

Takeaways From the Georgetown and Fordham Global Antitrust Law Symposia

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10 / 15 / 19

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In September, Georgetown University Law Center hosted its 13th Annual Global Antitrust Enforcement Symposium and Fordham University School of Law hosted its 46th Annual International Antitrust Law and Policy Conference. Each year, these symposia provide key antitrust regulators and industry leaders a forum to discuss recent developments and unveil future enforcement priorities. This year's events focused on technology and innovation, merger control and enforcement, antitrust and public policy, and litigation trends.

Key Takeaways

Technology and Innovation

At Fordham, the influence of the current populist and pro-enforcement political environment was evident as discussions focused on how antitrust regulation and enforcement can keep up with the digital or "Big Tech" economy and be better equipped to intervene in anticompetitive conduct. Several panelists emphasized procedural or structural changes their respective agencies had made or were considering to appropriately evaluate such a rapidly evolving area. For example, Daniel Francis, associate director for Digital Markets at the FTC, noted that the FTC has formed a new Technology Task Force that will focus on enforcement in technology markets to keep pace with the changing digital economy. At Georgetown, Bilal Sayyed, director of the FTC's Office of Policy Planning, similarly highlighted that one of the FTC's highest priorities is publishing guidance on the application of antitrust law to conduct by dominant technology firms. He also noted that big data and artificial intelligence may be topics of the FTC's future hearings.

Some panelists noted the challenges associated with regulating the evolving digital economy from a substantive perspective. At Fordham, for example, Alexandre Barreto de Souza, president of CADE, emphasized the importance of understanding different types of data and how remedies affect both sides of a data-driven platform. At Georgetown, Barry Nigro, principal deputy attorney general at the DOJ, stated that, although antitrust tools will need to be improved as regulators learn more about Big Tech, traditional tools like the consumer welfare standard can adequately ensure that Big Tech companies behave competitively. Also at Georgetown, Andrea Coscelli, chief executive of the U.K. Competition and Markets Authority (CMA), remarked that the CMA was focused on avoiding past mistakes of non-intervention on tech mergers, soliciting complaints about past tech acquisitions and investigating the digital advertising sector. Andreas Mundt, president of German Bundeskartellamt, likewise noted at Georgetown that his office is becoming more engaged in digital markets, including by prohibiting Facebook's collection of data as conduct that allegedly breaches privacy rules and constitutes abuse of a dominant position (a decision that has been stayed pending appeal), as well as by conducting a sector inquiry into online advertising.

Merger Control and Enforcement

Merger enforcement was another popular topic at both events. At Georgetown, Barry Nigro touted the DOJ's use of binding arbitration to define the relevant product market in merger cases for its potential time and cost savings. He also suggested that agencies' continued ability to conduct "quick look" searching review in merger cases is at risk if U.S. District Judge Richard Leon's approach to Tunney Act review in the CVS/Aetna deal becomes commonplace. Nigro reasoned that agencies may have to extensively investigate all overlaps (even those that they believe do not present material antitrust

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issues) if Tunney Act review were to require the DOJ to prove via testimony or other evidence the absence of anticompetitive effects in areas outside of the agency's complaint. Meanwhile, at Fordham, former DOJ Deputy Assistant Attorney General Andrew Finch remarked that aggressive vertical merger enforcement will likely continue and that the DOJ and FTC are moving forward to create a single guidance document on non-horizontal mergers as an update to the DOJ's 1984 guidelines. In his Fordham remarks, Assistant Attorney General Makan Delrahim also stressed the DOJ's commitment to international cooperation and comity in reviewing mergers to prevent inefficiencies and avoid unnecessary conflicts. Notably, there was no criticism of foreign authorities' targeting of U.S. tech companies.

At Georgetown, Kathy O'Neill, senior director of Investigation and Litigation at the DOJ, noted that the DOJ will not limit its analysis to traditional market share and concentration, but will continue to explore vertical theories, such as foreclosure. Ian Conner, deputy director at the FTC's Bureau of Competition, remarked that the FTC is looking to continue its trend of reviewing consummated mergers. Additionally, several regulators at Georgetown stressed that merging parties should raise efficiency defenses early in the merger review process. At Fordham, Andrew Finch stated that the DOJ has not changed its approach to fashioning behavioral and structural relief, and confirmed the DOJ's historical preference for the latter. Regulators shared similar sentiments at Georgetown, where Gail Levine, deputy director of the FTC's Bureau of Competition, observed that behavioral remedies are rarely imposed. She further signaled openness to the possibility of unbundling as a remedy, as has been used in Europe.

Antitrust and Public Policy

Panelists also opined about the direction of various antitrust policies. At Fordham, FTC Chairman Simons signaled support for reauthorizing the U.S. Safe Web Act as a permanent part of the FTC Act, as it gives the FTC strong power on cross-border enforcement actions. For example, Simons highlighted the important efficiencies gained by effective information sharing in cross-border enforcement actions and noted that the Safe Web Act broadens the FTC's ability to share confidential information with foreign law enforcers.

Meanwhile, at Georgetown, Gail Levine discussed the "unintended consequences" of mixing political goals with antitrust, including that adopting measures designed to protect domestic

firms can leave them ill-equipped to compete abroad. Also at Georgetown, Andrea Coscelli, chief executive at the CMA, stressed that the upcoming U.K. election and Brexit decision will significantly influence antitrust review and that the CMA has already started to independently investigate mergers despite a parallel review in Brussels.

Litigation Trends

Finally, conference panelists spoke on trends in antitrust litigation, including how varying approaches to antitrust claims create challenges in bringing and defending against class action litigation. At Fordham, for example, panelists discussed a potential divide over the standard of review in franchise no-poach cases. Some courts, panelists noted, have denied motions to dismiss after concluding that quick-look or *per se* analysis may apply to the claims, but other courts could be persuaded by the DOJ's position (outlined in statements of interest filed in other franchise no-poach cases) asking courts to apply the more permissive rule of reason. Despite this uncertainty, Fordham panelists noted that additional guidance may emerge as courts issue rulings in cases that survived motions to dismiss and are now approaching the class certification stage. Panelists similarly suggested that the analysis in these cases may be clarified by challenges to class allegations at the motion to dismiss stage.

Also at Fordham, panelists emphasized how the presence or absence of raw data can impact a putative class action. Panelists, for example, discussed cases in which courts have grappled with how many uninjured class members could be sufficient to defeat class certification. Panelists also remarked on the importance of this data in the indirect purchaser class action context, particularly when courts require plaintiffs to show that a proposed class is "ascertainable" under Rule 23, *i.e.*, that class members can be identified through objective criteria and a reliable and administratively feasible process. As one panelist noted, plaintiffs may face challenges obtaining the downstream data needed to make this showing.

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We will continue to follow global developments in these areas, the issues emerging in them and any antitrust scrutiny that follows. If you have any questions about the Georgetown symposium, the Fordham conference or any of the topics covered in this alert, please do not hesitate to contact us.