

# US and EU Antitrust Enforcers Remain Active and Aggressive, With Some New Wrinkles

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Antitrust enforcement agencies in the U.S. and Europe were once again busy in 2018, particularly in the area of merger review. In the U.S., despite new leadership at both the Department of Justice (DOJ) and the Federal Trade Commission (FTC), the pace of and approach to merger enforcement largely remained unchanged from the Obama years. The European Commission also was active in 2018 and continues to explore new theories of potential harm.

## US Enforcement Stays the Course, With Renewed Interest in Vertical Mergers

Both U.S. antitrust agencies pursued vigorous merger enforcement agendas in 2018. The DOJ attracted the biggest headlines when it sought and failed to enjoin AT&T's proposed acquisition of Time Warner. It was the first time in 40 years that either agency requested to enjoin a vertical merger, and it represented the DOJ's first loss in a merger case in more than a decade. The AT&T case also reflected the most notable change in the DOJ's enforcement approach in 2018: a complete unwillingness to accept behavioral remedies (*i.e.*, commitments by merging parties to engage in certain behavior) as an alternative to structural relief (*i.e.*, divestitures). This is notable because Comcast's 2011 acquisition of NBC Universal — which raised very similar issues to those in the AT&T deal — was resolved with behavioral remedies without a lawsuit. The DOJ also was very active in a slew of other deals, suing to block a consummated merger, causing parties to abandon several deals in response to DOJ objections and obtaining divestitures in several transactions.

The FTC was equally busy, obtaining injunctions against two mergers in federal court and obtaining divestitures or behavioral relief in several other transactions. (The FTC has not adopted the DOJ's hard line on behavioral remedies.) As with the DOJ, new leadership (in the case of the FTC, a completely new slate of FTC commissioners) has not appeared to result in any drop-off in merger enforcement activity.

Behind the curtain, we also are seeing both agencies step up their scrutiny of and standards for proposed remedies, even aside from the DOJ's new policy on behavioral remedies. This does not come as a surprise, as Assistant Attorney General Makan Delrahim, who heads the DOJ's Antitrust Division, and FTC Chairman Joseph J. Simons promised changes in this area during their respective confirmation hearings. As a result, parties should expect a lengthy and onerous review process when proposing divestitures or other remedies to get a deal done.

We did not see any material changes to the substance of merger review in 2018, and we expect that to remain the case in the new year. Both agencies have demonstrated they will continue to scrutinize horizontal transactions in concentrated industries in which the merging parties appear to be close competitors. In addition, following AT&T, both agencies seem to have a renewed interest in vertical mergers, particularly those involving parties with a significant presence at one or both levels of a supply chain (*e.g.*, AT&T has a significant presence in television distribution and Time Warner in producing television content for distribution). The agencies also have discussed issuing new guidelines for nonhorizontal mergers, but the timing and process for issuing such guidelines largely remain unknown. While the agencies remain active, they have shown little appetite to heed populist calls for enhanced enforcement efforts, including revisions to the antitrust laws, based on less traditional theories of antitrust harm (*e.g.*, big data, privacy, innovation, conglomerate effects). These theories are gaining traction in the

academic community and in other jurisdictions, but as of yet little evidence indicates that they will meaningfully influence the outcome of U.S. merger reviews.

New leadership at the agencies appears open to applying their experiences from private practice to improve the merger review process. In September 2018, Delrahim took the lead in this respect when he announced a series of potential reforms designed to “modernize the merger review process” to avoid “unduly long merger reviews ... [that] waste public and private resources.” Among other promises, the DOJ has said it will resolve most merger investigations within six months, limit the scope of burdensome requests for information and afford parties greater access to key DOJ decision-makers earlier in the process. Delrahim has been clear, however, that parties should not expect faster results unless they are willing to do their part by being transparent, providing information in a timely manner and foregoing the alleged gamesmanship that the agencies have seen in some investigations (*e.g.*, over designations of privileged documents).

Although these are welcome promises, it remains to be seen when these policies will be implemented and to what extent the DOJ will adhere to them. In addition, it is unclear whether the FTC will follow suit. If not, there may be substantial differences in the duration of merger reviews at the two agencies. This is noteworthy, as the agencies appear to be fighting with greater frequency for clearance to review major transactions. As a result, developing a comprehensive antitrust strategy in advance of signing a transaction agreement is crucial, including how and when to engage with the antitrust agencies.

### **A Steady Path in the EU Despite Leadership Changes at the European Commission**

The current European Commission’s term comes to an end on October 31, 2019, and changes in leadership are anticipated.

Unless Commissioner Margrethe Vestager is reappointed, someone else will take the helm of the European Union’s main merger and antitrust authority. Additionally, the head of mergers within the Commission’s Directorate-General for Competition (DG Comp), Carles Esteva Mosso, will move to the state aid directorate. He will be succeeded by Cecilio Madero Villarejo, who will be vacating DG Comp’s top job for antitrust.

In terms of case practice in 2019, we expect a continuation of themes that characterized merger and antitrust activity in 2018: online sales, pricing and margins, innovation, and big data. Digitization, which comprises not only questions around big data but also various other implications of new-generation information technologies, may become a new focus area. The Commission has appointed three outside advisers to report on competition challenges associated with digitization. The report is due on March 31, 2019.

**Online Sales.** Since 2015, the “EU digital single market” has been the Commission’s flagship policy, through which it has attempted to break down e-commerce barriers across the European Economic Area using legislative initiatives and antitrust investigations. In 2018, the Commission issued two infringement decisions, fining four electronic appliance manufacturers and clothing company Guess for allegedly restricting online cross-border sales. There are ongoing investigations in the areas of pay-TV services, merchandising rights, hotel bookings and video games. 2019 will be the year in which we will see the Commission’s attitude toward enforcement take shape, in particular regarding whether it will seek fines.

**Pricing and Margins.** Pricing and margins came under increased scrutiny at the Commission in 2018 as well. One of the electronic appliance cases mentioned above was the first case in which the Commission took issue with pricing algorithms — in that case, to monitor

resale prices. But pricing is also central to some ongoing investigations, both by the Commission and national regulators. The pharmaceutical industry has been the main target of these investigations, which are based on concerns over “excessive pricing” by a dominant company. Commission officials also have been focused on high prices in the area of merger control. On several occasions in 2018, DG Comp’s chief economist stated that high profit margins may increase the risk of anti-competitive leverage and should therefore be part of the review process.

**Innovation.** Concerns around potential reductions in innovation were another driver of the Commission’s enforcement agenda. In the area of mergers, the Commission has not shied away from remedies to maintain premerger innovation levels. Its investigation into potentially collusive conduct with respect to car emission technology shows that the innovation agenda is not limited to merger control. Other cases relating to new-generation information technologies may follow, depending on what the digitization report concludes.

**Big Data.** Another hot topic in competition law circles across Europe was big data and platforms, and this is expected to continue in 2019, especially given the Commission’s interest in digitization. One of the key questions is whether, and to what extent, access to and use of big data can be considered to confer market power in relation to particular goods or services. This has become a thorny issue in the context of merger control. Another central issue is to what extent platform and network hosts can collect and make use of user data, including when host and user offer competing products or services through the platform. We expect more clarity on these issues in 2019 as the German investigation into Facebook’s data collection practices runs its course.

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