



GEORGETOWN LAW

12th Annual Global Antitrust Enforcement Symposium

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On September 25, 2018, Georgetown University Law Center hosted the 12th Annual Global Antitrust Enforcement Symposium. The event, which was co-sponsored by Skadden, featured keynote addresses from leaders of competition authorities in the United States and Europe as well as panel discussions by enforcers from around the world and private practitioners, which included Skadden partners **Steven Sunshine**, **David Wales** and **Ingrid Vandenborre**. The top enforcers at the U.S. agencies and the European Commission revealed policy positions and plans that included active antitrust enforcement of both mergers and conduct and the desire to ensure that antitrust enforcement is not too lax, as claimed by some populist commentators. Key themes included merger process reforms, continued antitrust enforcement vigilance, and a focus on technology, innovation and the behavior of large tech companies.

Merger Process Reforms

Makan Delrahim, assistant attorney general of the Department of Justice's (DOJ) Antitrust Division, gave a keynote address in which he announced new efforts to modernize the merger review process, with a goal of resolving most investigations within six months of the Hart-Scott-Rodino filing. For example, Mr. Delrahim indicated that the DOJ would allow parties to have an introductory, initial meeting with the front office of the Antitrust Division to explain the transaction and its rationale. Traditionally, these initial meetings are held only at the staff level. Mr. Delrahim also said that the DOJ will enforce deadlines and specifications in civil investigative demands to third parties, including bringing actions in court, to ensure that third parties do not delay the investigation's progress.

Also, to facilitate more efficient reviews, Mr. Delrahim stated that the DOJ would seek documents from no more than 20 custodians per party, limit depositions to 12 per party and issue a decision no longer than 60 days from the time the parties certify compliance with a second request. These limits, however, can be overruled by the deputy assistant attorney general overseeing the investigation if necessary. In exchange for these reforms, Mr. Delrahim — who cited the song “It Takes Two” as the theme for this effort — said that the DOJ expects parties to produce documents more quickly, produce data earlier and reduce privilege “gamesmanship.”

Mr. Delrahim is not the first assistant attorney general to attempt merger process reforms. Past attempts have had mixed results and failed to materially reduce the increasing burden on merging parties. Today, the average merger investigation extends beyond nine months. These current efforts are welcome, but it likely will take more than aspirational goals on

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Key Takeaways

the scope of investigations to shorten the average duration to six months. The front office will need to play a more central role to focus investigations on key issues and allow staff to move more quickly.

In a panel focused on merger enforcement, Federal Trade Commission (FTC) Bureau of Competition Director Bruce Hoffman also noted several steps the FTC is taking to improve the merger review process. For example, Mr. Hoffman noted the publication in August 2018 of a model timing agreement, which the FTC claimed should increase transparency for merging parties undergoing an extended investigation. Some have criticized the model agreement, however, as simply providing the FTC with even more leverage in merger reviews and prolonging investigations even further. Mr. Hoffman also revealed that the FTC is beginning to collect additional data internally regarding the length of merger reviews, in an effort to identify areas where the process can be expedited.

Continued Vigilance

After the Trump administration took office, some observers expected a noticeable relaxation of antitrust enforcement compared to the robust approach the Obama administration had taken. However, the U.S. enforcers speaking at the symposium made clear that any such notions were misguided. For example, in his keynote address, new FTC Chairman Joe Simons explained that his prior experience as director of the FTC's Bureau of Competition taught him that aggressive enforcement was vital, and he intends to continue to bring nonmerger cases as well as merger challenges. Mr. Hoffman reinforced this message on the merger enforcement panel, noting that the FTC brought more merger challenges last year than in any other year, save one.

Likewise, on the DOJ side, Mr. Delrahim has been outspoken about his skepticism regarding the ability of behavioral remedies to cure illegal mergers, particularly vertical transactions, which played a role in his decision to challenge the AT&T/Time Warner transaction in 2017. Mr. Delrahim punctuated that skepticism in his keynote address by announcing the formal withdrawal of the DOJ's 2011 Policy Guide to Merger Remedies, which had indicated that conduct remedies "can be an effective method for dealing with competition concerns raised by vertical mergers." Acting Deputy Assistant Attorney General Richard A. Powers also warned that criminal antitrust enforcement by DOJ is not being relaxed, despite a decline in criminal fines, pointing out that this decline is merely the result of two cases with abnormally large fines winding down.

European Commissioner for Competition Margrethe Vestager also reaffirmed her agency's commitment to root out threats to competition, regardless of their source. In particular, she emphasized that private businesses are not the only potential causes

of anti-competitive effects. Rather, sometimes governmental bodies can impede competition as well, particularly by offering subsidies to some competitors and not others. Ms. Vestager noted that such actions can harm competition just as much as actions by private enterprise. We expect the European Commission to continue to be very active in merger and conduct enforcement.

Technology and Innovation

Finally, the enforcers' remarks demonstrated that ensuring competitive markets in high-tech industries and fostering innovation are at the forefront of their agendas. For example, in his keynote address, Mr. Simons focused on the need to investigate and police unilateral practices by dominant tech firms. He added that the FTC would also investigate acquisitions by dominant high-tech companies of their nascent potential rivals. Meanwhile, on a panel of global enforcers, DOJ Deputy Assistant Attorney General Roger Alford emphasized that innovation is of significant importance, and antitrust enforcers should be careful to create an environment in which entrants can properly challenge incumbents. These comments suggest that the FTC and DOJ want to be, or at least appear, responsive to populist concerns over the increasing size and power of large tech companies — concerns that have been echoed by congressional leaders and the White House.

Technology and innovation also seem to be at the forefront of the European enforcers' minds. For example, Cecilio Madero Villarejo, deputy director-general for antitrust at the European Commission's Competition Directorate-General, raised concerns about increased consolidation in digital markets, citing the acquisitions made by large tech companies in the last decade. Likewise, Ms. Vestager argued that traditional competition laws can and should be vigorously applied to today's markets. For example, she noted that tying arrangements are not new and can pose competition concerns, even though these arrangements might now take different forms than they used to, citing the Google-Android case as an example. Ms. Vestager also referenced the recent German car company cartel case, arguing that cartel conduct limiting innovation is just as illegal as cartel conduct focused on fixing prices.

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The candor of the U.S. speakers confirmed the Trump administration's interest in aggressive antitrust enforcement and highlighted that there may be less of a gap between U.S. and European Union antitrust enforcement than one might otherwise expect with a Republican administration in the U.S. And while reform to the U.S. merger review process is welcome, it remains to be seen whether those efforts will result in meaningful change.