saying that what happened in the past 12 months means more than what happened in the previous 10 years, seriously, because they have these agencies to overcome a very big capacity obstacles, and so that will have quite far-reaching impact on future Chinese antitrust enforcement.

DARYL LIM: Thank you, Angela. I should get my crops right. In the US it was a peanut farmer, not a potato farmer.

[laughter]

I want to turn now to folks in the US because when they talk about the DMA, they say, "Well, here we are in the US. We seem to be dragging our feet. On the other hand, we have champions in Khan and Kanter, and both of them seem to be very warm to the idea of emulating something similar." Are we expecting something similar, and how does politics in the United States and really the structure of the institutions in the United States cause us to take pause and look at the nuances, Bill.

WILLIAM E. KOVACIC: Daryl, thanks for the wonderful opportunity to be part of this conversation. There are two policy streams. The first involves the pursuit of new legislation. Just last evening, Ken Buck, the ranking Republican member of the house judiciary subcommittee on competition law, made a prediction that by the end of July, the US will adopt a platform regulation statute that incorporates many features if not the philosophy of the DMA. That still remains a matter of speculation.

Congress has been talking about doing things for the past two years, but they haven't actually acted, and nobody ever built a reputation based on what they said they were going to do, and as yet they haven't delivered. That would be a crucial ingredient in the new policy framework. The other stream is what the agencies themselves can do under new leadership, which I think could not have imagined even two years ago that they would ascend to the position of significance that they've achieved.

This is Lina Khan at the Federal Trade Commission, it's Jonathan Kanter at the Department of Justice, Tim Wu in the white house. They've committed themselves to a bold rethink of US policy that tries to reset its goals more in alignment with the egalitarian statement of purpose that appeared in American jurisprudence, especially between, say, 1940 and 1970, and to embark on a bold new set of enforcement measures. Angela mentioned capacity constraints. The US agencies face serious capacity constraints. They have already major matters underway.

Bet your agency abusive dominance cases involving Facebook and Google. A variety of merger cases that they're litigating now, criminal

enforcement cases that are having a bumpy ride in the courts at the moment, a host of different matters. In order to add new items to that mix, we'll require a dramatic infusion of new resources. Here again congress has spoken about it but they haven't done it.

DARYL LIM: Do you think it's a better approach what we're doing in the United States with targeted enforcement private litigation rather than sweeping legislation?

WILLIAM E. KOVACIC: I think the technology of antitrust enforcement is revealing a number of weaknesses. The scheduled beginning of the Facebook trial that the FTC is pursuing, this is a monopolization case. The scheduled beginning of the trial is February 2024, which means there'll be no decision until 2025, going through the first level of appeal so it's 2026. If you go to the supreme court, it's 2027. The Google case, by contrast, is on a fast track. The trial begins in September 2023.

I think the ponderous schedule of these matters begins to raise basic questions about whether the system is fit for purpose. In my mind, it's not at all surprising. This resonates with, I think, Damien's point about the pace of Article 102 matters in the European Union. It's no surprise that we're turning to alternative strategies, and I think it makes perfectly good sense to experiment with alternatives.

DARYL LIM: Thanks, Bill. Eleonor, I see you have unmuted yourself. Good morning.

ELEONOR M. FOX: Good morning. Nice to be here. Thank you.

DARYL LIM: Did you want to chime in, Eleonor?

ELEONOR M. FOX: Could you say that again?

DARYL LIM: Would you like to chime in? I saw you unmuted yourself.

ELEONOR M. FOX: I am unmuted?

DARYL LIM: Yes, you are.

ELEONOR M. FOX: Yes.

DARYL LIM: Okay. Well, not hearing an immediate response, then let's move on. Tom, you unmuted yourself too. Did you have something to say?

THOMAS B. NACHBAR: No, I just wanted to follow up on something that Bill had said, and also I'd just like to express how glad I am to be here. I enjoy speaking at these things, but especially with this panel format, I learn so much from these, and it really is a great format and a great conference. Thanks for having me back again. I think Bill makes a great point about the timeline for enforcement, that it does show real problems. I guess I'm a little concerned about whether or not we're going to see timelines shorten with more specific regulation.

I think it's going to depend a lot on exactly the type of regulation, and even in regulatory cases, cases that are going through administrative agencies, those cases wind up taking a really long time too. I'm on board with the idea of speeding things up. I think, Damien makes a great point about ex-ante versus ex-post regulation, and I think that that's really what this is about as much as anything. We've seen this happened several times through the history of antitrust itself in the history of United States.

Courts wind up getting to a place that congress isn't very excited about. Congress comes up with what it thinks are more specific standards courts respond. It'll be interesting to see what happens in this domain. I recognize this isn't strictly speaking competition regulation, but it might be-- It's not the general competition regulation, but it might be that congress gets to the point where it tries to regulate so finely that it has a different kind of problem that the rules they come up with are specific enough that they wind up being easier to circumvent on the merits as opposed to circumventing as a matter of the application of a broader rule or a broader standard.

