

DOJ Antitrust Head Endorses Tightened Merger Laws

December 4, 2020

On Tuesday, December 1, Assistant Attorney General for Antitrust Makan Delrahim expressed support for tightening restrictions with respect to merger laws for dominant companies.

Section 7 of the Clayton Act of 1914 prohibits any transaction where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” While enforcers currently must demonstrate that a merger would lead to competitive harm in the form of increased prices, lower output or diminished quality or innovation, Assistant Attorney General Delrahim, speaking on a panel at Fortune’s Brainstorm Tech conference, voiced support for requiring companies that control more than 50 percent of a market to prove that a merger will improve competition, shifting the burden to dominant companies and marking a significant change from current antitrust law.

Democrats on the House Judiciary Committee’s Subcommittee on Antitrust, Commercial and Administrative Law in October released the [findings](#) of their more than 16-month long investigation into the state of competition in the digital economy, which is likely to result in legislative consideration in the 117th Congress.

The Antitrust Subcommittee’s report recommends that Congress codify bright-line rules for merger enforcement, including new structural presumptions, in which transactions involving concentrated markets and high market shares would place the burden of proof upon merging parties to demonstrate that the merger will improve competition.

The report also calls on Congress to “consider shifting presumptions for future acquisitions by the dominant platforms,” requiring mergers by dominant platforms to be presumed anticompetitive unless the companies are able to demonstrate that the transaction is needed to serve the public interest and that similar outcomes could not be achieved through internal growth and expansion. The Subcommittee notes that this process would occur outside of the Hart-Scott-Rodino Act (HSR) process, with dominant platforms required to file all transactions and outside the HSR statutory time for review.

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These remarks from Assistant Attorney General Delrahim, a Trump appointee, in conjunction with recent statements from Congressional Republicans such as Rep. Ken Buck (R-CO) indicating receptiveness to the proposal, demonstrate that there may be bipartisan interest in changing the standard for some subset of mergers in the 117th Congress, despite opposition from industry groups.

Assistant Attorney General Delrahim's endorsement of tighter merger laws for dominant companies also increases the likelihood that other antitrust proposals could gain traction in the 117th Congress, such as increased funding for antitrust agencies, an issue which has received support from both sides of the aisle. As such, the Antitrust Subcommittee's report recommended additional funds for the Federal Trade Commission (FTC) and the Department of Justice's (DOJ) Antitrust Division. The new administration could adopt these budget increases in its budget proposal as early as February 2021, as the Biden-Sanders Unity Task Force Recommendations also call for ensuring that antitrust regulators have sufficient funding to conduct a thorough review of mergers and acquisitions. Changes to the HSR filing fees, although not tied to the antitrust agencies' budgets, also are likely to be proposed again in the 117th Congress.

Separately, on December 1, 2020, the Federal Register published the FTC's Notice of Proposed Rulemaking (NPRM) to change certain HSR filing requirements, including expanding the filing requirements for acquisitions by certain investment entities and separately providing a 10 percent or less interest filing exemption (separate and in addition to the solely for the purpose of investment exemption) if the acquiring party meets certain other requirements. The Federal Register simultaneously published the FTC's Advanced Notice of Proposed Rule Making (ANRPM) that asked for comment on other potential changes to the HSR filing requirements and process. The deadline for public comments on both is February 1, 2021.

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