

## ANTITRUST TRADE AND PRACTICE

# Insights From Fordham Conference on International Antitrust Law and Policy

Bringing together leading antitrust practitioners, enforcers, academics and economic experts for the past 48 years, the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy is the longest running conference focusing specifically on international antitrust issues. On Sept. 30 and Oct. 1, 2021, the 48th Annual Conference took place in New York, and focused on major themes including international and inter-agency cooperation and accounting for public interests in antitrust enforcement. Among the many distinguished guests were keynote speakers Andreas Mundt, Tim Wu, Margrethe Vestager and Richard Powers, who set the stage for later discussions that took place each day.

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### Day 1: Mundt, Wu and Global Merger Policy

Day one of the conference opened with keynote addresses by Andreas Mundt and Tim Wu, who each offered his own remarks about the future of antitrust enforcement. Mundt, the President of Germany's Federal Cartel Office (FCO) and Chair of the International Competition Network, began by noting that stringent application of competition law in Europe has already made a meaningful impact. For example, Mundt explained, the FCO was recently successful in obtaining amendments to Amazon's general terms of business for third-party sellers, including limiting Amazon's exemption of

liability towards sellers, requiring that Amazon give notice before terminating sellers' accounts and eliminating exclusivity of jurisdiction in Luxembourg for disputes. However, Mundt was clear that the impact of antitrust enforcement is not yet what he aspires it to be.

Switching to where antitrust is headed, Mundt then laid out a five-part, multi-track development for the future of antitrust enforcement. The first track involves increased enforcement with better tools, chief among them the new Section 19A of Germany's Competition Act. A core element of Section 19A is that it permits the FCO to designate companies that are of paramount importance for competition, including Big Tech firms Google, Apple, Facebook and Amazon, as "gatekeepers" and prohibits them from taking certain actions. Mundt's second track involves "new and innovative theories of harm that are adapted

to new and innovative business models,” such as those that are “purely data driven.” Third, Mundt believes that competition law must be complemented with consumer protection laws, particularly with respect to the digital economy. Fourth, Mundt envisions stricter merger control, especially for gatekeepers under Section 19A. Fifth and finally, Mundt underscored that, despite the high-profile focus on digital competition issues, antitrust enforcers still need to grapple with non-digital issues including, specifically, sustainability concerns and a decline in leniency applications (which he said are the genesis of most enforcement actions).

Following Mundt, Tim Wu, Special Assistant to the President for Technology and Competition Policy on the United States National Economic Council, focused his remarks on President Joe Biden’s new Executive Order on Promoting Competition in the American Economy. According to Wu, American antitrust policy over the past four decades has undeniably failed, resulting in “too many American industries [where] there is far too little competition.” For example, Wu noted that just four conglomerates control the entirety of the meat processing market and connected this fact to data showing that rising meat prices accounted

for half of the food-at-home price increase during the COVID-19 pandemic. As Wu explained, the new Executive Order, which rededicated the United States to a policy of strong antitrust enforcement, will revitalize antitrust law in the United States by returning to a regime influenced by the Roos-

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velts, Brandeis and Thurman Arnold.

Wu then identified three areas where changes can be immediately seen. First, Wu stated that the Biden Administration has appointed strong, enforcement-minded figures in Lina Khan and Jonathan Kanter to lead the Federal Trade Commission (FTC) and Department of Justice (DOJ) Antitrust Division, respectively. Second, Wu asserted that the Biden Administration is committed to appointing judges devoted to the rule of law, including laws concerning economic justice. Lastly, Wu focused on the White House Competition Council, which was created by the Executive Order and launched last month, and

which is composed of the heads of all government agencies with competition authority. While the FTC and DOJ remain the first line of defense against anticompetitive behavior in the United States, the Council also includes, for example, the FCC, HHS and USDA, all of which have authority over competition in specific markets. In total, the Council has been charged with tackling 72 distinct competition related tasks, ranging from the USDA being asked to write new rules governing competition in the meat industry, to the FTC being asked to craft rules under its Section 5 powers regarding data collections.

Later in the day, global merger enforcement took center stage as a panel of experts discussed global merger review. Isabelle da Silva, President of the French Competition Authority, opened the panel with an overview of new methods in French merger control, including defining markets through new methods like customer surveys and reconsidering the definition of a market itself with an eye towards the digital economy. Frederic Depoortere, a partner in Skadden Arps’ Brussels office, added that coordination between authorities is key for getting global deals done and, although such coordination has become routine, there are still clear diver-

gences across jurisdictions. On U.S. merger control, Republican FTC Commissioner Noah Phillips expressed his view that recent initiatives by the new administration are doing their “best to repeal the Hart-Scott-Rodino Act” by failing to reinstate the Early Termination program. Commissioner Phillips added that, by also rescinding the Vertical Merger Guidelines and issuing more Second Requests with questions reportedly unrelated to competition, the FTC has removed guidance from the market without replacing it, leading to increased deal uncertainty.

