

## ANTITRUST TRADE AND PRACTICE

# Global Antitrust Enforcement Symposium; Conference on International Antitrust Law and Policy

October 19, 2023

**O**n Sept. 19, 2023, Georgetown Law hosted its 17th Annual Global Antitrust Enforcement Symposium. In the same week, Fordham Law hosted its 50th Annual Conference on International Antitrust Law and Policy from Sept. 20 to Sept. 22. The conferences featured U.S. and global enforcers, economists, private practice attorneys and other professionals.

This article highlights some of the popular topics discussed at these two events including the Department of Justice (DOJ) and Federal Trade Commission (FTC) draft merger guidelines, merger enforcement and remedies, labor, artificial intelligence (AI) and international enforcer perspectives.

## Analysis of the Draft Merger Guidelines

During her Fordham keynote, FTC Chair Lina Khan explained that the recently released draft merger guidelines were animated by two goals: (i) to ensure that the guidelines cover the full scope of laws passed by Congress and set by legal precedent and (ii) to ensure that the guidelines capture the reality of how corporations operate in modern society.

During his Georgetown Symposium keynote, Assistant Attorney General Jonathan Kanter told his



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audience that the merger guidelines “are not the law.” The role of the Justice Department, Kanter explained, is to enforce the laws created by Congress and interpreted by the courts.

During the Georgetown Panel “Practitioner’s Guide to the Draft Merger Guidelines,” Dave Lawrence, policy director at the DOJ Antitrust Division, observed that the guidelines were updated partly to provide a clear and evolved understanding of the agencies’ merger enforcement approach. He explained that the guidelines reflect what the agencies believe the law to be today, rather than an aspirational vision for what the law could be.

From a transparency perspective, Lawrence argued that the guidelines may be helpful in understanding the legal framework that the agencies consider when a case comes before them. The panelists debated specific changes in the draft merger guidelines, including the reversion back to the 1800 HHI post-merger indicator of a highly concentrated market (HHI refers to

the Herfindahl-Hirschman Index and it is a measure of market concentration.

For reference, in the 2010 horizontal guidelines, the HHI for a highly concentrated market was 2500+). Lawrence explained that the draft guidelines moved to 1800 because a larger portion of the agency's practice and case law were utilizing the threshold.

Aviv Nevo, director of the Bureau of Economics at the FTC, reported that the draft merger guidelines have provided an opportunity to push beyond market definition and comprehensively evaluate the substance of mergers.

The Georgetown panel "Monopolization: Moats, Castles, and Entrenchment" also dedicated significant time to discussing the draft merger guidelines. Deputy Chief Trial Counsel with the FTC's Bureau of Competition, James Weingarten, discussed some areas where the merger guidelines and monopolization claims may overlap.

The draft guidelines provide that "mergers should not entrench or extend a dominant position." Weingarten

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noted that a merger that entrenches or extends a firm's dominant position may also violate Section 1 or Section 2 of the Sherman Act. In this regard, as well as in others, Weingarten posited that an inquiry under the draft guidelines is similar to a Section 2 inquiry (though the two still have critical differences).

### **Merger Enforcement and Remedies**

During the Georgetown panel "Impact of More Aggressive Merger Enforcement on Agency Reviews and Substantive Standards," panelists discussed various perspectives on antitrust merger enforcement and remedies.

Principal Deputy Assistant Attorney General for the Antitrust Division, Doha Mekki, explained that the Antitrust Division's merger enforcement is less radical

than might be generally perceived. Mekki noted that, although more than 3,000 deals were notified to the agency as of fiscal year 2022, the Division permitted the vast majority of those notified deals to proceed without so much as a phone call from the Division. According to Mekki, only a small subset of mergers (less than 5%) have resulted in preliminary investigations.

Regarding remedies, Mekki explained that while consent decrees and fixes are still on the table, the division has some skepticism about remedies and consent decrees that are not full fixes for problematic mergers. Mekki noted that parties should recognize problems and present them to the agencies up front. Moreover, parties should present remedies that are comprehensive and structural.

Dave Wales, a partner at Skadden, Arps, Slate, Meagher and Flom, provided an outside counsel perspective on the issue of remedies, observing that clients must be prepared to comply with second requests for certain deals.

Because the DOJ has not agreed to a non-litigated consent decree since Kanter began leading the division, parties cannot assume that the DOJ will accept a fix. Moreover, if the agencies seem unwilling to accept a remedy, parties should consider how best to present their proposed remedy to a judge.

During his Georgetown Symposium keynote, Kanter explained the division's reluctance to pursue remedies that require the American public to shoulder the risk of a remedy's failure. Kanter noted that remedies must address the risk of harm to competition. This directive is imperative because, according to Kanter, many remedies do not work. Under the Tunney Act, if the DOJ plans to settle a case with a defendant, a court must determine that the consent judgment is in the public interest. Kanter explained that if the division does not believe a remedy will be workable, it cannot endorse that remedy in court.

### **Labor Markets and Agency Enforcement**

During her Q&A at Fordham, Khan was asked whether the draft merger guidelines' focus on labor markets and the recent memorandum of understanding between the FTC and the Department of Labor were signs of an increased focus on labor in mergers.

Khan responded that, although the FTC does not control its merger docket, it has begun seeking information where labor markets may be important within a transaction. Moreover, the proposed revisions to the HSR form (if finalized) would give the FTC more insight into labor earlier on in the merger review process. (See *Premerger Notification; Reporting and Waiting Period Requirements, A Proposed Rule* by the Federal Trade Commission on 06/29/2023 (“The commission proposes creating a new Labor Markets section that would require each filing person to provide certain information about its workers in order to screen for potential labor market effects arising from the transaction.”)).