WILLIAM E. KOVACIC: Daryl, I was wondering if I could just take on everything Tom said. I think he's absolutely right. Those of you who have traveled between Washington and New York know that we have two kinds of train service. We have a fast-slow train and we have a slow-slow train. We're not comparing bullet train performance here. The consequence is that the implementation rollout of the DMA, of measures and other jurisdictions, in many ways, will be the US policy as a default in key respects until we put our own infrastructure in place.

DARYL LIM: Thank you. Eleanor. Thibault, I saw you after that so go ahead, Eleanor.

ELEONOR M. FOX: Oh, okay. I agree with all that's said. The one point that hasn't been made yet regarding US is our case law as decided by the supreme court, and the supreme court case law has narrowed and narrowed the scope for finding a violation for abuse of dominance monopolization. This sets into play a very big ideological dispute. When Bill was talking about Lina Khan and Jonathan Kanter and Tim Wu coming on stage, it's really trying to push back against very conservative law.

We have a few things going on. One is very conservative law, which unless there is legislation, it will remain very laissez-faire. Let the firms mostly do what they want. The other thing, on the other side is these proposals. Looking abroad and taking up from Damien, there's the DMA in the EU. Something similar but more flexible, the DMU in the UK, and CMA which Bill knows more than I know about. There is the problem which is spanning everything that the case-by-case litigation is really too slow to patch the practices that have been identified as abuses.

Certainly, our new administration agrees that these are real abuses, and if we just continue case-by-case in the United States, first of all, the time is too long. Second of all, when it gets to the supreme court, the supreme court might throw everything out. That is part of the background. The legislation is part of the background, and as Bill said, nobody knows whether the legislation will pass. If it passes, the two bills that are most likely to pass will be very specifically limited to big tech area. They would not cure the problems that our law, US law, touches very little in terms of condemning what dominant firms do.

DARYL LIM: Thanks, Eleanor. Thibault and then Tom. Thibault.

THIBAULT SCHREPEL: I'm also incredibly happy to be on this panel and thank you very much, Daryl, for organizing this great conference. I just wanted to say that we may have a clue of what might be happening with the DMA in terms of speed. In fact, a few years ago, I've conducted empirical study

regarding what we have in Europe, restriction by object on the one hand and effect on the other. The logic would be that restriction by object would be faster to litigate because you don't even need to prove the effect of the practice. You could go straight to characterizing the practice and that will be the end of it.

What we see in practice, and I haven't done the study in a few years, but at the time, is that restriction by object and the litigation related to those types of restrictions. By object, we'll take an average of 946 days, and the ones by effect will take 904 days. Of course, you could say this is statistical noise, and it's not very important.

I just wanted to show here that what might be the case is that when it comes to those restrictions by object, the European Commission and then later on The Court of Justice may want to be sure that the practice fits within the box of by object because this would be the worst case scenario to fit within this box a practice that would be by effect. I suspect that we're going to see the exact same when it comes to the DMA. None of the big tech companies will say, "Oh, sorry I got caught, and yes my practice is exactly the one listed in the DMA."

I think they will argue the practice is slightly different and then you will go on for litigation where the European Commission will have to prove that “no, no, no the practice is exactly the one in the DMA”. So I think, when it comes to speed, we may have actually a longer time for the litigation when it comes to characterizing the practice, as opposed to studying the effect or maybe on top of that. This might be just an overview, but it might be what's coming up.

DARYL LIM: I think that's a great insight. One of the things that I find peculiar, if you like, about the thresholds is they're taking a very structuralist approach. Market cap is only 45 million users. There doesn't seem to be any genuine, conscious, deliberate way to define the market. I know, Tom, you have been giving a lot of thought on the importance of market definition, your piece which I recommend folks to read.

I'll just read this colorful section that says, "Saying that finding of anti-competitive effects obviates the need to define the relevant markets is like saying that a finding of drunk driving obviates the need to determine whether the defendant was driving." I think this goes a little bit to Thibault's point. Is that true with the DMA?

THOMAS B. NACHBAR: I think Thibault made a great point, and it goes back to the Damien's point about ex-ante versus ex-post regulation, about the more specific the rules become, not only is there going to be room to argue about whether a practice fits the specific rule, but also it could have an effect on the speed of the litigation. I think that that's really important. With regard to market definition, market definition has been a huge topic in antitrust over the history of antitrust.

You see, I think all the lines of what Eleanor was talking about, some frustration about the way market definition is being used, and certainly a huge dispute in the American Express case about market definition and platform markets. The response is, I think, starting to look a little bit like the DMA response a bit, which is, "We're just fed up with this, and we're going to get out of it." You see Justice Breyer in American Express itself picking up this argument

that if there are established anti-competitive effects, you don't need to do market definition.

He made two objections to the majority's market definition on MXE, objected to the way that the majority defined the market, but he also objected to the need to conduct market definition at all. This is an idea that seems to be getting some traction. It appeared in the Klobuchar Bill the CALERA and the guidelines RFI, the DOJ, FTC, RFI for the merger guidelines revision that's happening right now also has this concept in it that might be possible to find harm without defining a relevant market.