## Day 2: Vestager, Powers and Public Interest in Antitrust Enforcement

On day two, keynote speakers Margrethe Vestager and Richard Powers addressed conferencegoers. Vestager, Executive Vice-President of the European Commission, spoke of the value of cooperation in global competition enforcement. A day earlier, she had been in Pittsburgh co-chairing the first Tech and Trade Council meeting between the EU and United States. In her view, that meeting was a moment of hope, showing that the EU and United States were determined to work together to “make the world a fairer, freer and safer place.” Noting the 30th anniversary of the

EU-U.S. competition cooperation agreement, Vestager then reflected on EU-U.S. cooperation over the past few decades. Since 2010, the two jurisdictions have cooperated closely on over 130 merger decisions. For example, last year, the EC and DOJ each examined Danfoss’s acquisition

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of Eaton Corporation, two leading manufacturers of industrial and agricultural equipment components. By sharing information, Vestager said that it became clear the merger raised similar competitive issues in the EU and United States. Ultimately, the two jurisdictions worked closely to accept a single resolution protecting customers in both Europe and America.

Vestager asserted that this kind of cooperation is in everyone’s best interest, including for businesses that receive efficient, consistent decisions. With deep changes to our economies over the past decade, including the rise of digital gatekeepers with power throughout the economy,

Vestager observed that enforcers’ viewpoints have increasingly converged in the EU and United States, noting that Biden’s Executive Order was filled with familiar ideas. However, Vestager did opine later that antitrust laws should not be used to enforce non-competition issues, explaining that there is a difference between focusing on labor market collusion and focusing on whether jobs are gained or lost. In Vestager’s view, competition authorities can be most effective if they stick to their original mission focusing on price, quality, innovation and consumer choice.

Acting Assistant Attorney General of the DOJ Antitrust Division Richard Powers followed Vestager with his own remarks on agency cooperation, both at home and abroad. Picking up on Tim Wu’s remarks from the prior day, Powers began by observing that President Biden’s Executive Order elevated the Antitrust Division’s mission to a priority, and that the DOJ was committed to fulfilling this mandate. Powers stated that this will involve civil merger enforcement actions, like the DOJ’s recently filed complaint against American Airlines and JetBlue; advocacy, like the DOJ’s filing of an amicus brief in the *NCAA v. Alston* case; and robust international dialogue on

promoting competition in digital markets.

Powers then laid out two areas where the DOJ will specifically work to promote economic opportunity and fairness: labor markets and international engagement. On labor, Powers stated his view that competitive labor markets are essential to a properly functioning market-based economy. The DOJ has accordingly increased its substantive knowledge and enforcement capacity in this area, with Powers noting that companies that do not compete in the same product markets may nonetheless compete vigorously in the labor market. Powers also observed that unlawful labor restraints are an issue faced in many jurisdictions, and cross-border collusion in labor markets is likely to increase. Turning to international engagement, Powers asserted that it is essential to prevent fragmented enforcement globally. To this point, Powers stated that the DOJ is staunchly committed to working with its international counterparts and has cooperated with 14 different jurisdictions on 21 civil matters since January.

The analysis of public interests in merger review was later discussed in a panel. John Oxenham, Director of Primerio, spoke about the South African merger

control statute, which, unlike most merger review statutes, now requires the Competition Commission of South Africa to assess whether a merger can be justified on public interest grounds. Oxenham noted that this assessment has increased transaction uncertainty, explaining, for example, that the Competition Commission blocked a private equity firm from purchasing a Burger King franchise, despite a lack of harm to competition, because the acquiring firm did not have historically disadvantaged persons among its shareholders. Kirsten Webb, a partner at Australian law firm Clayton Utz, noted that public interest review has also made its way into Australian merger control. There, the Australian competition authority may approve mergers if the likely public benefit outweighs the likely detriment. For the United States, Andrew Finch, a partner at Paul Weiss, noted that, although the FTC appears increasingly to consider the public interest in merger review, a major difference is that the United States is not a true regulatory system. Ultimately, the FTC must bring enforcement actions in court under existing case law, and may not succeed without some grounding in traditional harms to competition.

## Wrap-Up

From all corners of the globe, whether in person or online, the Fordham Competition Law Institute's 48th Annual Conference brought together some of the leading minds in the antitrust field. As Margrethe Vestager noted in her day two remarks, the world does not have the benefit of a single competition law or authority, yet there is competition all over the planet. Thus, if there is one major takeaway from the event it is this: While diverging thoughts may now exist in how to tackle evolving markets and economic fairness for all, to benefit everyone from businesses to consumers, the clear path forward is global cooperation.