### **AI and Merger Guidelines**

While presenting at the Fordham symposium, Kanter warned that companies need to train their AI programs not to commit price fixing. In addition, the “AI, Algorithms, and Antitrust Economics” panel elaborated on some of the potential antitrust implications stemming from AI.

Malika Krishna, an economist with the Antitrust Division, provided an overview of AI and explained that, as AI algorithms “learn,” they can serve as a channel for anticompetitive conduct. Josephine Duh from the Brattle Group reported that one key question in the use of AI is whether users are ceding their decision-making powers to the algorithms. The panelists posed thoughtful questions about the liability of firms that cede decision-making power to AI systems that then learn to collude. Likewise, panelists questioned the appropriateness of multiple firms using the same AI tools.

While the antitrust community continues to grapple with the development of AI, Krishna noted that the DOJ is likewise ramping up its resources for addressing AI issues.

### **Perspectives from The European Commission**

During the Fordham symposium, Olivier Guersent, director-general of the Directorate General for Competition at the European Commission (EC), addressed the subject of regulating digital markets and compared antitrust enforcement strategies under Articles 101

and 102 of the Treaty of the Functioning of the European Union with similar strategies under the Digital Markets Act (DMA).

For example, Guersent noted that Article 102 enforcement is more ex-post focused while the DMA is more ex-ante focused. Additionally, the DMA does not cover all market abuses or all market players. Nevertheless, Guersent acknowledged that the two laws have synergies.

In the merger context, Guersent highlighted the EC’s focus on jurisdiction. Guersent noted that certain deals that should have been reviewed in the European Union slipped through because the merger did not meet traditional notification thresholds.

In March 2021, the EC published guidance which would allow EU member states to refer deals to the Commission although the deal did not meet the EU threshold. (See *Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*, March 26, 2021.)

For a member state to refer such a deal to the EC, the deal must “affect trade between Member States and threaten[ ] to significantly affect competition within the territory of the Member State(s) . . . making the request.” Guersent noted that this approach has been challenged in court and is pending final review.

Speaking briefly on remedies, Guersent noted that for merger remedies, stand-alone divestitures that can fully address competition concerns are preferred. He also explained that parties lead the design of merger remedies. The EC gives “due consideration to any reasonable proposals” parties put on the table. However, when a remedy proposal does not meet the EC’s standards, the EC is willing to reject the proposal.

### **Perspectives From Other International Enforcers**

The “Global Enforcers Roundtable” provided an exciting opportunity for enforcers from around the world to share updates and thoughts about antitrust enforcement in their respective countries. The panel featured Sarah Cardell, chief executive of the Competition and Markets Authority (CMA); Andreas Mundt, president of the Bundeskartellamt; and Andrea Marván

Saltiel, president of Mexico's Federal Economic Competition Commission.

Cardell explained that the CMA is interested in using competition and consumer protection law to make impacts for consumers, businesses and the economy. For example, the CMA recently looked at the high cost of housing and analyzed whether consumers were being protected by competition.

Cardell also described tools that the CMA has used to promote competition including market studies, anti-trust enforcement and industry reviews. Cardell also previewed that the CMA has been investing in resource support for a digital markets unit.

Mundt discussed recent efforts by the German Anti-trust Authority, including efforts to guide companies about appropriate cooperation during global crises like COVID and the Ukraine war; the prosecution of price abuse cases; and the promotion of competition

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in important economic sectors like fuel. Mundt also highlighted the new tools crafted by the European Commission to address big tech platforms.

Marván Saltiel cheered the Mexican Competition Authority's 13th anniversary. She noted that the agency is working to ensure that the public recognizes the benefits of increased competition. Marván Salitel also outlined various sectors of interest to the agency including food and beverage, transportation and logistics, finance, public procurement, construction and real estate, health care and the digital market.

Salitel noted that the Mexican Competition Authority has reviewed approximately 50 digital-related mergers in recent years.

## International Cooperation

During his Fordham keynote, Kanter underscored the value of international cooperation. He explained that the Antitrust Division works with their international counterparts daily, and has cooperated with over a dozen international agencies on civil and criminal matters over the past year.

Olivier Guersent echoed the value of cooperation in his keynote. "There can be no doubt," Guersent stated, "that in today's global economy, the competition policy community needs cooperation." Cooperation works, he said, and is fruitful when enforcers know and trust each other.

In the spirit of cross-border collaboration, Kanter announced that the Antitrust Division has coordinated with Mexico's Federal Economic Competition Commission and Canada's Competition Bureau to "deter, detect and prosecute collusive schemes" related to the 2026 World Cup. (Press Release, Department of Justice, *United States, Mexico, and Canada Launch Joint Initiative to Detect Collusive Schemes Seeking to Exploit the 2026 FIFA World Cup*, Sep. 22, 2023.)

## Conclusion

Georgetown Law's Global Antitrust Enforcement Symposium and Fordham Law's Annual Conference on International Antitrust Law and Policy brought together members of the antitrust community from across the world. The events highlighted the vast perspectives, challenges, agreements and disagreements that shape antitrust law in the U.S. and abroad. A common thread throughout the four days was the desire to expand the antitrust conversation to members of the general public who live with the outcomes of antitrust law and policy daily.

Attendees left both events with the enforcement agencies' assurance that they will continue to tackle issues that affect people's lives, while communicating with the general public about legal and policy developments as they happen.