ABA ANTITRUST SPRING MEETING: ENFORCERS ROUNDTABLE TAKEAWAYS

By Brian Grube and Charlie Stewart

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In late March, top antitrust and competition law enforcers from around the globe joined a candid Q&A discussion at the Enforcers Roundtable, concluding the American Bar Association Antitrust Law Section's Spring Meeting. This year's roundtable focused on proposed antitrust legislation, enforcement priorities and trends, including the global focus on Big Tech companies, and efforts to safeguard innovation in the agencies' review of M&A deals.

The participants included Rebecca Kelly Slaughter, Acting Chairwoman, U.S. Federal Trade Commission ("FTC"); Richard A. Powers, Acting Assistant Attorney General, U.S. Department of Justice ("DOJ"), Antitrust Division; Margrethe Vestager, Executive Vice President and Commissioner, European Commission ("EC"); Sarah Oxenham Allen, National Chair of the National Association of Attorneys General Multistate Antitrust Task Force ("NAAG") and Senior Assistant Attorney General and Antitrust Unit Manager, Officer of the Virginia Attorney General; and Sarah Court, Commissioner, Australian Competition & Consumer Commission ("ACCC"). Jones Day's Brian Grube co-moderated the Enforcers Roundtable. This article reports on the highlights of that discussion.

Legislative Proposals to Change Antitrust Competition Laws

Proposed legislation in the United States and elsewhere could produce the most dramatic changes to antitrust and competition law and policy in decades. In the United States, Senator Klobuchar's proposed Competition and Antitrust Reform Act, among other things, would significantly increase funding for federal antitrust enforcement, lower review standards and shift burdens of proof in merger challenges, and loosen standards for unlawful conduct and allow the DOJ and FTC to pursue civil penalties in monopolization cases. While supporters of that legislation say that their concerns are motivated by the so-called "Big Tech" platforms, the application of some of the changes would not be limited to the high-technology sector. Not surprisingly the enforcers had some views on the proposals.

Chairwoman Slaughter (FTC) did not endorse any specific proposals, but supports "modernizing and updating" the U.S. antitrust laws. In her view, such changes could help remedy two problems facing antitrust enforcement agencies: a lack of resources and a lack of deterrence. The agencies, she said, are "grossly under-resourced" to meet the demands of modern antitrust enforcement, with the FTC's headcount remaining flat despite a doubling of merger filings in 10 years. In her view, the lack of deterrence is reflected by companies' pursuing merger proposals that should "never have left the boardroom." Chairwoman Slaughter attributes the lack of deterrence to the prevailing legal standards being too stringent, requiring the FTC to prove and balance competitive harms and competitive benefits that are hard to measure.

This problem is especially acute, she said,

where the agencies must try to prove a proposed transaction's probable impact on innovation, which is even harder to quantify than a proposed transaction's potential impact on prices. According to Chairwoman Slaughter, legislation that introduces more bright line rules or requires parties to prove why a transaction is procompetitive, rather than requiring the agencies to prove it is anticompetitive, could improve the agencies' ability to police anticompetitive conduct and transactions. In the absence of any such changes, Chairwoman Slaughter said, the FTC would continue to bring "bold" cases under the current standards to raise important questions in antitrust law. Chairwoman Slaughter also highlighted the FTC's recent creation of a rulemaking group. She said that the group will explore opportunities to use the FTC's rulemaking authority[1] to add to its "toolbox" and "promote robust competition."[2]

EVP Vestager (EC) explained that significant regulatory changes are also underway in the EU. Under its Digital Markets Act, the EC is developing regulations for digital markets like those it relies on to regulate the telecom, payment card, and airline reservation sectors. The goal, in her words, is to keep digital markets "fair and contestable." The regulations would not supplant, but complement, existing EU and member state competition laws. As contemplated, they would designate dominant digital platforms as "gatekeepers" and prescribe "dos" and "don'ts" for their conduct. Gatekeepers would be prohibited from self-preferencing their products on their platforms, leveraging dominance from one area to another, and combining certain data collected across services or platforms. At the same time, gatekeepers would be required to deal with competitors by providing platform access, interoperability, and data sharing. EVP Vestager added that the EC is also reevaluating its merger control procedures. Changes under consideration are aimed toward simplifying and reducing the burden of merger filings and, as further discussed below, identifying for review transactions of nascent competitors by dominant firms that might not trigger the existing filing thresholds, but nonetheless raise competitive concerns.

