



2022 ENFORCEMENT OUTLOOK SERIES

TOP TAKEAWAYS

Antitrust in the EU and US: Enforcement Trends and Risk Mitigation Strategies

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The DOJ recently announced new guidelines on corporate compliance, as well as information about enforcement policies involving mergers and monopolization. The agency has staked out boundary-shifting antitrust enforcement positions yet remains unwavering and undeterred even when its positions are rejected by juries or courts. This aggressive posture by antitrust enforcers has also been found in Europe.

In this session, our panel examined the current enforcement approaches in the United States and Europe, what this means for your business, and what you should consider doing now to adjust to the new policies. Keep reading for key takeaways from the session.

- The Biden Administration has prioritized aggressive antitrust enforcement in ways that we have not seen in decades. The President has appointed new, aggressive enforcers at DOJ and the FTC, who are not afraid to pursue novel and untested legal theories. DOJ alone has more open grand jury investigations and has charged more cases than they have in decades. The government has also pursued civil lawsuits: some challenging mergers and others taking on other conduct. In addition, the antitrust enforcers – DOJ and the FTC – have requested historic budget increases to support their aggressive agendas. These additional resources translate into more individuals to investigate, litigate, and train law enforcement officials and more eyes focused on what the government believes is anti-competitive conduct.
- The European Commission and national competition authorities will continue to enforce competition law using all tools at their disposal: cartel detection and enforcement, acting against abusive behavior by dominant companies, carefully scrutinizing M&A transactions, and reviewing state aid granted by member states. Enforcement priorities will continue to be determined by the three main objectives the European Commission has set out in its Strategic Plan: the European Green Deal, a Europe fit for the digital age, and an economy that works for people.
- The European Commission is significantly upgrading its toolbox by the advent of the Digital Markets Act and the Foreign Subsidies Regulation, two important tools that the Commission is eager to start using.
- Two examples of the DOJ's efforts to push the boundaries when it comes to antitrust enforcement are its pursuit of criminal cases for anti-competitive labor practices and monopolization under Section 2 of the Sherman Act.



Pursuing criminal liability for anti-competitive labor market practices is one of the most ambitious and aggressive boundary shifting enforcement approaches from the DOJ and it remains a top priority. Historically, the DOJ treated such conduct as civil issues, resulting in fines. Now, the DOJ is trying to put people in jail for engaging in such alleged conduct.

- Despite recent defeats with judges and juries, DOJ remains steadfast in its aggressive pursuit of criminal liability for naked wage-fixing and no-poach/non-solicit agreements.
- This increases the importance of early detection for companies of agreements that look like what DOJ is focused on and educating human resources and other professionals involved in employee recruitment and hiring about these issues as well.



The European Commission has also signaled that it will act against naked no-poach agreements and will consider such agreements as hardcore cartel infringements.



In addition, the DOJ recently made good on its promise to revive criminal enforcement of Section 2 with a guilty plea for attempting to monopolize the market. This is the Division's first criminal prosecution of a Section 2 case in decades and demonstrates that seemingly unilateral conduct that "attempts" to collude is now subject to criminal investigation and prosecution, even if that "attempt" didn't result in any collusive agreement. The "attempt" that the Division relied on to obtain a conviction in this case was an attempted but unconsummated Section 1 market allocation case where a potential co-conspirator cooperated with the government rather than entering into a potentially collusive agreement.



The antitrust agencies have also made significant policy and process changes that affect merger enforcement.

- The antitrust agencies are more apt to challenge vertical mergers (aka, companies involved in different stages of the supply chain) and less likely to accept behavioral remedies to resolve foreclosure concerns. The agencies are also focusing on new theories of competitive harm (e.g., impacts on labor markets) and including more questions on non-competition-related topics in Second Requests. Revised merger guidelines are expected by the end of the year and will likely embrace new theories of harm.
- Procedural changes, such as the suspension of grants of early termination for Hart Scott-Rodino (HSR) Act waiting periods, sending "close at your own risk" letters at the end of HSR Act waiting periods, and insisting on including prior approval/prior notice provisions in consent decrees, make mergers and acquisitions more difficult.



In Europe, the Commission will start identifying digital gatekeepers and imposing obligations and prohibitions on the behavior of any company designated as such under the novel Digital Markets Act.



Also in the area of M&A, the Commission will not hesitate to look at non-reportable transactions if it worries about the transaction's consequences on a given market. For now, the Commission's focus is on digital and pharma, but it can look at any industry. In addition, with the arrival of the Foreign Subsidies Regulation, the Commission will start reviewing certain M&A transactions but also public procurement offers for foreign subsidy support, with the aim of creating a level playing field, thus adding a layer of complexity for M&A transactions.

 In September, Lisa Monaco, the Deputy Attorney General of the U.S., announced significant changes to DOJ's corporate compliance policy. She announced that for the first time, DOJ would require all components that prosecute corporate crime have in place a leniency program that incentivizes voluntary self-disclosure. Under this new approach, companies seeking cooperation credit need to come forward and disclose important evidence to the DOJ quickly. Also for the first time, DOJ will formally encourage companies to hold in escrow or claw back compensation from employees responsible for wrongdoing.

 The clear import of Deputy AG Monaco's ongoing policy statements is that compliance matters. The DOJ could not be clearer; DOJ will be taking a hard look at compliance programs and expects them to be robust. The emphasis on early self-reporting is intended to further incentivize companies to have strong compliance programs that identify and address misconduct before the DOJ does. For those organizations that have not already done so, it is time to reassess the compliance program; for organizations that have recently reviewed and updated their programs, it is critical to take a hard look at Deputy AG Monaco's most recent comments—including those about executive compensation—to ensure that they are being considered in compliance program design and implementation.

ON THE HORIZON

 United States	 European Union
<ul style="list-style-type: none">Expect to see additional Section 2 criminal charges in the near future.Expect continued focus on labor market issues.Expect continued focus and charges from the Procurement Collusion Strike Force.Regarding new corporate liability policies, expect actual case resolutions in near future that will provide more guidance on how those policies work in practice.	<ul style="list-style-type: none">Expect to see further dawn raids in the future.Expect continued investigations of cartels and abuses of dominance cases covering many industries.Expect fierce debates and litigation on the application of the Digital Markets Act.Expect an increase of informal checks and occasional application of the Commission's new approach of non-reportable M&A transactions.Expect the Commission to apply the upcoming Foreign Subsidies Regulation very actively in M&A transactions and public procurement offers.



The graphic features a large teal play button in the center. To its left is a stylized 'M' logo. To its right is a video call interface showing a man in a suit, identified as Justin Murphy. The background is dark with abstract geometric shapes and arrows. At the bottom left is the McDermott Will & Emery logo, and at the bottom center is the text "September 28, 2022" and "mwe.com".

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