I think it's not really clear what that means yet. In American Express, interestingly, the anti-competitive effect, the effect that was observed was the ability for American Express to raise its prices over time. As I laid out in the paper, I think, that's particularly a problematic definition of anti-competitive effect because price increases can be an indication of anti-competitive effects, but they can also be an indication of product differentiation. Telling the difference between the two of those can be pretty hard unless one does market definition.

It seems to me that, like in the DMA context, some degree of dissatisfaction with what the court has been doing, which goes back to Eleanor's point, is leading to a push in the other direction. In the DMA case, it's more specific rules and with regard to market definition, it's kind of pushing away from market definition in trying to avoid some of that doctrine.

I think this is actually particularly important for intellectual property lawyers because a lot of the ways in which you see firms differentiate their products is through intellectual property and intellectual property like protections like branding. I think that there's going to be a real push to figure out what to do with the kind of product differentiation in those cases. What I suggest in the paper is that single-brand markets are, at least, interesting from an interest perspective.

The court has generally been pretty solicitous of the idea that firms can recoup the investments that they make in their brands, but the ability to raise price, it is the exercise of market power. I think that as enforcers get more either push back on market definition or get more fluid with it, the guidelines RFI also mentions the idea of using qualitative factors in market definition, which is really what my paper was about. It's not really clear what that means. In the paper, I try to explore a little bit about what that might mean, about importing other values through qualitative criteria, but I think it's going to be a big topic in the days to come.

DARYL LIM: Thanks Damien, and thanks Tom. Damien, I want to hear from you but also I want to follow up on the GDPR point that you made, so please go ahead.

DAMIEN GERADIN: Two quick points, first on things that have been said and with which I agree, I think that the focus on quantitative criteria doesn't make much sense, I must say. There are many things I like in the DMA, but the designation process it's not really functioning. It's even worse than that. There is a rebuttal process, so if you meet the quantitative criteria, you can in theory submit a brief explaining why although you meet the criteria you're not a gatekeeper.

This ability to rebut your designation as a gatekeeper has been essentially eliminated from the final text, so that I think it's quite unfortunate.

The second thing on timing, the DMA will not be fast. It will be everything, but fast. First of all, the obligations will effectively kick in in 2024, and I agree with Thibault. I don't think that the gatekeepers will say, "All right, this is indeed self-referencing. Sorry we made a mistake." No, they will litigate this to death. I should remind you that an appeal to the general court of the EU takes three years, and the next appeal at the Court of Justice they also take three to four years.

Intel, the Intel cases were started in 1999, and it's back to the Court of Justice, 23 years, so eventually it will be settled in 26 years, so delay is a problem. Companies move fast and break things, and the law doesn't deliver a quick solution. An idea that is in the DMA, as part of the obligations imposed on some gatekeeper, is to come up with a proper dispute settlement system. I'm a great believer in that. I don't think that any problem is an antitrust or even a regulatory issue, and I hope that dispute settlement or quick dispute settlement mechanism will often deliver a good solution to these problems.

Under GDPR, yes. Two differences, one the designation GDPR applies pretty much to everyone, whereas the DMA will focus on, it's generally said eight to twelve companies, the big five, the GAFAM as we call them, and then possibly three or four more such as, for example, online travel agencies, or large e-commerce websites. Second different, enforcement. That's really critical. The lethal mistake of the GDPR and the reason why, in my view, it doesn't function is that enforcement was supposed to take place in the country where the company is hosted.

That means that Ireland has become the de facto GDPR enforcer for big tech. It's a small country, limited resources, the regulator is not up to the job. This time the EU didn't make the same mistake, enforcement will be centralized to the European Commission. Will it work? Not so sure because I think the resources that will be devoted to the DMA, we've heard different things.

Initially, 80 people. More recently we've sets 120, it's far too few. It's a monster. Implementation enforcement is a gigantic path. It's probably the most demanding regulations that has seen the light of the day in the EU, and I don't think it's with 80 or even 100 civil servants that you will manage to implement and enforce it properly.

DARYL LIM: Thanks Damien. I think the last I heard was 230, but even that is a drop in the ocean, and I'm hearing resources, resources, resources. GDPR key criticism didn't fly. You mentioned that, but also that lack of resources. United States legislation might pass. Bill made the point and I think a few others as well resources.

Is this really more like a paper tiger. We can talk about it. Well, I hate to say this in an academic way since all of us are in that sense academics, but is there going to be a practical impact on the day to day**.** Are we expecting to see whether in the US, or in Europe, a change in the way that people behave or is this just business as usual, Bill.

WILLIAM E. KOVACIC: I think of an experience I had when I spent a summer working for a bank in Germany during university. I went to Schwesing to look at a wonderful delft pottery store and I picked up a nice piece, and the shop owner, I think, sized up my income demographic quickly and my backpack and said, "Oh monsieur, it costs."

