

November 6, 2018

ASSISTANT ATTORNEY GENERAL MAKAN DELRAHIM AND FTC CHAIRMAN JOE SIMONS TESTIFY ON ANTITRUST ENFORCEMENT BEFORE SENATE SUBCOMMITTEE ON ANTITRUST

To Our Clients and Friends:

On October 3, 2018, Assistant Attorney General Makan Delrahim, head of the Justice Department's Antitrust Division, and Federal Trade Commission Chairman Joseph Simons testified before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights. The key themes of their testimony are summarized below.

Focus on Technology and "Dominant Online Platforms"

Chairman Simons stated that the Commission looks for markets characterized by significant market power. Dominant online platforms are prime examples. Chairman Simons described enforcement in this area as a Commission priority. AAG Delrahim seconded Simons' views and described internal meetings with Division personnel, up to and including Attorney General Sessions, to discuss how the Division should apply antitrust law in this area.

AAG Delrahim stated that he views search engine protocols that favor one company over another as a source of potential collusion and disclosed that there is a pending criminal investigation in this arena. Chairman Simons stated that such conduct was not necessarily "per se legal," and noted that the Commission investigated this issue in recent years and closed its investigation without further action.

Senator Richard Blumenthal raised data privacy as a concern. AAG Delrahim testified that he viewed online platforms' use of personal data as an antitrust issue, both in terms of the platform's position as a monopoly seller of this information as well as a monopsony buyer. He also expressed concern that personal information could be used by dominant platforms to stymie entry or growth by a competitor. Chairman Simons described data privacy as an aspect of product quality, a factor that is a traditional consideration by the Commission in its merger review process.

Standard-Essential Patent Licensing

Patent licensing emerged as a subject of disagreement between the Division and the Commission. AAG Delrahim suggested that Division resources should be focused on exercise of monopsony power by patent implementers against patent holders, warning that misapplication of antitrust laws to protect implementers could lead to reduced incentives to innovate. In contrast, Chairman Simons viewed patent hold-up by implementers as well as patent hold-out—the practice of routinely ignoring patent holders'

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rights—as equal sources of concern and adding that the Commission should not "discriminate" against either.

Employee "No-Poach" Agreements

AAG Delrahim stated that the Division is actively searching for, and investigating suspected agreements between competitors not to solicit or hire each other's employees, commonly referred to as "no-poach" agreements. AAG Delrahim disclosed that the Division has deployed software that canvasses documents produced during merger investigations to uncover evidence of potential employee no-poach agreements. He stated that there were several investigations in this area, some of which are criminal.

Reverse Payment/Pay-For-Delay Litigation

Chairman Simons testified that the Commission would continue aggressively investigating and challenging "pay for delay"—settlements between brand drug manufacturers and generic drug makers in which the generic drug maker delays the introduction of a competing generic drug in exchange for value. He also stated that the Commission would also look closely at pay-for-delay deals in the biosimilar sector.

Sham Patent Infringement Litigation in the Pharmaceutical Sector

Chairman Simons indicated that the Commission would continue to investigate "sham litigation" brought by brand drug makers against potential generic competitors designed to forestall generic entry. He cited the Commission's recent win in *FTC v. AbbVie* as the first example that this conduct violates Section 2 of the Sherman Act.

FTC Act Section 5 Enforcement

Chairman Simons testified about the Commission's Section 5 activity. Section 5 prohibits, in broad terms, "unfair methods of competition." The scope of "unfair competition" has never been precisely defined, though Commissioner Rohit Chopra suggested in a public comment on September 6, 2018 that the Commission should consider rulemaking in this area. Chairman Simons was skeptical of this approach, noting that the Commission's efforts are largely focused on enforcement of the Clayton and Sherman Acts. He expressed a preference for courts and adjudicatory proceedings to provide clarity on this issue.

Commitment to Faster Merger Reviews

AAG Delrahim also indicated that the Division would try to resolve most merger investigations within 30 days and the rest within six months. He cited the Division's investigation of the Disney-Fox merger as an example of the six-month deadline being attainable in a complex matter. He stressed however, that prompt cooperation by the parties was essential to helping the Division meet these goals.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition practice group, or the authors:

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