Updates
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2019 ABA Antitrust Spring Meeting: Federal and State Antitrust Enforcement Takeaways

The American Bar Association's 67th Antitrust Law spring meeting held earlier this month featured several sessions addressing the efforts of federal and state antitrust enforcement agencies, including a number of discussions with representatives from those agencies.

In this first of a three-part series, we offer some key takeaways from those sessions, including recent enforcement activities and signals regarding future priorities.

DOJ Antitrust Division

In two different sessions, U.S. Department of Justice officials (Assistant Attorney General Makan Delrahim and Deputy AAGs Roger Alford, Andrew Finch, Michael Murray, Barry Nigro and Richard Powers) outlined their priorities in merger, civil nonmerger and criminal enforcement.

In merger matters, Murray said that although the DOJ was disappointed by the outcome in the AT&T and Time Warner case, it was pleased that the court of appeals corrected certain errors in the district court's analysis. It is clear that vertical mergers that increase bargaining leverage can violate Section 7 and that harms to quality and innovation matter just as much as price effects. Finch stated that the Antitrust Division has learned some lessons from the case and is planning some changes in response. Noting that the DOJ last litigated a vertical merger case 40 years before AT&T, Finch predicted that it would not take another 40 years before the DOJ's next vertical merger trial.

AAG Delrahim agreed that the 1984 vertical merger guidelines are outdated and that the DOJ and the Federal Trade Commission should cooperate to draft new guidelines. The DOJ was waiting for the AT&T case to conclude before starting such an effort. No drafts have yet been exchanged between the two agencies, so the project is still in the early stages.

Nigro stated that the DOJ has largely complied with its goals to expedite the merger review process. Since announcing the initiative last September, 30 Hart-Scott-Rodino Antitrust Improvements Act filings have resulted in open investigations. Of those 30, Nigro stated that all had been completed, or were "on track" to be completed, within the six-month target period. The DOJ has abided by its promised limits on document custodians in all 30 investigations and has limited the number of depositions to the target in 27 of them. As AAG Delrahim noted in announcing the initiative, "it takes two" to expedite the pace of these investigations and the DOJ cannot control the pace of document or data production by the merging parties.

In civil nonmerger matters, many panels throughout the week explored the question whether antitrust should "tame" the large digital platforms and contrasted Europe's relatively aggressive action in this area with the absence of Section 2 cases in the United States. Despite that contrast, AAG Delrahim stated that the DOJ's enforcement priorities include high-tech industries. These are "winner-take-all" industries due to network effects. The DOJ is bound by U.S. Supreme Court precedent, which dictates that "big is not bad"—but the division is monitoring to ensure that "big is not behaving badly" and that the winners in these industries have not acquired and are not maintaining their market power in unlawful ways.

Finally, the DOJ responded to reports that the number of leniency applications and grand jury investigations have decreased. AAG Delrahim claimed that leniency applications in 2018 were both higher than in 2017 and on par with historical averages. Powers stated that at the end of 2018, the DOJ had 91 open grand jury investigations—the most since 2010. The DOJ has six criminal trials scheduled in the upcoming year.

The DOJ's enforcement priorities include handling public bid-rigging cases (like the ones filed against suppliers of fuel services to U.S. military bases in South Korea) and continuing to emphasize individual accountability by bringing cases against executives involved in cartel conduct. Powers declined to predict when the DOJ would bring its first criminal "no poach" case but confirmed that it has a number of ongoing grand jury investigations looking at such agreements among employers.

In response to reports that he has declined to open new criminal investigations, AAG Delrahim said those rumors were not true. He has asked DOJ staff to gather additional information before doing so, and he asserted that he takes the criminal enforcement program very seriously and has not vetoed recommendations to open new matters.

Federal Trade Commission

In separate sessions, FTC Chairman Joseph Simons and a panel of bureau directors (Bruce Hoffman, Bureau of Competition; Andrew Smith, Bureau of Consumer Protection; and Bruce Kobayashi, Bureau of Economics) spoke about the FTC's activities and priorities.

Hoffman provided details regarding a "busy year" for the Bureau of Competition, including trials in seven cases, the largest disgorgement award in FTC history in the AbbVie Inc. case and the favorable settlement of the long-running Actavis Inc. case. Hoffman explained that the FTC has a great deal of interest in pursuing additional conduct cases, with a particular interest in cases involving two-sided markets and the parameters of the Supreme Court's decision in *Ohio v. American Express Co.* He noted, however, that the FTC is limited in its ability to identify appropriate cases given the lack of a leniency program and a criminal investigatory apparatus, imploring private parties and state enforcers to identify cases of potential interest to the commission.

Hoffman also addressed the FTC's creation of the Technology Task Force, which will enable the commission to increase its expertise regarding the application of competition law to digital technology platforms. Chairman Simons confirmed the FTC's interest in the high-tech industry, noting that the approach that will be taken is still evolving and will be informed by the recent FTC hearings. He indicated that one focus will be monopoly maintenance through the acquisition of competitors (particularly nascent competitors), and that the FTC may review consummated mergers in this space.