Commissioner Court (ACCC) confirmed that, as part of its AdTech inquiry, the ACCC is studying the market chain for online advertising, as well as Google's role in it, and considering the adoption of regulations similar to those under consideration by the EC.

Turning to criminal antitrust enforcement, AAG Powers (DOJ) highlighted Congress' reauthorization of the Antitrust Criminal Penalty Enhancement and Reform Act, which supports the DOJ's anti-cartel enforcement program by reducing the exposure to private damages lawsuits of companies that report cartels under the DOJ's lenience policy. He also noted the newly enacted Criminal Antitrust Anti-Retaliation Act, which protects individual employees who blow the whistle on price-fixing cartels from retaliation by their employers. AAG Powers encouraged companies to alert their employees to the new protections afforded under the anti-retaliation act and to incorporate that information into their compliance programs.

The U.S. states, as AAG Allen (NAAG) explained, also are active legislatively. On the antitrust front, Connecticut, Massachusetts, and Washington recently have enacted their own premerger notification requirements for healthcare transactions, and California and Florida soon may also do so. New York also recently introduced a bill that would overhaul its state antitrust statute,

and in the last four years, 16 states banned some form of non-compete agreements. On the consumer protection front, AAG Allen highlighted Virginia's new data protection and privacy legislation, the second in the country after California, and how similar legislation has being introduced in New York, Washington, Florida, and Minnesota. These statutes, AAG Allen explained, resulted in part from inaction by Congress on a federal privacy and data protection law. Chairwoman Slaughter agreed, referring to the emerging state legislative patchwork as a "clear call" for federal legislative action.

Antitrust Enforcement Trends

The competition authorities' alleged concerns about tech are not only are driving new legislation, but also account for a substantial portion of their active, ongoing caseloads. The FTC and DOJ have filed lawsuits against Facebook and Google, respectively, and nearly all state AGs have joined or filed parallel actions against both companies. The EC already has levied fines against Google, and has an open investigation into Google's advertising business. It also has open investigations of Amazon and Apple, targeting conduct and rules that allegedly preference their own products over their competitors or restrict the ability of app developers to compete on other platforms. And earlier this year, the ACCC squared off against Google and Facebook over Australia's Media Code. Two themes emerged in the discussion of these high-profile actions that could have important implications in future cases for parties across different sectors:

1. Remedies.

The panelists discussed the principles underlying the remedies they are pursuing in their enforcement actions. Chief among these is structural relief or the requirement that companies divest assets to resolve a competitive problem. Chairwoman Slaughter explained that in its Facebook action the FTC is demanding that Facebook "at least" divest Instagram and WhatsApp (which Facebook acquired in 2012 and 2014, respectively) to remedy a course of conduct that, the FTC alleges, reduced consumer choices, stifled innovation, and allowed Facebook to maintain a monopoly.[3] She observed that structural relief long has been the preferred remedy in the US because it is "cleaner" than behavioral remedies and does not require ongoing governmental or court supervision. In that respect, she said, structural relief is more conservative than behavioral remedies. Ultimately, Chairwoman Slaughter explained, the FTC's approach is to seek the best remedy to solve a particular problem. The FTC would continue to rely on structural relief where it is needed, and it would prefer to litigate rather than accept an insufficient or unworkable remedy.

EVP Vestager agreed that structural remedies are often easier to enforce, and that remedies should be tailored and proportional to the competitive problem at hand. But she noted that the EC has a wealth of experience (and seemingly more comfort) with behavioral remedies. EVP Vestager also made reference to *restorative* remedies, *i.e.*, remedies that seek to return a market to its condition before the alleged harm, but she acknowledged the difficulty of this type of remedy and how the EC is still working through its Google Shopping case from 2017.[4]

2. Interagency Cooperation, Coordination, and Conflict.

Each of the panelists stressed the importance of interagency cooperation and the benefits of coordinating investigations and enforcement actions.

