ABA Antitrust Webinar Recap: The Next Big Thing

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ABA Committee Articles (February 2, 2026)

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The Antitrust Law Section of the American Bar Association hosted a panel discussion on September 10, 2025, titled "The Next Big Thing: Innovation Competition Hot Topics." The discussion, moderated by Dr. Olga Kozlova Guglielmi (Analysis Group), brought together Professor Florian Ederer (Boston University), Meghan Rissmiller (Freshfields), Rahul Rao (White & Case; former Deputy Director of the Federal Trade Commission (FTC) Bureau of Competition), and Michaela Spero (Amadeus IT Group). The panel explored how innovation shapes competitive dynamics, the challenges of assessing nascent competition, and the evolving global regulatory landscape for mergers and acquisitions, among other topics.

Defining Key Terms in the Innovation Competition Space

Professor Ederer opened the discussion by distinguishing among different types of innovation-driven acquisitions. He defined a "killer acquisition" as one in which a company purchases a nascent rival and subsequently terminates or delays the development of the target's competing product. While such cases have drawn public attention, Professor Ederer noted that the concept is often applied too broadly in policy discussions. He emphasized that when acquisitions have an innovation dimension,

killer acquisitions represent only the most extreme form of innovation harm, with more subtle effects—such as slower release cycles or redirected R&D priorities—also posing significant antitrust concerns. The broader concern for innovation competition, he added, lies in the loss of products that "never see the light of day" and in these subtler distortions of innovative effort.

Professor Ederer highlighted that the 2023 Merger Guidelines recognize these dynamics through their treatment of nascent competition and he discussed two related ideas: the concept of a "reverse-killer acquisition," in which an acquirer shuts down its own innovation pipeline after acquiring a rival, and the "acquihire," in which firms purchase startups primarily for their specialized labor rather than their products.

Dr. Kozlova Guglielmi then turned to Mr. Rao to ask him to contrast mergers in the innovation space with more traditional mergers in mature markets. Mr. Rao explained that, in the case of mature markets, agencies can rely on established data on market shares, pricing evidence, and diversion ratios. By contrast, transactions involving nascent competitors are inherently forward-looking and speculative, as they involve markets and technologies that may not yet exist.

With this in mind, Ms. Rissmiller highlighted a key tension in how agencies assess future competition. While merging parties often argue that sufficient competition will emerge within a few years, the 2023 Merger Guidelines indicate that agencies tend to discount or dismiss such speculative claims by defendants when evaluating harm. This creates a perceived inconsistency, as similar future-oriented reasoning is adopted to support theories of harm advanced by the agencies. Mr. Rao acknowledged this tension, noting that it presents a real challenge for regulators—one that agencies will continue to confront as they pursue innovation-driven cases. Mr. Rao noted that agencies want to retain all enforcement tools at their disposal and want to index the error costs in a way that benefits the agency. Ms. Spero emphasized a growing tension: as technological innovation accelerates, there is a risk that certain transactions will be approved without full consideration of their long-term impact on competition. In such cases, authorities may later intervene through abuse-of-dominance proceedings, by which time the anticompetitive effects may already be deeply entrenched and difficult to reverse. Mr. Rao added that agencies, once convinced a practice is problematic after a prior enforcement error, tend to prevent similar behavior systematically—a pattern reflected in recent enforcement strategies.

Patterns of Repeated Acquisitions

Turning to the issue of repeated acquisitions, Mr. Rao explained that regulators are increasingly focusing on business models characterized by a "buy, not build" strategy. A single acquisition rarely raises antitrust concerns, but serial transactions in the same sector, such as biotech or app development, may signal an intent to eliminate emerging rivals before they mature. He noted that this theory is being tested in a growing number of trials.

Ms. Rissmiller reframed the question as a "make versus buy" dilemma: at what point does a legitimate capital allocation decision become problematic from a competition perspective? Professor Ederer added historical context, noting a shift over the past three decades from IPOs[1] to acquisitions as the dominant startup-exit strategy. He characterized these dynamics as a complete reversal that changes both incentives and risks. The prospect of being acquired, rather than going public, now serves as a major innovation driver for entrepreneurs. However, the ex post effect of acquisitions (i.e., potentially reducing long-term competition) may outweigh the ex ante incentives to innovate. In particular, Professor Ederer referenced Adobe's proposed acquisition of Figma as an example of this tension, noting that the deal could have altered the trajectory of a potential rival.

Mergers and Innovation

Dr. Kozlova Guglielmi then oriented the conversation to the potential impact of mergers on innovation. Professor Ederer emphasized that the impact of mergers on innovation is highly context dependent. He highlighted that while economic theory on firm concentration suggests innovation is lowest under both monopoly and perfect competition, empirical evidence often shows that consolidation reduces innovation intensity in R&D-heavy industries. At the same time, synergies from mergers can raise R&D productivity, which underscores the complexity of assessing net effects.

Ms. Rissmiller observed that the Clayton Act's Section 7 remains the statutory foundation for merger enforcement, with its broad reference to "any line of commerce" allowing innovation markets to be considered alongside traditional product markets. She highlighted that innovation considerations have long been embedded in agency analysis, but the 2023 Merger Guidelines give them a more prominent role, particularly under Guideline 4, which addresses potential competition.