With respect to consumer protection, Smith stated that the bureau's enforcement priorities could be gleaned from its recent actions, including challenges to deceptive marketing (for example, its recent case against Office Depot regarding tech support claims, as well as enforcement actions directed at robocalls); consumer financial services (including payday lending and fintech); advertising practices (such as false claims about data speed and products' health benefits, as well as use of fake reviews and influencers); data privacy and security practices; and enforcement of existing consent decrees.

Kobayashi underscored the role of the Bureau of Economics in supporting the FTC's various enforcement efforts and the lack of staff time and resources for pursuing important economic research, suggesting that any increases in the other bureaus' personnel should be met by even larger increases in the Bureau of Economics' staff, given that any increase in enforcement creates a corresponding increase in the demand for the FTC's economists.

Asked about the decision from the U.S. Court of Appeals for the Third Circuit in *FTC v. Shire ViroPharma Inc.*, which held that the FTC may only seek equitable relief if the defendant "is violating, or is about to violate" the law, the directors noted that although they disagreed with the decision, they did not foresee changes in the types of cases pursued by the commission, although they acknowledged that the ruling may create pressure to bring some cases more quickly or as administrative actions. Hoffman emphasized that the decision would not deter the FTC from taking chances by litigating difficult cases.

State Attorneys General

A panel of officials from state AG offices discussed enforcement efforts and priorities at the state level. Representatives from California (Kathleen Foote, senior assistant attorney general, and Paula Gibson, deputy attorney general) were joined by officials from Wisconsin (Gwendolyn Cooley, assistant attorney general for antitrust) and Maine (Linda Conti, chief of the Division of Consumer Protection). The panel was moderated by the former chairman of the National Association of Attorneys General Multistate Antitrust Task Force, Victor Domen. The current chairwoman of the task force, Sarah Oxenham Allen of the Virginia Attorney General's Office, participated in a separate roundtable discussion.

Allen identified four categories of cases that she anticipates will remain a priority for state enforcers. The first category involves cases originating out of joint federal and state investigations, but that are ultimately led by the states. Allen cited the Suboxone litigation as a leading example. Cooley explained that her office leads this litigation on behalf of 42 states, which alleges product-hopping and conspiracy to monopolize by the makers of the prescription drug Suboxone.

Litigation involving prescription drugs also exemplifies the second category of cases identified by Allen: those in which states initiated or were instrumental in spurring investigations and litigation. For example, 49 states are currently pursuing claims against 20 defendants that allegedly conspired to fix the prices of several generic drugs.

The third category of priority cases includes enforcement actions involving issues that are not being prioritized by federal officials. Allen pointed to challenges to vertical no-poach agreements, including the Washington AG's franchise cases. Noting that California had joined the DOJ in early cases involving horizontal no-poach agreements, which were challenged as being per se illegal, Foote expressed surprise at the DOJ's recent filing of an amicus brief advocating for application of the rule of reason in the Washington case. Foote suggested that the application of differing standards under some states' laws would be important in areas such as this, noting that under California's Cartwright Act, vertical no-poach agreements would likely be treated as per se illegal even if they are not deemed as such under the Sherman Act.

Several panelists acknowledged that the positions and priorities of enforcers at the state and federal level—and of the separate sovereign states themselves—sometimes diverge, but insisted that the relationships between the various enforcement bodies are strong nevertheless. Cooley credited states that continue to vigorously enforce antitrust and consumer protection laws in areas where federal enforcement has waned.

Matters involving issues of importance to individual AGs were the final priority area identified by Allen. In many states, these include cases related to healthcare, pharmaceuticals, and the privacy and security of personal data. Foote suggested that competition within the healthcare industry will continue to be an important focus of state enforcers given the states' historic role in protecting the safety and well-being of residents, the local nature of many of the relevant markets and players, and the impact of healthcare spending on state budgets. She cited recent challenges to vertical consolidation in healthcare, including cases involving allegedly unequal bargaining power of hospital systems vis-à-vis insurers.

Foote pointed to the recently settled Atrium Health case in North Carolina as well as the California AG's pending challenge to Sutter Health, which is set for trial this August. Conti discussed the multistate investigation and litigation against opioid manufacturers, including the surprise announcement of a settlement between Oklahoma and Purdue Pharma LP just days prior.

Addressing another hot topic currently pending before the U.S. Supreme Court, Gibson discussed the amicus brief submitted by 31 states in the *Apple Inc. v. Pepper* case urging the court to overturn *Illinois Brick*. She noted the prevalence of cases involving both federal claims brought by direct purchasers and state law claims brought on behalf of indirect purchasers under a patchwork of state *Illinois Brick*-repealer laws, which create difficult damages and settlement issues for plaintiffs and defendants alike.

Asked whether she believes the amicus brief will have an impact on the court's consideration of the issue, Gibson noted that Justice Neil Gorsuch inquired about the states' briefing during oral argument, suggesting that the court may be giving serious consideration to the states' request to reverse *Illinois Brick*.

Read the entire ABA Antitrust Law Spring Meeting recap series:

Part 2: Merger Analysis Takeaways

Part 3: Consumer Protection Takeaways

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