Chairwoman Slaughter and AAG Powers agreed that the FTC and DOJ lately had been cooperating well, both with one another and with the state AGs. AAG Allen confirmed this on behalf of the states, noting the 49 states, plus the District of Columbia, Guam, and Puerto Rico, had joined in the DOJ's lawsuit against Google or in a parallel action with similar allegations; and 46 states, plus the District of Columbia and Guam, had filed an action paralleling the allegations in the FTC's lawsuit against Facebook.

EVP Vestager explained that the agencies' cooperation extends internationally—and not just in the tech matters, but across all sectors. Interagency cooperation, she observed, not only helps the agencies to alleviate resource constraints, but it can also help private parties to the extent the agencies can align the timing and demands of their respective investigations, subject to the rules and procedures of each jurisdiction. She also stressed that all interagency cooperation is undertaken within a procedural framework. This provides greater continuity in the agencies' cooperation by allowing the agencies to interact regularly, rather than on only an ad hoc basis; and it ensures that the agencies' cooperation complies with the agencies' respective procedures, such as those for maintaining the confidentiality of parties' information and exchanging it only subject to waivers.

As an example of interagency cooperation the panelists touted their recently announced international working group to examine the analysis of pharmaceutical mergers. The new group is a collaboration between the FTC, DOJ, state Attorneys General, the EC, the Canadian Competition Bureau, and the UK's Competition and Markets Authority. Chairwoman Slaughter, who has expressed concern over the adequacy of the conventional analysis of pharmaceutical transactions, stated her hope that the working group would serve to improve the agencies' analysis and better protect innovation, research, and development in the pharmaceutical pipeline. She emphasized the COVID-19 pandemic as showcasing the need for a proper understanding of these markets at an international level to foster innovation and new market entry.

Not all of the agencies' cooperative efforts, however, lead to coordinated or consistent outcomes. The panelists conceded that the agencies' investigations of the same conduct by the same companies—or the same transactions—does raise the risk that they may seek conflicting remedies. Chairwoman Slaughter observed that where a particular transaction or company is the target of multiple agencies' investigation, the FTC's goal is to align the outcomes of those investigations as much as possible. But, she added, the FTC's job is to enforce U.S. antitrust law, and that may not always align with the laws of other jurisdictions. In her view, having to manage differences between the laws in different countries is the cost of doing business in more than one jurisdiction. EVP Vestager agreed. She noted that the EC also seeks to coordinate with its sister agencies to foster a consistent resolution, particularly for mergers where a single remedy may resolve all agencies' concerns. However, differences in jurisdictions' controlling laws, as well as how a company's conduct or particular deal may affect different markets, can lead to different outcomes in different jurisdictions.

M&A: Innovation, Nascent Competition, and Killer Acquisitions

The acquisition of nascent competitors by dominant firms to secure or protect their market position—so-called "killer acquisitions"—is a

priority issue for all the enforcement agencies represented on the roundtable. Protecting nascent competition and innovation, Chairwoman Slaughter observed, not only is "at the heart" of the FTC's Facebook lawsuit,[5] but also provided the basis for recent FTC challenges to proposed mergers in the consumer goods and healthcare sectors. In her view, the agencies need to ensure that acquisitions by dominant firms are not going to interrupt the flourishing of the competitive process—and waiting too long to bring challenges could result in significant competitive harm. When asked how the agencies in such cases can distinguish between nascent competitors that actually will flourish from those whose resources might benefit consumers more by being acquired, Chairwoman Slaughter observed that each case requires a fact-specific inquiry. The inquiry, she said, should include the reasons why the incumbent is seeking to acquire the target. In its Facebook case, for example, the FTC alleges that Facebook engaged in a long-term strategy to "buy and bury" nascent competitors rather than to risk their competition. In the end, she observed that in this particular area, she is more concerned about the risk that under-enforcement poses for nascent competition than the risk of over-enforcement.