When I think of our discussions about doing good policy in this area, it costs, and if you're not willing to pay for it and build the infrastructure, you run a risk of not simply moving the policy ahead. You run a danger of doing it badly and creating cynicism about future efforts to do it right. Now, I think there's some good built-in capacity to do things well, but I am astonished at how policy makers wave their hands, and like Captain Picard say, "Make it so."

I'll give you one example, though, of a jurisdiction, I think, it's doing it better. During my time at the CMA, where I left the board recently when my mandate expired, the CMA is putting the resources in place to do the DMU when it comes about. More to the point, they're getting the right people. They put together a team of 50 technology specialists, analytics, and quants to put them in a position to actually understand what the platforms are doing.

Of all of the agencies I've seen in the world, the CMA is far ahead of the rest. Now, in our business, I grade on a curve, so I'm not saying it's absolutely perfect, but it's better than the rest of the class by far. If you want a model of how to put yourself in a position to do the right work, the CMA is the one to study.

DARYL LIM: Thanks, Bill. Eleanor.

ELEONOR M. FOX: Will this DMA et cetera DMU be a paper tiger? I wanted to make two points. One is a lot of this depends upon the lawyers and the advice they're giving to their clients. I do believe that the lawyers will take it seriously. It's a question. Some may, some may not, some may look for loopholes. I think, on the whole, that the lawyers will look at the instrument and advise their clients how to stay within the rules of the game. If the lawyers do this, that's a huge effort and path towards compliance.

Second word I wanted to say is about norms and norm setting. This goes together with what Bill just said in terms of change, and do it, and start where you can. Think about the United States, in the United States right now, as I said before, our norms on unilateral conduct are thin and weak. In the FTC case against Facebook, it involved several things, including acquisitions but also conduct. The judge threw out, as a matter of law, the claim that Facebook did what I will call “sabotage on the platform”. Vine, this young firm that had a great idea got too good and Zuckerberg said, "Cut them off from the data."

The judge, in this case, at least the district judge said, "That's not an antitrust violation in the United States because of our law because the platform invented the platform and can do what it wants. It's not subject to duties to deal." Sabotage on the platform is very serious. If we have norms, that would be clearly a violation of the norms in the DMA and the DMU and actually you don't have to go to non-antitrust law because as Damien as said, the DMA purports to be mostly not, or not antitrust, although some of it would be an antitrust violation, but in EU that vine problem would be a clear antitrust violation. You wouldn't have to think twice. I think that, as far as the US is concerned, even if we don't

adopt legislation, the fact of the legislation in Europe which will have to apply to American companies in Europe and around the world, will start setting norms at least against the most severe abuses that US law does not even capture today.

DARYL LIM: I want to ask you two follow-up questions and I see Angela's hand is up but I'm going to get your thoughts on this before we move to Angela's. One is what impact should we expect on innovation, a topic which I know that you had expressed you wanted to talk about? Well, why don't you answer that one first, and then we'll get to the second.

ELEONOR M. FOX: This actually follows on what I just said on whether the DMA, DMU, and proposals to reign in big tech are going to help or hurt innovation, a topic which, of course, is dear to the hearts of IP lawyers even if it usually comes up in a slightly different context. This is my point of view, there is another, and frankly, a lot of this tends to coincide with philosophy, just general philosophy of laissez-faire, on the one hand, Schumpeter and keep your hands off because the innovation will be done by monopoly firms.

On the other side which I think is much more accurate, there are at least two points. One is that when a dominant firm thinks about innovating, it does not want to cannibalize itself. As then Apple's CEO Steve Jobs said, "What's the point of focusing on making the product even better when the only company you can take business from is yourself." The startups, the small feisty companies want to do disruptive innovation. The very large firm that's entrenched wants to do something that's called innovation but it will be on a path that pleases and doesn't cannibalize it.

The second is related to the vine incident. We have examples all over the lab where dominant firms, and especially now big tech firms are cutting off very innovative firms because they're very innovative and challenging. The answer to the question, does the new regulation or proposed new regulation of big tech harm or help innovation. It's absolutely complex but good antitrust will not harm innovation on balance, it will unleash the innovative incentives of the challenging firms, and if it is done right. I think CMA is trying to do this right. It will allow the big tech firms and other firms to perform what they need to do to make their models, whatever their business model is to make the model work, to deliver the product.

DARYL LIM: Thank you, Eleanor. You've answered my second question too. I'll move to, Angela.

ANGELA ZHANG: Well, I'm not really making a comment but rather I want to use this as an opportunity to ask my fellow panelists because there are so many luminaries on this panel and all the leading experts. My question comes from my observation being a scholar in China. China, obviously, is a very important jurisdiction. We, similarly like the United States, have very big tech companies. We struggle with the similar problems. However, from what I see, if you take a step back at seeing the overall trend that's been happening so fast in the past two years, I see all of us are fundamentally struggling with how you strike the balance between so-called market chaos vis-a-vis the government's monopoly here.