Ms. Spero added that an important consideration in merger reviews is the role of third-party innovators. She explained that third parties in the market may be not only competitors but also key innovators. For instance, the discussion during the merger review of Amex GBT and CWT pointed to competition from newer, technology-driven players as potentially constraining the market power of traditional agencies. Ms. Spero stated that this type of competition represents a new factor that should be considered.

Additionally, Ms. Spero commented that regulators increasingly seem to treat certain segments as distinct markets as a justification for reviewing transactions using market share-based thresholds. This practice may be based on a legitimate belief that the products are indeed separate or reflect an effort to assert jurisdiction over specific deals.

The panel referenced several recent cases to illustrate evolving theories of harm. In Meta/Within, the court recognized the potential-competition theory, which posits that the threat of future entry can prompt incumbents to lower prices or innovate, and that real pressure arises when a prospective entrant has both the ability and intent

to enter within a reasonable timeframe. The FTC argued the merger would eliminate this pressure, but the court found insufficient evidence and allowed the transaction to proceed. In Sanofi/Maze, the FTC examined a licensing deal involving a drug still in the early stages of R&D, reflecting a willingness to intervene even when no commercial product yet exists. Mr. Rao noted that in Sanofi/Maze, it was likely crucial that Sanofi held a pre-existing dominant position in the relevant therapeutic area, which shaped the FTC's concerns. He added that Illumina/Grail and IQVIA/PMI reflected similar dynamics, with the acquiring party already possessing a significant market position in adjacent or overlapping areas.

Remedies and Regulatory Challenges

Dr. Kozlova Guglielmi then shifted the focus to the economics of remedies. Professor Ederer remarked that identifying a competitive concern is often easier than designing an effective remedy. He further cautioned that creating a new competitor is far more difficult than it appears on paper. Structural remedies such as divestitures or licensing frequently fail to restore pre-merger competition, particularly in innovation-driven markets where tacit knowledge and team capabilities are critical. If the remedy does not transfer the people or the know-how, he argued, it does not transfer the rival. Professor Ederer also cited meta-analyses showing that structural remedies often fall short in innovation contexts and explained that in some cases—such as the proposed Adobe/Figma transaction—divestiture would be impractical.

Regulatory Coordination and Divergence

Dr. Kozlova Guglielmi next raised the issue of regulatory approaches across different jurisdictions. Ms. Spero highlighted the contrast between US and EU merger-control approaches, noting that the divergence stems from institutional history and enforcement practice, as well as differences in legal standards. While US merger control under Section 7 of the Clayton Act focuses on whether a transaction may substantially lessen competition or tend to create a monopoly, the EU framework tends to allow for a broader and more flexible approach to assessing whether a merger would significantly impede effective competition—particularly when evaluating potential future competition in dynamic and innovation-driven markets. Ms. Spero opined that the EU has a longer tradition of incorporating dynamic competition into its analysis, especially regarding the impact of transactions on incentives to innovate and compete over time. She also commented that this perspective is increasingly reflected in U.S. enforcement as well. Looking ahead, Ms. Spero concluded that regulators and courts—especially in the technology sector—are likely to remain cautious, requiring thorough scrutiny of the innovation dimension before approving transactions.

Mr. Rao emphasized the growing importance of coordination across jurisdictions. He explained that global companies seek predictable outcomes, and in that context, harmonized remedies, for instance, can reduce uncertainty. While some divergence is inevitable due to differing legal standards—such as the EU's flexibility to treat innovation competition as a standalone theory of harm—he viewed closer procedural alignment as both possible and desirable.

Ms. Rissmiller identified the UK Competition and Markets Authority (CMA) as a particularly challenging outlier in multinational merger reviews, while Ms. Spero pointed to increasing complexity among EU member states. Ms. Spero explained that, for companies, particular attention is paid to the assessment of global synergies and innovation opportunities. As authorities scrutinize these deals more closely, she noted that although the factual and economic inquiry should be the same everywhere, the legal interpretation of those numbers can differ substantially.

Audience Q&A Highlights

During the Q&A session, panelists reflected on the implementation of the 2023 Merger Guidelines. Mr. Rao observed that the guidelines have been consistently cited and adopted by courts, enhancing transparency around agency reasoning. Ms. Rissmiller described them as "a gift" when counseling clients—a clear, up-to-date reference to antitrust agencies' thinking. Professor Ederer added that their inclusion of academic insights has brought greater analytical rigor and certainty, reducing the unpredictability of enforcement.

On the question of transaction-value thresholds, Professor Ederer acknowledged that while such thresholds are the best imperfect tool available, they can miss small but strategically significant deals—the very types that often constitute killer acquisitions. Ms. Rissmiller noted that the US has long relied on this metric, though the gap between deal value and current revenue remains controversial. Mr. Rao agreed that while thresholds are a blunt instrument, they serve as a practical mechanism for allocating agency resources.

Conclusion

The panel concluded that innovation competition represents one of the most dynamic and challenging frontiers in antitrust law. As agencies grapple with nascent markets, shifting incentives, and global coordination, firms must prepare for heightened scrutiny and evolving standards. Clear communication of innovation strategies and awareness of cross-jurisdictional differences will be essential in navigating the "next big thing" in competition policy.

Endnotes

1 Initial Public Offerings