

FTC and DOJ officials signal robust antitrust agenda at Enforcers Summit

April 12, 2022 | Client Update | 6-minute read

At last week's Enforcers Summit, leaders of various U.S. and international antitrust enforcement agencies set forth their enforcement priorities. The new heads of the U.S. antitrust agencies emphasized that the agencies are primed to litigate more cases, challenge more mergers, and use all enforcement tools at their disposal. Both U.S. and global enforcement agencies also emphasized their belief that antitrust law must evolve to police anticompetitive conduct in digital and labor markets.

Enforcers emphasized trials, criminal antitrust penalties, and using all the tools at their disposal to combat anticompetitive conduct

The U.S. Department of Justice's (DOJ's) Assistant Attorney General for Antitrust (AAG), Jonathan Kanter, repeatedly emphasized the DOJ's renewed focus on bringing antitrust cases to verdict. Consistent with his recent remarks,¹ AAG Kanter explained that the DOJ is no longer willing to accept "flimsy settlements" as an alternative to trying cases where the agency believes the antitrust laws have been violated. In his view, past settlements failed to ensure competition, which hurt both consumers and emerging competitors. The Federal Trade Commission (FTC) Chair Lina Khan echoed AAG Kanter's concerns, emphasizing that the FTC plans to increasingly reject settlements.

AAG Kanter stated that the DOJ plans to use all tools at its disposal, including increased use of antitrust criminal penalties. AAG Kanter emphasized that Congress made it a felony to violate the monopolization prohibitions and stated that the DOJ intends to bring criminal charges in monopolization cases (something that has not happened in many decades).

In her remarks, Chair Khan also made clear that the FTC plans to use its congressionally provided "toolkit" to the fullest to stop anticompetitive conduct. Chair Khan referenced the FTC's authority under the FTC Act to launch market-wide inquiries to investigate anticompetitive effects. She stated that the FTC used this authority recently to inquire into recent supply-chain disruptions and may launch an inquiry into pharmacy benefit managers and their role in drug pricing, especially of insulin. Chair Khan also supported the use of the FTC's rulemaking authority to issue market-wide rules to promote competition.

Moreover, Chair Khan and FTC Commissioner Rebecca Slaughter argued that § 7 of the Clayton Act is underutilized. Chair Khan explained that the provision not only prohibits mergers that "substantially lessen competition," but also prohibits mergers that "tend to create a monopoly." Chair Khan stated her belief that enforcers too often overlook this second prong. AAG Kanter agreed and explained that enforcers can use this provision to challenge mergers on the sole grounds that the merger increases market concentration, which can create the conditions for monopolies to form. Additionally, the Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra stated that the CFPB may revise the bank merger guidelines to scrutinize more closely the effects of large banking consolidations on competition and financial stability. AAG Kanter also flagged that the DOJ intends to increase its enforcement of Clayton Act § 8, which prohibits interlocking directorates among competitors.

The DOJ revamped its leniency policy

AAG Kanter previewed the DOJ's revised leniency policy, which was released earlier that morning.² Under the previous policy, individuals and companies could receive leniency if they were the first to self-report their involvement in an illegal cartel so long as they cooperated with the DOJ's investigation and met other listed conditions. The revised policy now imposes two additional requirements: corporate applicants (1) must "*promptly* self-report after discovering its wrongful conduct" and (2) must "undertake remedial measures to prevent reoffending."³ Although the policy does not specify the type of remedial measures a company must take, the DOJ explains—in its FAQs—that these measures should "fully remedy the harm caused by the offense, to the extent not covered by restitution, and eliminates or reduces the risk of recidivism."⁴

Discussion of new guidelines for non-horizontal mergers

One of the Summit's main goals was for U.S. enforcers to gather input from U.S. state and international antitrust enforcers on how to revise the federal agencies' non-horizontal merger guidelines. The panelists suggested a range of topics that could be addressed in the new guidelines, including presumptions and evidentiary burdens, safe harbors, potential remedies, and the treatment of mavericks, nascent competitors, "big tech," and companies offering no-cost services. Panelists, such as Michal Cohen, Israel's Director-General of Competition Authority, and Oliver Guersent, Director-General of the European Commission for Competition, also discussed the different theories of harm that new U.S. merger guidelines might address, such as foreclosure, increased prices, and reduced quality. Other panelists discussed how vertical mergers can also lead to less obvious harms such as the sharing of confidential information to advantage the corporate family over competitors. For example, Reiko Aoki, Commissioner of Japan's Fair Trade Commission, discussed how Japan blocked a vertical merger in the health technology sector over concerns that the merging parties would share confidential information of their competitors.⁵