Because as much as we're worried about tech monopolies, we're similarly concerned about government which has ultimate monopoly in law enforcement. Especially, in China what I observe, there's very few western styles of checks and balance in the Chinese institutions. Government can have the capacity to move forward very quickly. If you ask me how to choose about, I do have a lot of sympathy for what this panel has said. Case is very slow and things move very slowly. There should be something to adjust, how do we know that the government is doing it right here.

If we are choosing between two evils which one would you prefer? How do we know that our pendulum wouldn't swim too far? If 20 years from now with us, if we are still here joining this panel would us be discussing the government has gone too far? I just don't know but I've just seen China being an extreme example because what happened in the past 12 months what I observed, we've already gone too far.

You see how the market has reacted very negatively and how it affected the tech firms. To the extent, I'm not sure if it is a good idea for China to replicate what's happening in Europe and United States to have a next anti-regulatory model. So that these administrative officials, regulators are sitting in the office of big tech companies and become the product manager of our most innovative and most dynamic companies in the country. This is something that I generally would love to hear from our panel what you think about this.

DARYL LIM: Thanks, Angela. Does anybody have a quick response? Thibault, yes, go ahead.

THIBAULT SCHREPEL: That's the point I wanted to make actually. I think it's indeed the central question. When you ask the question is it going too far I suppose the question next is toward which objective? What's the thing you're trying to achieve? What you see in that, what Eleanor mentioned is that indeed on the one hand you have new materials. If you read carefully what they write, they will never factor antitrust. Institutions are never part of the picture.

It's all about the market and the natural emergence of what's coming on the markets so no role for antitrust. On the other end, we have new branches, and here I'm going to quote Lina Khan on the famous paper on the Amazon Antitrust Paradox page 742. She's making the point that antitrust should not be about material ends, meaning more competition, it should be about political ends. With that in mind, is China going too far?

Well, maybe not because you could say they are achieving a political objective, but when it comes to creating more competition on the market, you could say that yes, certainly so and you are more of an expert than I am. The point that we made in a paper with Nikola is that if you want to foster innovation, it seems to us that what you want is uncertainty. You want a big tech company or a small company to be uncertain as to how to capture future profits. Here the law has a role to play.

For that, I think you need to create more complexity on the markets. In that respect, it seems to me that some of the provisions of the DMA are going in the right direction because indeed they make it harder for the big tech companies to capture the profit that is next to them, and they have to diversify. On the other

hand, it seems to me that some other provisions are freezing the markets and actually making it easier for those companies to keep on capturing the profits by preventing competition from the other big tech companies.

That's the short answer to my question. I think this is central, what's the role of institutions? Unfortunately, in all of the DMA negotiation, we haven't heard much about that. This is exactly the discussion that we have right now. I'm sorry that the European Commission didn't factor all of those questions into consideration while drafting the text.

DARYL LIM: Thanks. Angela, it looks like you put jet fuel on a bonfire. Everybody has their hand up. I'm going to ask those of you who want to respond to keep your responses to about a minute or so that we can cover the other topics. Tom, Bill, Eleanor, and then Damien. Go ahead.

THOMAS B. NACHBAR: Yes. I think that Angela and Thibault actually make a fantastic point in that the benefit of being with this group. Look at the literature that scholars are writing on antitrust these days. Lots and lots of citations to the EU, not as many citations to China. American antitrust scholars, a lot of them holding up the EU as a model not paying as much attention to China. I don't think that's true among the population is generally. We tend to focus on the substance of what the EU is doing.

I think a lot of people are concerned about the political consequences of what's happening in China with their forms of regulation. That really goes to the institutional point that this has been a factor in US antitrust debates since the Chicago School. A lot of the objection is not an objection to substantive antitrust rules, it's about allocating authority to different kinds of entities. The skepticism that comes from a lot of the conservative objections is the skepticism of regulation itself, not of particular antitrust rules.

I really do think that until reformers get a handle on that objection, as opposed to just reiterating the substantive objections, which people have been making going back and forth, I take all of those points on both sides. I think a lot of people have great arguments up that the substance of antitrust is either moving away or is overly permissive or whatever. I think a big part of the objection is institutional. I think it really behooves performers to take a look at some of those institutional objections and think about them in those terms.

DARYL LIM: Thanks, Tom. Bill we're going to get to you, but if you would weave in some of your discussion on root and branch, because I think it ties to what Tom has said as well. Go ahead.

WILLIAM E. KOVACIC: Thibault mentioned a key element of the modern discussion in the US which is that, when you look at all of the speeches that Chair Khan and General Kanter have given each speech mentions democracy now is the ultimate objective of policy. That is competition law is designed to protect a system of economic organization that is compatible with democratic norms, and the preservation of the integrity of the electoral process. That is first and foremost, a core belief of the new leadership in the agencies.

