

CLIENT ALERT

Senators Grill Antitrust Officials over Lax Merger Enforcement

Mar.09.2007

The newly formed Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Senate Judiciary Committee cross-examined Assistant Attorney General for Antitrust Thomas O. Barnett, and FTC Chairman Deborah Platt Majoras on the perceived leniency of their respective merger enforcement practices. Subcommittee Chairman, Senator Herb Kohl of Wisconsin, noted an "alarming decline in antitrust enforcement" and went so far as to suggest that the current antitrust climate is effectively encouraging mergers. Calling for more vigorous enforcement of the laws, the Senators referred to mergers in the airline, agriculture and satellite radio industries. Kohl expressed concerns about the DOJ's "cursory review" of AirTran's acquisition of MidWest Airlines, while Senator Grassley of Iowa questioned the method of review by Division and the FTC of all agriculture mergers and whether the agencies are "looking at the right things...[because] there's just too much concentration in the industry." Senator Harkin of Iowa suggested that "history shows that the Department is not committed to preventing, or altering industry mergers and acquisitions that lessen competition."

While the Subcommittee was interested specifically in AAG Barnett's views on the pending Monsanto/Delta & Pineland and XM/Sirius mergers, Barnett refused to be drawn in to commenting on these pending matters. Instead, he assured the Subcommittee that the Antitrust Division has applied the Merger Guidelines consistently, and will do so in connection with these two mergers. Reiterating the theme expressed in the Agencies' "Commentary" on the Merger Guidelines issued a year ago, Mr. Barnett emphasized that markets shares were merely the starting point, and that high shares alone would not be a sufficient basis to challenge a merger. When confronted with the Division's prior challenge to the 1997 attempted merger between Monsanto and Delta & Pineland, Mr. Barnett emphasized that the Division is examining the case based on 2007 facts, not 1997 facts.

In response to the more general assertions of lax merger enforcement, Barnett highlighted that the Division challenged 16 transactions in 2006, and was prepared to litigate those challenges if the parties had not settled those cases. Similarly, Chairman Majoras maintained that the FTC continues to aggressively enforce antitrust laws in areas where consumers can be most impacted and cited 12 second requests in merger probes in the past year. According to Majoras, significant FTC resources have been devoted to antitrust enforcement in the global commerce and energy sectors, and close attention is being paid to the pharmaceutical, real estate and technology industries.

For more <http://judiciary.senate.gov/hearing.cfm?id=2586>

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Wm. Randolph Smith

Partner – Washington, D.C.

Phone: +1 202.624.2700

Email: wrsmith@crowell.com