

Top Antitrust Enforcers Tell ABA Antitrust Spring Meeting Attendees That They Are Studying Tech Industry

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Last Friday, the 67th American Bar Association Section of Antitrust Law Spring Meeting wrapped up in Washington, D.C., with the annual enforcers roundtable. Much of the discussion by the heads of leading competition authorities at the closing program was focused on competition issues raised by the world's tech giants. The heads of the Department of Justice Antitrust Division and Federal Trade Commission also disclosed that they were considering guidance on vertical mergers.

Makan Delrahim, Assistant Attorney General in charge of the Antitrust Division, told attendees that the Antitrust Division is grappling with how to address concerns of anticompetitive conduct by tech giants, but he noted that the agency cannot simply ask a court to break up a company. He reiterated his view that "big is not bad, but big behaving badly is bad."

The antitrust chief could not comment on any investigations but said that his agency was studying the issues raised by the tech sector and continuing to learn. Delrahim commented that his agency was not at the stage, like some presidential

candidates, to call for a cap on the growth of companies. Earlier this month, Senator Elizabeth Warren (D., Mass.) pledged to break up Amazon, Facebook, and Google if elected.

Also speaking at the enforcers' roundtable panel, FTC Chairman Joe Simons said that his agency was in the process of studying issues raised by the tech sector. The FTC recently established a technology task force that would among other things coordinate and consult with staff throughout the FTC on tech-related matters, including prospective merger reviews and reviews of consummated mergers in that sector.

Simons said that the agency's approach to reviewing consummated tech sector mergers is a work in progress. He suggested that the task force would likely look at monopoly maintenance issues through acquisitions of nascent competitors. While the task force is not an outgrowth of the ongoing hearings on the competition and consumer protection in the 21st century, the hearings will likely inform the approach taken by the task force, according to Simons.

The state enforcers are also studying this area. The National Association of Attorneys General Multistate Antitrust Task Force has recently formed a task force that is looking into the tech industry, said Sarah Oxenham Allen, who chairs the NAAG Multistate Antitrust Task Force. She added that the NAAG task force will likely to coordinate with a FTC task force to discuss issues that they have in common.

International Enforcers' Views

The European Commission (EC) has been one of the most active competition agencies in its enforcement efforts aimed at the tech sector. For example, the EC has fined Google billions following multiple investigations.

While not referring to any particular enforcement actions, EC Competition Commissioner Margrethe Vestager said that "these are challenging times for all of us . . . and it becomes more and more urgent to protect innovation."

Australia Competition and Consumer Commission (ACCC) Chairman Rodney G. Sims offered attendees his view that it was not necessary to introduce new tools or new thinking to tackle the issues raised by this sector. The ACCC is currently conducting an inquiry into digital platforms, such as Google and Facebook, at the

request of the Australian government.

Sims suggested that conventional competition and consumer protection tools can be used to tackle any anticompetitive conduct in this sector. According to Sims, the agency's inquiry has led to five investigations and that the agency will likely make recommendations resulting from those investigations at the end of June.

Alejandra Palacios Prieto, head of Mexico's competition commission, agreed with Delrahim's comment that in abuse of dominance cases the focus should be on bad behavior rather than bigness alone. She suggested that generally there is nothing wrong with a company that grows organically. The enforcer did note, however, that her agency continues to study the sector. She mentioned the competition commission's ongoing investigation of monopolistic practices by e-commerce platforms.

Vertical Merger Guidance

Vertical mergers were also addressed by the heads of U.S. antitrust agencies. The discussion was particularly timely in light of the Antitrust Division's recent defeat at the appellate level in the AT&T/Time Warner case, as well as disagreements among the FTC commissioners with respect to vertical aspects of merger reviews. This recently came up in the agency's review of Fresenius's proposed acquisition of NxStage.

Simons assured the audience that he was open to vertical merger enforcement, as long as the case involves "good documents, good testimony, and good economics." The FTC chairman suggested that those factors were not present in the Fresenius case.

Both Simons and Delrahim said that their agencies were looking into providing guidance to practitioners and business on vertical mergers.

Delrahim suggested that such guidance was clearly needed. "The 1984 vertical guidelines have little relevance in today's world," Delrahim said. He suggested that the Antitrust Division had been waiting to hear from the D.C. Circuit in the AT&T/Time Warner case before moving ahead with guidance.

Reflecting on the 1984 guidelines, Simons said: "Things really change, we have to do something to keep up with the change."

The federal antitrust agency heads also both appeared to believe that joint guidance would be best. The antitrust chief said that a joint product would be better “if we can get there.”

Simons added that it would be best if the guidelines were as bi-partisan as possible so they are not reversed with a change of administrations. Noting that vertical merger guidelines present a difficult challenge, Simons said that a vertical merger commentary, as opposed to full guidelines, might be possible in the interim.