It's not a nice to have item if you don't begin there, their view is you haven't even started on the right path. I don't know how universally that would be accepted, I don't imagine that Chinese government officials will say that that's the

purpose of any monopoly law. Unmistakably, in the US, that is the central theme of policymaking. Now, how you make that operational as Tom was just suggesting how you develop criteria to do that. Does blocking this merger assist or retard the attainment of that objective it's going to be something hard to put in place.

Second, and this isn't a normative comment, but just a positive description of what's going to happen. My review about the last 30 years is that the US has been somewhat above break on the establishment of broader enforcement globally. It's been a voice of caution saying, "Don't make too many mistakes, be careful." That's switched. The US is going from the break to the accelerator. I think the larger message is going to give to other governments is, "We are never going to tell you again, what you should be doing.We're not going to tell you what your goals are. China if you want to apply it with distinctive characteristics, maybe USTR will tell you to be careful in dealing with IP." The antitrust agencies are going to tell you, "You formulate your views, you do what you want and do as much of it as you can."

The last thought is that given all of the uncertainties in application, you would hope that there would be continuing intense interest in asking how are things turning out? Not five years later, but as we go along. That is what were the prior assumptions? What is the actual experience then?

DARYL LIM: We'll follow up with you, Bill. In your article, you talk about staff and courts. Most of it reads almost like a slow train wreck. In terms of your prognosis, but there is a bright spot there. You talk about how the staff and the courts might step in and act as a buffer to this ideological uprooting, if you like of the last 40 years. Are you still optimistic about that and where do you see antitrust policy going?

WILLIAM E. KOVACIC: I'm with Eleanor side-by-side in the view that our courts have to moderate their views in a number of areas. We have gotten to the point where to quote, Judge Vanderwood from the General Court, "Now has antitrust become unenforceable, because of the kinds of demands and restrictions that have been imposed?" Some rethink is absolutely necessary in the courts, but our courts, by and large, do not believe this new vision.

That is, they are quite content with the more cautious approach that has developed since the late 1970s, in cases like Brunswick Sylvania, they are comfortable with that. Eleanor described it so well. If Congress doesn't come to the rescue with a rewrite, and again, Eleanor and Tom made this point very clearly the reforms are focused on tech, not on a basic overhaul of antitrust generally. If Congress doesn't intervene at all, everything's going to ultimately have to work its way through the courts, through a judicial process. Whether it's rulemaking, whether it's litigation, and that's going to be a hard gauntlet.

The final thought, Daryl, on this is it, when you look at the Reagan administration, Reagan had eight years in office, Bush following had four more. That was 12 years, for Republicans to put a vision of antitrust through appointments to the agencies and the courts. If we ask now, how many elections will the advocates of the transformation win? How many do you have to win in order to put your vision in place? I don't think you can do it in four years.

DARYL LIM: You said nothing about the agency staff, is that an implied way of saying they probably have no effect on buffering this?

WILLIAM E. KOVACIC: They do. I think one thing, when you look at the previous more radical transformation efforts in 1881, early 1970s for the Federal Trade Commission, I think what advocates of transformation realizes that they come in like Gulliver, really big guy. They move in, but then they wake up one morning and say, "My God, I can't move, what happened?" All these little people tied them down. Unless you bring the little people along with you in the process, motivate them, sell them on your program, they'll tie you down too.

DARYL LIM: Thank you. Eleanor?

ELEONOR M. FOX: I'm going to back up to Angela's question, which is really the question. How much market, how much States have, and you put it has China gone too far in intervention, because when China brought the crackdown on Alibaba and Ant Group. The stock market really felt the value that these companies fell. What I'm going to say is a rhetorical question really to Angela, because I know there's no time to answer it. What Alibaba and Ant Group did was very, very anti-competitive. The take one and not two, you have to choose me, if you choose me you can't deal with my competitor.

That was so anti-completive, that was so modest. What seemed to me was happening was that Jack Ma, who owns Alibaba had asserted himself really asserting private enterprise as big and standing up against government. I learned from you, Angela, but I think that was the trigger. It was the music behind it wasn't exactly what these companies had done and what China did to restrain them, but it was the music behind because it seemed like a crisis that the government wasn't going to let private enterprise do what they needed to do.

DARYL LIM: Thanks, Eleanor. Actually, a great follow-up question to Angela, which you brought up during the DC bar talk that I enjoy is, I think people don't understand, appreciate enough, the subtleties in dealing with the Chinese government. There are these formal norms, but there are also these informal norms. To the folks, both here as well as behind us, that we can't see our audience. What we tell them in advising them to better tread this path in dealing with the Chinese government with antitrust. Angela?

ANGELA ZHANG: I think the IP lawyers probably now, like informal institutions do play a very important role in Chinese law enforcement. I guess this is something that it's difficult to learn from the book. They really need to deal with the officials and then also the lawyers and learn it from the ground. Maybe the best way is to work with a local Chinese law firm, which have vast experience in this area.

DARYL LIM: To the point that Eleanor made, Jack Ma is just about as institution as you get. He grew up in, I think Hangzhou and he had his whole army of Chinese antitrust lawyers and yet he still made the boo-boo. If Jack Ma can't do it, but what hope do the rest of us have?

