

PODCAST: International Litigation and Transactions in the Face of GDPR

A Panel Preview

Podcast Categories: Antitrust, Corporate, Litigation, Privacy

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[Brian Dolan]

Welcome to our latest Pepper podcast.

On December 11, 2019, Pepper Hamilton will host our 10th Annual Antitrust Developments Update at the Bellevue Hotel in Philadelphia. This interactive seminar will cover some of the leading topics in antitrust today and will provide attendees with practical guidance on how to minimize and manage their exposure in litigation.

Jeremy Heep, co-chair of the Litigation and Dispute Resolution Department and co-chair of the Antitrust and Competition section, and Alex Nisenbaum, a member of the firm's Health Sciences Department, join me today for this podcast to preview their panel at the conference.

Jeremy and Alex welcome!

[Jeremy Heep]

Thanks Brian.

[Alex Nisenbaum]

Thanks Brian, it is good to be here.

[Brian Dolan]

Great. Thanks guys. I appreciate you spending some time with us today before the conference starts up in a couple of weeks.

So Jeremy and Alex, let's start with some background on the conference itself. Pepper has been hosting this event for about 10 years. Why do you think it has had such longevity?

[Jeremy Heep]

Brian, I will take this round, this Jeremy. It is a very exciting conference. We are really thrilled to be on our tenth year. I would say that its success really is due to (1) it focuses on truly cutting edge issues in the world of antitrust and competition, (2) we make it a real point to offer participants practical advice and pointers as they face these issues, (3) it always got an interesting international/European flavor, (4) we always have a great keynote speaker, and (5) perhaps most importantly, it always attracts a very excellent, quality audience. Many of whom have also been coming for the full 10 years.

[Brian Dolan]

That's great. Alex, let's turn to you, you will be covering the ethics panel titled "International

Litigation and Transactions in the Face of GDPR.” Can you tell our audience why this issue is so important.

[Alex Nisenbaum]

Sure, what Jeremy mentioned – practical advice and how we try to bring that to the conference – and we see these issues relating to personal data all the time in international litigation and deals. Personal data is particularly constantly in litigation and on the transactional side – as an asset for example – and sometimes there is confusion as the obligations a lawyer or a client has with respect to that personal data. And of course as lawyers, we have a duty to preserve the confidences of our clients and certainly the personal data of any resident that we process on behalf and falls under this professional obligation. And in it GDPR and other regionally passed legislation provides individuals with certain rights relating to their personal data and since these individuals are necessarily are as clients or even folks that have interests that are aligned with our clients, the lawyers need to understand how to navigate these tensions. And the GDPR also has implications for how lawyers safeguard data and what type of technical and organizational measures in GDPR and parlance lawyers use to protect their data. Another thing are instructive as to the measures that attorneys should consider in safeguarding new client information generally.

[Brian Dolan]

Thanks Alex. Jeremy, let’s talk about GDPR a little more. Can you explain and Alex mentioned this, but the ethical challenges around it from the litigation stand point?

[Jeremy Heep]

Sure. Let me just begin by saying that the newest regulations only became effective in May of 2018. So there has been a very sort of short period of time for experience with the regulations, how they are implemented and the issues we are facing. So, in the litigation world, where rules are becoming more and more clear in how they are being interpreted, they are still really new. So there is a lot challenges, that we face all the time. A couple of quick examples that are happening in litigation and may also be happening on the transactional side. First, when simply collecting documents from your own client in Europe, one of the practices now is that you have to enter into a contract with your client about how the documents will be handled. So you are now on opposite sides of the negotiating table with your own client, but also have to be align in terms of achieving their litigation objective and without going into too many details, that creates some interesting and challenging ethical problems. A second issue that I have been coming up against is what do you do as a law firm with regard to GDPR if your client says “thank you very much for your advice” – we choose not to follow it. We will comply or not comply in the way that we think is appropriate. That is a challenge because GDPR creates liability for both the client and the law firm. So again, it gives rise to ethical issues that one has to grapple with.

[Brian Dolan]

And Alex, let’s turn back to you. What are some of the issues that you are seeing on the transactional side related to GDPR?

[Alex Nisenbaum]

Sure, Brian, well, data can be an important asset in any deal in its own right and every business

uses personal data in a variety of ways. You can have employee data that can be quite sensitive, customer data and with the definition of personal information being very broad in GDPR, even business contact information, customer lists and things like that would be covered under GDPR so if issues arise all the time, when it comes to the point of a transaction, where for example, you need to transfer that personal data, we need to start to doing diligence on employees, start getting that information over so that when the active employees are now employees of the buyer that you can continue to fulfill your obligation as an employer and things like that. And also, just client data in general. Often times, lawyers will be working with U.S. entities that have foreign affiliates and then working a deal with the foreign affiliate and all of a sudden you have personal data of E.U. clients and then on the back end, when you get that information in your own system, you go through it and diligence and things like that, you are going to need – have an obligation in your own right to make sure that all of your vendors are properly securing that data – so there is a lot vendor management obligations on the back end that lawyers need to make sure that they are complying with and to make sure they are complying with the GDPR in general and comply with the ethical obligations.

[Brian Dolan]

Sounds like it is going to be a great panel. Let's tell our audience what some of the other topics they can expect to hear if they do attend the Antitrust conference. Jeremy, can you go over that a little bit?

[Jeremy Heep]

Sure, there are three other panels and a very exciting keynote speaker. The first panel is called "Reexamining the Great Victories," and asks the really interesting question which is these giant Supreme Court cases that the antitrust defense bar primarily has celebrated as victories – whether they have in fact resulted in less litigation and more defense victories. So for example, all the way back to *Twombly* and the pleadings standards are more antitrust cases being thrown out on motions to dismiss. For example, the famous *Legion* case with vertical price fixing has that actually helped companies be able to develop uniform pricing policies. The second panel is "Hot Topics," including DOJ's recent guidance on compliance and the no poach policy that was promulgated by the justice department. Actually now in 2016, but was followed by statements by Assistant Attorney General Makan Delrahim, that were going to be criminal prosecutions following that policy which we have not seen yet. Although we have seen a fair amount of civil litigation. So that panel will be covering those hot topics. And then the third panel is "International Competition in the Digital Economy" and this is really the hottest antitrust issue throughout the world right now. Whether these giant data companies like Google are engaging in practices with regard to masses amounts of data that violate that our antitrust/competition laws and there is all kinds of activity all over the world and we will be exploring U.S. and European developments in that regard. And then finally, we've got Koren W. Wong-Ervin who is the Director of Antitrust Policy and Litigation at Qualcomm who will be a fascinating speaker addressing these issues.

[Brian Dolan]

Thanks Jeremy and thanks Alex. Sounds like it is going to be a great conference. And to our listeners if you are interested in attending this annual antitrust development update that Pepper

hosts in Philadelphia. This year it is going to be on December 11, 2019. Please visit the Pepper Insight Center on our website at www.pepperlaw.com for more information and to register.

Jeremy and Alex, thanks again.

[Jeremy Heep]
Thank you Brian.

[Alex Nisenbaum]
Thank you.

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