Continued agency focus on "Big Tech" and labor markets

As they have throughout their tenures, both Chair Khan and AAG Kanter highlighted the ways in which antitrust law may be deployed with respect to "Big Tech" and labor markets. Panelists focused on their beliefs regarding challenges that "Big Tech" poses and how antitrust enforcement should evolve to address anticompetitive behavior in the digital sector. In her opening remarks, Chair Khan specifically stated that one of the goals of the Summit was to create a forum to discuss how antitrust law should develop to address anticompetitive conduct by digital companies. Panelists, including the U.K. Competition and Markets Authority's chief executive Andrea Coscelli, discussed their belief of the need to develop more dynamic theories of competition to better challenge "Big Tech" companies. Other panelists, such as Germany's Competition Chief Andreas Mundt, argued that enforcers must increase scrutiny of technology mergers to prevent consolidation. Chief Mundt further argued that increased merger scrutiny should focus on the technology sector's dynamic nature and the long term protection of innovation in the market. Panelists also argued that enforcers should shift away from using static tools, such as the Herfindahl-Hirschman Index (HHI), when analyzing technology mergers to a more holistic approach that focuses on market realities, the merging parties' growth strategies, and whether the transaction is a "killer acquisition."

Enforcer panelists also discussed the need to refocus antitrust law away from outputs to an equally intense focus on inputs, particularly with respect to labor markets. Commissioner Slaughter and CFPB Director Chopra argued that anticompetitive conduct can impact wages and that enforcers should prioritize fair competition in labor markets. Along with targeting no-poach agreements, enforcers discussed the need to focus on corporations that require employees to sign training repayment contracts.

Increased cooperation and accessibility

Panelists emphasized the importance of the antitrust agencies working with the broader government, including other federal agencies, as well as local and state agencies, to ensure the efficient administration and enforcement of the antitrust laws. Additionally, panelists discussed the importance of international collaboration, especially to help regulate conglomerate, multinational corporations. Finally, the panelists discussed the need to make antitrust accessible to the public and use fewer technical terms. Both the FTC and DOJ committed to having more open meetings and seeking comments from the public.

Key takeaways

As reinforced during the Enforcers Summit, the U.S. antitrust agencies have an enforcement-focused agenda. While it remains to be seen how this agenda will play out in practice, we expect that the U.S. antitrust agencies will be increasingly focused on opportunities to test the boundaries of the antitrust laws going forward. Further, the participating panelists from foreign agencies echoed U.S. enforcers' priorities to target vertical mergers.

Law clerk Brandon J. Hanley contributed to this update.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

D. Jarrett Arp

+1 202 962 7150
jarrett.arp@davispolk.com

Arthur J. Burke

+1 212 450 4352
+1 650 752 2005
arthur.burke@davispolk.com

Ronan P. Harty

+1 212 450 4870
ronan.harty@davispolk.com

Nathan Kiratzis

+1 212 450 4157
nathan.kiratzis@davispolk.com

Christopher Lynch

+1 212 450 4034
christopher.lynch@davispolk.com

Gregory S. Morrison

+1 212 450 3455
gregory.morrison@davispolk.com

Suzanne Munck af Rosenschold

+1 202 962 7146
suzanne.munck@davispolk.com

Howard Shelanski

+1 202 962 7060
howard.shelanski@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.

- ¹ Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section (January 24, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york>; Assistant Attorney General Jonathan Kanter Delivers Keynote at CRA Conference (March 31, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference>
- ² The revised policy can be found on the DOJ's website (April 4, 2022), <https://www.justice.gov/atr/leniency-program>.
- ³ Antitrust Division Updates Its Leniency Policy and Issues Revised Plain Language Answers to Frequently Asked Questions (April 4, 2022), <https://www.justice.gov/opa/pr/antitrust-division-updates-its-lenency-policy-and-issues-revised-plain-language-answers>.
- ⁴ Frequently Asked Questions About the Antitrust Division's Leniency Program (April 4, 2022), <https://www.justice.gov/atr/page/file/1490311/download>.
- ⁵ Results of Review on the Acquisition by M3, Inc. of the Shares in Nihon Ultmarc Inc., (October 24, 2019), <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191024.html>.