

GEORGETOWN GLOBAL ANTITRUST ENFORCEMENT SYMPOSIUM – SEPTEMBER 14, 2021

On Tuesday, September 14, Georgetown Law Center virtually hosted the Global Antitrust Enforcement Symposium. The Symposium included panels on merger review, legislation and rulemaking in the US, the antitrust policy of the Biden administration, and international enforcement, as well as keynote addresses from Olivier Guersent (Director-General, DG COMP) and Vanita Gupta (Associate Attorney General, US Department of Justice ("DOJ")).

The overarching theme of the symposium was increased enforcement. There appears to be consensus among competition authorities in the US and abroad that past competition enforcement has been insufficient, at least in certain sectors. In certain jurisdictions—and especially in the United States—antitrust policy has also been transformed from a highly specialized practice area into an arena of significant political salience. Vanita Gupta described antitrust as deeply intertwined with economic justice, and Andreas Mundt (President, German Cartel Office) defined the consumer welfare standard to encompass a broad array of objectives not typically captured in narrow economic analysis.

Panellists agreed that this is an exceptional time in the United States. Tim Wu (President Biden's Special Assistant for Technology and Competition Policy), Lina Khan (Chair of the US Federal Trade Commission ("FTC")), and Jonathan Kanter (President Biden's nominee to head the DOJ Antitrust Division) all know each other well and are aligned on aggressive enforcement priorities. On July 9, President Biden issued an expansive Executive Order on Promoting Competition in the American Economy.¹ The Order details a bold agenda for the DOJ and the FTC, and describes a whole-of-government approach that sweeps in numerous other federal agencies.

On the merger front, firms contemplating transactions that require review by the FTC or the DOJ should expect close scrutiny and slower processes. Review timelines have lengthened. The agencies have suspended Early Termination,

¹ Available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

meaning even the most innocuous transaction will not be able to close before the expiration of the HSR waiting period. Staff are also issuing more requests for parties to pull and refile, lengthening the time available for initial review. Both agencies appear more willing to issue Second Requests, as well. The FTC has also initiated a new policy where, for transactions that staff cannot fully investigate in the initial waiting period but that they believe may raise competitive concerns, the staff will issue a warning letter before the waiting period expires.² Those letters will inform merging parties that the FTC's investigation remains open, and that if the parties choose to close their transaction, they do so at their own risk of a post-closing investigation.

Where the agencies do issue a Second Request and conduct a fulsome investigation, staff are likely to be highly suspicious of claimed efficiencies and to explore novel theories of harm, including harms in labor markets. The agencies are also more likely to be skeptical of remedies. Skepticism of behavioral remedies—which existed under prior administrations—is certain to continue and is likely to become an even more significant obstacle. There are also indications that the agencies are likely to be suspicious of even structural remedies. Panellists generally agreed that the agencies are more likely to pursue litigation than in the past. Merging parties should be aware of the heightened timing and substantive antitrust risk and should incorporate appropriate protections in transaction agreements.

While increased enforcement is likely to impact industries across the economy, digital markets continue to be a focus for all competition authorities. The largest digital platforms are under investigation in jurisdictions around the world, and many recent legislative proposals explicitly target these businesses. These legislative initiatives include multiple proposals in the US House of Representatives, as well as the Digital Markets Act in the European Union.

Policymakers in the US are also prioritizing labor issues. Enforcement against no-poach and non-compete agreements has captured headlines in recent years and will continue to be a focus for the agencies. In addition, FTC and DOJ staff have reportedly begun asking question about labor markets in the course of merger investigations. However, in recent years, neither agency has challenged a merger based on harms in labor markets, so there is substantial uncertainty about how these markets will be analyzed.

Congress, too, has entered the fray to push for antitrust reform. There appears to be substantial bipartisan support for the proposed Merger Filing Fee Modernization Act,³ which would increase merger filing fees and provide for inflation adjustment, and there is widespread support for increasing funding for the agencies generally. Substantive proposals are diverse and include Big Tech-focused proposals in the House of Representatives that go well beyond traditional antitrust principles, as well as more broadly applicable legislation in the Senate that would shift burdens within the framework of existing antitrust law. In addition, the FTC has indicated that it will not wait on legislative developments and is exploring options for antitrust rulemaking. Republican Commissioner Christine

² See Holly Vedova, "Adjusting merger review to deal with the surge in merger filings," <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>.

³ Available at: <https://www.congress.gov/bills/117/congress/senate/bills/228/text>.

Wilson questioned the wisdom of substantive legislative reform and of agency rulemaking, but she is almost certain to remain a minority voice on these issues at the current FTC.

The US is not the only jurisdiction where enforcers are pushing the limits of existing analysis and authority. The European Commission has shown its willingness to use interim measures to halt allegedly anticompetitive conduct, and, more controversially, the Commission has issued expansive guidelines on Article 22 EU Merger Regulation referrals and has proactively sought referrals from national authorities.⁴ While Reiko Aoki (Commissioner of the Japan Fair Trade Commission) and Alexandre Cordeiro Macedo (President of the Brazilian CADE) expressed concern about unduly expanding the scope of competition policy, all enforcers agreed that increased international cooperation among competition authorities is crucial.

⁴ *Article 22 Guidelines* available at: https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf

CONTACTS

Timothy Cornell
Partner

T +1 202 912 5220
E timothy.cornell
@cliffordchance.com

John Friel
Partner

T +1 212 878 3386
E john.friel
@cliffordchance.com

Robert Houck
Partner

T +1 212 878 3224
E robert.houck
@cliffordchance.com

Peter Mucchetti
Partner

T +1 202 912 5053
E peter.mucchetti
@cliffordchance.com

Sharis Pozen
Partner

T +1 202 912 5226
E sharis.pozen
@cliffordchance.com

Lauren Sillman
Associate

T +1 202 912 5089
E lauren.sillman
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

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