ANGELA ZHANG: What I saw in China is really a black swarm event. It's a really random event that trigger this, although the tension has been there for a really long time. I really love Eleanor's comments said that, "Very dramatic investor reaction is more the reaction to the music behind the music in the

background rather than substantive regulatory action, which actually are long overdue."

DARYL LIM: Thanks. Damien and then I want to go to one round where people talk about the future, and we'll start with Bill since has to leave first, but Damien goes ahead.

DAMIEN GERADIN: Thank you. Just three quick points. Very often there's a confusion that Lina Khan and Jonathan Kanter are close to the philosophy of EU competition law in what they say and what they do. To me, no. I don't recognize myself much into Lina Khan, and I'm definitely on the progressive side. I'm more often than not on the other side of big-tech.

Yet, I think in the EU, this idea that antitrust should be there to protect democracy don't have much of space, to be honest. That's my first one. The second one is that will the DMA, the DMU, and other legislation such as those contemplated in the United States will be paper tigers? My view, having been involved for 15 years in big tech, I think that none of these legislations will make a difference in and of themselves. If you look at what's coming, there will be laws, such as the DMA, the DMU in major jurisdictions, including Australia and/or China.

I think if it's the addition of these different rules plus the cases. If you look at companies like Google and Apple, they're pretty much sued everywhere. They're investigated in multiple jurisdictions. I think that it's going to be very hard for them to manage all of that. I think that, at the end of the day, and this is probably what happened to Microsoft 15 years ago is to say, "This is really getting out of control. We can't be investigated in 20 different places. This isn't manageable. We need to change our ways." I think the big threat for these companies is not so much the DMA or the DMU, or the DMS in the US. It's whether they will be able to manage being faced with all these rules.

That's the real threat. Final point, I totally agree with Bill. I think lawmakers are quite keen on adopting legislation, but they're unwilling to pay for it. If you look at the reason why it takes so much time for the European Union, the European Commission, to process antitrust cases, it's just lack of staffing. Everything takes ages. You're told, "Oh, we will send you a request for information." Four months later, you still don't have it. It's just that they don't have the staff. Nothing is being done to increase the staff. You can adopt as many rules as you want. If there's not enough staff, it won't make a difference.

DARYL LIM: Thanks, Damien. Bill.

WILLIAM E. KOVACIC: Thank you, Daryl. I have to start an exam in a couple of minutes. I wish I had taken all of your questions and asked these on the exam. It's a little bit late to do that. One on the future. I think the alliance in the US between left and right that forces law and tech could be durable. It's for the reason that Eleanor and Angela were just discussing. There was a concern that large tech information services platforms have displaced the state, that they are circumventing the state creating new private institutions that perform public functions without public accountability.

Left and right, are joined together in a concern about that. That could last for a while, regardless of who wins elections in the US. Final point, Damien put

his finger on a crucial unfolding development. It's the multiplicity of effort and activity globally cumulatively weighs upon the companies. One thing I've observed from my time at the CMA is a growing awareness by competition agencies that in some sense, they are best off hunting in packs, that is working as a group instead of individually. Working as a group gives you insulation from the claim that you're a rogue outlier.

Working as a group enables you to learn cumulatively about the effect of each individual intervention. I think we're going to see a broader effort across borders to formulate collective strategies with the expectation for the reason that Damien mentioned that that will be more effective in individual cases.

DARYL LIM: Thank you very much.

WILLIAM E. KOVACIC: Thank you for allowing me to attend this wonderful seminar.

DARYL LIM: Thank you, Bill. Thanks for joining us. Thibault, I want to give you a chance as we look to the future. You really in any sense the antitrust futurism blockchain, and with computational antitrust. Tell us what's happened in the last 12 months since you came. Developments on computational antitrust, and are we closer to integrating blockchain into antitrust analysis?

THIBAULT SCHREPEL: Sure. I do have a few QR codes. In a few weeks, we're going to publish contributions made by competition agencies explaining what is the use they are making of computational tools within the agency. You'll be surprised. We've received as I speak, about 15 contributions coming from the French, the Dutch, Argentina, Brazil, and many other agencies. It's moving fast. I think this is great. We discussed the fact that European Commission wanted to hire just 80 new public officials, and maybe now 200.

I think this is indeed the key issue here. When it comes to hiring the staff, you need to talk about which staff you are hiring. I think if you're not hiring computer and data scientist, you may have all the staff you need, you won't be able to study billions of data entries. Which is exactly what the European Commission had to do in the Google shopping case. 1.7 billion entry points to analyze. I think most of the agencies are moving in the right direction. As Bill mentioned, the CMA is leading the pack but other agencies are hiring lots of computer scientists. This is great news.

