Updates

This is the second of three updates on the American Bar Association's 68th Antitrust Law Spring Meeting. The first update covered the sessions featuring agency representatives who discussed recent enforcement activities and signals regarding current and future priorities.

This year's event was released in digital format due to the ongoing global health crisis. The meeting included sessions on merger enforcement that addressed a number of important issues. Highlights from two of those panels are discussed below.

Merger Analysis Gone Digital: Time to Reboot?

In 2019, big technology companies faced increased antitrust scrutiny around the globe. For example, the Federal Trade Commission launched a technology task force to review consummated technology deals that were not reported under the premerger notification program established by the Hart-Scott-Rodino Act. And U.S. presidential candidates campaigned for greater federal oversight of big technology companies.

These actions reflect concerns that current antitrust laws may have failed to meaningfully review or challenge attempts by technology companies to acquire future potential competitors, leading to monopolistic market power and reducing competition surrounding data privacy protections.

The panelists first discussed whether existing antitrust laws are effective at addressing nascent company (potential future competitor) mergers. FTC Commissioner Christine Wilson explained that nascent competition is not a new or unique concept (it has traditionally been analyzed as potential competition), but that such cases present greater challenges under the Clayton Act in terms of analyzing potential anti-competitive effects and benefits.

Foad Hoseinian at Sullivan & Cromwell LLP in Brussels suggested that European authorities might have less difficulty than the FTC because under EU competition law, serial acquisitions of nascent companies may be challenged as an abuse of a buyer's dominant position. Wilson noted that the FTC brought Sherman Act Section 1 and Section 5 claims in its complaint against Altria Group Inc. and Juul Labs Inc.

The panelists agreed that mergers involving zero-price and multisided markets present unique concerns because, although such mergers might have little near-term impact on consumer prices, they may harm consumers by adversely affecting future innovation, quality, and data protection.

Hoseinian warned that adopting bright-line rules could squash mergers with procompetitive benefits, a concern to which Europe is particularly sensitive. Diana Moss, president of the American Antitrust Institute, disagreed, explaining that antitrust enforcement should not give way in these situations because competition drives innovation.

Finally, regarding potential "fixes," the panelists agreed that sector-specific rules were not needed but reached no consensus on any other recommendations. Wilson advocated for federal privacy legislation addressing the gathering, monetizing, and sharing of consumer data. Moss favored strengthening and clarifying antitrust laws by using stronger presumptions for vertical mergers and potential competition mergers, citing pending legislation from Senator Amy Klobuchar, D-Minn.

Sequences and Sparks: Life Sciences Innovation Mergers

In the complex, ever-innovating life sciences industry, the standard tools of mergers analysis should be brought to bear—along with a healthy dose of humility. So concluded a panel moderated by Skadden Arps Slate Meagher & Flom LLP partner Bill Batchelor, who was joined by Debbie Feinstein, head of Arnold & Porter's antitrust group and a former director of the Bureau of Competition at the FTC; James Weiss, deputy assistant

director of the Mergers I Division at the FTC; and Bob Majure, vice president of Cornerstone Research and a former director of economics for the U.S. Department of Justice's Antitrust Division.

Compared to the shorter time frames usually involved in other kinds of mergers, Majure noted that assessing a merger's effect on innovation is particularly hard because "we are predicting a future that often takes place very far out into the future." Majure explained that evaluating merger effects in the life sciences field is not impossible, however.

Weiss began by identifying three flavors of life sciences mergers that the FTC often addresses. The first, and most straightforward, concerns mergers featuring evidence of reduced incentives to develop existing products, whether on-market or in the research pipeline. Pharmaceutical mergers are paradigmatic of this type, with the Roche-Spark Therapeutics Inc. merger providing a recent example.

The second involves mergers of two firms with research and development capabilities in a general field. Weiss cited the DOJ's challenge of the merger of agribusiness giants Bayer AG-Monsanto Co. as illustrative of this type, while Feinstein highlighted the complex 2001 Genzyme Corp.-Novazyme Pharmaceuticals Inc. acquisition, a merger of two specialized companies focused on treating Pompe disease.

Third, and finally, Weiss described cases of an established player acquiring a nascent competitor, citing the FTC's aggressive challenge of Illumina Inc.'s planned purchase of fellow DNA sequencing company Pacific Biosciences.

In many respects, the analysis applied in each of these three types of mergers is familiar—defining markets and reviewing documents from the parties as well as information from customers and competitors.

But there are also differences. Predicting the likely effects of such mergers can run the gamut. As Feinstein observed, cases involving a generic that is about to be introduced are fairly predictable, while other cases present an array of future outcomes that is much hazier. She referenced as an example the Steris Corp.-Synergy Health PLC merger, where a major issue was not when a product would go to market, but if.

Economists also struggle with innovation effects. As Majure said, "the creative process is something that doesn't lend itself to economic modeling." While economists can easily make predictions about the likely effects of a new factory built by a rival firm, what about the opening of a new research lab? Will it focus on the same product innovations as other labs or novel projects? In other words, is the result invention or reinvention?

Majure listed three important considerations. First, the contestability principle—how big is the prize? He noted that some research and development projects might not be undertaken unless the potential rewards can be realized across a large share of the market.

Second, the appropriability principle—how long will the innovator enjoy the prize? Notably, traditional metrics of appropriability, such as IP protections, might be misleading in the life sciences context. Majure described recent research suggesting that one firm's acquisition of a patent might not cause its rivals to abandon the field, but instead lead to more competitive innovation.

And third, how do inputs combine to yield synergy? This, the panelists agreed, is another tricky aspect to life sciences mergers. As Feinstein stressed, traditional inputs like capital investment do not necessarily pay off in scientific innovation—the best innovator might not be the firm pumping good money after bad into an inefficient project, but instead the leaner firm that maximizes the research value of every dollar spent. In other words, more inputs might not lead to more outputs, and so a reduction in inputs—a traditional red flag to competition authorities—is an imperfect measure of a corresponding reduction in innovation.

This, in short, is where humility plays a role. The panelists all agreed that firms and regulators should not be too confident in their ability to foresee likely effects. As Feinstein noted, Yogi Berra's observation that "it's tough to make predictions, especially about the future" applies with even greater force in life sciences mergers.

Read the entire virtual ABA Antitrust Law Spring Meeting recap series:

Part 1: Federal and State Antitrust Enforcement Takeaways

Part 3: Consumer Protection Takeaways

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