AAG Powers agreed noting that protecting new entry and innovation is also top priority for DOJ. As an example, he cited DOJ's challenge to Visa's proposed acquisition of Plaid, a competing and potentially disruptive online payment services provider.[6] That case, in his view, showed importance of analyzing market structures and market dynamics to understanding the competitive effects of an allegedly dominant firm's acquisition of a growing rival. In Visa/Plaid, Powers observed, the online debit market had not had a meaningful new entrant in decades, raising the risk of entry to Visa's position and making the protection of a relatively new entrant all the more important to competition and consumers.

EVP Vestager noted a similar focus on this issue by the EC. The EC's concern over nascent competition, she said, is part of the drive behind the EC's ongoing review of its merger control regulations. In particular, the EC intends to catch certain of these acquisitions through the procedure by which member states may refer to the EC for review a transaction that does not meet the threshold for EC review. The EC released new guidance about this procedure specifically to catch transactions that could have significant competitive implications. EVP Vestager emphasized that the potential for innovation will play an important role in evaluating nascent competition on a case-by-case basis in the newly released EC competition guidelines on this issue.

Takeaways

- Legislative proposals in the United States and elsewhere could significantly alter antitrust law for the first time in decades. While these changes are already occurring in Europe, whether they gain traction in the United States remains to be seen. At a minimum, U.S. antitrust enforcers will likely receive increased funding, and they intend to use it.
- Expect merger enforcers in the United States to continue to pursue structural remedies to address competitive concerns about transactions and even anticompetitive conduct, and to pursue more aggressive theories of alleged competitive harm in litigation to block (or even unwind) a transaction.
- Interagency and international cooperation is

alive and well, creating the potential for more streamlined global merger filings, but also conflicting priorities and remedies across agencies and jurisdictions.

- Merger enforcers around the globe continue to focus on perceived risks to innovation and R&D posed by "killer acquisitions" of nascent competitors by allegedly dominant firms. Expect increased scrutiny of even modest transactions involving the acquisition of new entrants or innovations, especially in high-profile industries like tech and pharmaceuticals.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]Section 18 of the FTC Act (15 U.S.C.A. § 57a) permits the FTC to promulgate rules that "define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of the Section 5 of the FTC Act. In its history, the FTC has used its rulemaking sparingly.

[2]FTC Acting Chairwoman Slaughter Announces New Rulemaking Group, FTC (Mar. 25, 2021), available at https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group.

[3]*See* FTC Sues Facebook for Illegal Monopolization, FTC (Dec. 9, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

[4]*See, e.g.*, Case AT.39740, Google Search (Shopping), Antitrust Procedure, European Commission on Competition (Jun. 27, 2017), *available at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

[5]*See FTC v. Facebook, Inc.,* FTC (Dec. 9, 2020), *available at* https://www.ftc.gov/enforcement/cases-proceedings/191-0134/facebook-inc-ftc-v.

[6]*See* Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block, DOJ (Jan. 12, 2021), *available at* https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

NEGOTIATING TIPS FOR REPRESENTATION & WARRANTY INSURANCE POLICIES

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The use of insurance to cover breaches of representations and warranties in an acquisition agreement ("R&W Insurance") remains a highly touted option in Japan to protect buyers and sellers from losses in M&A transactions, and continues to gain in popularity. Fueling this product surge are numerous papers and seminars that discuss the pros and cons of R&W Insurance (also known as W&I Insurance). However, once a transaction party opts to obtain R&W Insurance and receives a draft insurance policy, an insured party ("insured") may feel left at the altar to fend for itself. All too often a draft R&W Insurance policy will be delivered in a boilerplate form a few days prior to the signing date of the acquisition agreement when the transaction parties are scrambling to reach a deal. An ill-advised insured may believe that its R&W Insurance policy document is a standard non-negotiable form, and may quickly provide its sign-off after simply confirming the accuracy of basic factual matters. An insured adopting this approach may have unwittingly