On the private side, though, I would say that there are companies developing new tools that we can use, but I haven't seen much law firms hiring computer scientists as part of their team. I think this might be what's coming next because the more it goes, the more you need that for you to be able to provide a good defense for your client. Also, to understand what's the issue at stake, especially if you talk about something like understanding Python or C++ to get to the core of the litigation. That's what's happening when it comes to competition antitrust. You've been asking me about blockchain. There are lots of cases coming. In fact, here, I do have an overview.

For the IP lawyer in the room, you would see that over the last decade, actually over the last 11 years, IP is the fourth most common claim when it comes to blockchain and crypto. It represents about 13% of all litigations. Antitrust is actually the fifth one. Here, most of those cases are about unfair competition as

defined in California, but there are some important cases. Tether is one important case. Long story short, and you have the QR code if you want to read more, but what's happening in that case, is that they pretended that their token was a stable coin when it wasn't. It became very easy for them to exchange their token against other cryptocurrencies.

This created a bubble, the bubble exploded, and the entire markets collapsed by over $450 billion. The creators of this cryptocurrency are being sued for three times the amount of the damage they posed, meaning $1.4 trillion. The claims here, in that case, are Section 1 of the Sherman Act and Section 2 of the Sherman Act, a potential collusion with an exchange and their abuse of market power. We see that there are important cases coming. It might be that in the few coming weeks, we're going to hear about another very important case in big jurisdictions. That's all I can say for now. Last point, when it comes to a blockchain antitrust, we also have I think to talk about the competition that blockchain is creating.

You may have heard about NFT. Now the new trending topic is the Web3. We see that indeed when it comes to venture capitals in California where I was just last week, all they talk about is investing in Web3 and in the centralized services now. Competition is here and is coming. I think this is good. I wish that competition agencies will support this new type of competition even more than they do today.

DARYL LIM: Thank you. Tom.

THOMAS B. NACHBAR: I think Thibault is exactly right. I think that our conversation generally shows there's just going to be a huge amount of confusion in overlap. In the crypto cases, regulators can't figure out how to think about it. Is it currency? Is it securities? Are there IP problems? Are they competitional problems? How do we address them? I think that they're just beginning to hash this out. I will say, the one thing that we really have not heard on the US side yet in Congress, is that much of the response from tech on these new bills.

I think as those bills move forward, we're going to start hearing more from that. I think it'll be interesting to hear that and how they are able to deal with the political pressure that they're facing on them.

DARYL LIM: Thank you, Tom. Eleanor.

ELEONOR M. FOX: This has been a wonderful seminar. To take away, I would say, we're in an really exciting era for IP and intellectual property innovation and competition. I think there's been a lot of disruptive competition in focusing on new forms of power, which the agencies have not been able to grab onto very easily. Which has caused new forms of regulation to come forward. I agree with those of you who said, "It won't be easy. It won't be easy to enforce the new forms of regulation." I do think that the world is coming to some convergence on the fact that there are new forms of power. They don't fit neatly into the output limitation price rights paradigm.

There should be a higher-level conceptual control of the power, but without going too far to control the innovation incentives of the firms that are bringing us so much that we did not have before.

DARYL LIM: Thank you, Eleanor. Angela.

ANGELA ZHANG: Hi. I guess my last word will probably be that what I observed in the past couple of years and is very dramatic shift of regulatory approach in terms of regulate big tech. Whether in Europe, United States and in China, kind of reinforced my belief that antitrust enforcement, it's not all about economics as what I have been taught at law school, it cannot possibly be immune from politics.

In fact, it is so tightly integrated, entangled with politics at the moment. If you have me back next year, I probably will say, what I will predict is probably there's probably not much going on. That's what I'll predict in the next year given what had happened in China. There's very likely, they will give it a pause for the next year. Yes. I will stop there.

DARYL LIM: For the sake of my stocks, I hope you are right [laughs]. Damien. My Chinese [crosstalk] that is. Yes. Please go ahead.

DAMIEN GERADIN: I think two trends for the future, more competition between competition authorities for exciting cases. We see a lot of that in Europe. Head of agencies are pitching to get exciting cases, and I think that that's great in a way. You see a lot of energy and dynamism. We always speak about the European Commission. I'm actually, very impressed by some national competition authorities and the work they do.

The second thing, the great challenge would be to streamline processes. Antitrust has become an incredibly heavy tool. There's too much paper pushing. We need to go to the core of these matters and try to get things done in a timely manner by focusing on what matters. In many areas, merger control, be an example, too much time is wasted on satellite issues rather than focusing on what really matters.

DARYL LIM: I think that's a great note to end on. Let's focus on what really matters. I noticed no questions from the audience but more time for our discussion. Thank you very much, everybody, for joining us. Thank you to the panelists. Have a good year.

DAMIEN GERADIN: You too. Bye-bye.

DARYL LIM: Hopefully, see all of you next year.

ELEONOR M. FOX: Thank you. Thank you all.

DARYL LIM: Yes. Thank you.

THOMAS B. NACHBAR: Thanks so much.

THIBAULT SCHREPEL: Thank you.

ANGELA ZHANG: Thank you. Thanks for having me.