Updates
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2020 Virtual ABA Antitrust Spring Meeting: Federal and State Antitrust Enforcement Takeaways

Last month, the American Bar Association offered a virtual version of what would have been its 68th Antitrust Law Spring Meeting, presenting a select number of panels online. The in-person conference, at which thousands of practitioners and enforcers typically converge, was canceled to protect health and safety during the COVID-19 pandemic.

Several of the virtual sessions addressed the efforts of federal and state antitrust enforcement agencies. These sessions featured agency representatives who discussed recent enforcement activities and signals regarding current and future priorities. In the first of three updates covering the virtual panels, we offer some key takeaways from those sessions.

Federal Trade Commission

In two different sessions, commissioners of the Federal Trade Commission offered their views on the agency's enforcement priorities.

Commissioner Rebecca Slaughter spoke about the impact of COVID-19 on the agency's work, emphasizing that the agency would "in no way relax" its standards or expectations of rigorous analysis. But, because the agency cannot sacrifice its standards, parties should understand that processes may take longer.

Beyond the administrative hurdles posed by the pandemic, Slaughter noted that the agency is thinking critically about the supply chain and protecting procurement; being vigilant about failing firm merger defenses, of which she foresees more; and staying on the lookout for anti-competitive conduct like wage fixing. She also noted that the agency is investigating consumer scams related to the virus, such as fake cures. Commissioner Joseph Simons noted that the agency is also investigating activity that preys on consumers' financial fears.

When questioned about whether the consumer welfare standard was the appropriate measure of competitive harm, Slaughter noted that while "consumer welfare" is context-dependent, antitrust law does and should continue to address harms beyond price, such as innovation, output, and choice.

She also noted that considering a burden-shifting approach is a valuable thought exercise, given the impact of high burdens on agencies' decisions to bring cases and allocate resources. She emphasized that any further discussion regarding the appropriate measure of competitive harm should consider the intersection of consumer protection, competition, and privacy.

Discussing Part 3 proceedings, Slaughter described the FTC as an "expert tribunal" and stated that there may be times when certain issues—detailed economic analyses, for example—are better suited to a Part 3 proceeding than federal court. She also noted that a Part 3 proceeding is often the beginning of litigation, rather than the end.

Department of Justice Antitrust Division

Assistant Attorney General Makan Delrahim spoke about enforcement by the U.S. Department of Justice, noting that several DOJ initiatives have pivoted to address competition issues specific to the COVID-19 pandemic.

For example, the DOJ, in conjunction with the FTC, issued guidelines on business collaborations. One purpose of those guidelines, Delrahim explained, was to communicate that the agencies would not tolerate firms taking advantage of the current pandemic and corresponding economic conditions to engage in anti-competitive conduct.

He also stated that the DOJ had teams working "around the clock" to conduct business reviews related to the national strategic stockpile of essential medical equipment, and that the multi-agency Procurement Collusion Strike Force (PCSF), created last November to address bid-rigging and other anti-competitive conduct related to state and local procurement, is now advising on issues specific to COVID-19 procurement.

Delrahim described the PCSF as an incredible success, noting that it has responded to over 50 inquiries and has completed more than 30 training sessions. The PCSF's training is anticipated to generate more enforcement in this area. Delrahim shared that approximately one-third of the grand juries convened recently have involved government procurement issues.

Delrahim also offered lessons learned from the T-Mobile/Sprint merger and the Novelis arbitration.

The Novelis case was well suited to arbitration, he said, because many of the issues were tied to market definition. The arbitrator was able to decide that issue on a predetermined and efficient timeline, which provided certainty for the transaction and overall process.

In contrast, Delrahim offered the T-Mobile/Sprint merger as an example of inefficient enforcement, with the inefficiencies stemming largely from the existing multi-enforcer system, in which governments at the federal and state level each have independent jurisdiction to enforce the antitrust laws. He noted that the state and federal agencies should work together moving forward to minimize conflicting approaches which create unnecessary uncertainty for transactions and do not deliver remedies for consumers.

State Attorneys General

Officials from state attorneys general offices discussed enforcement efforts and priorities at the state level. Representatives from California (Paula Blizzard, deputy attorney general), Wisconsin (Gwendolyn J. Cooley, assistant attorney general), Louisiana (Stacie Lambert deBlieux, assistant attorney general), the District of Columbia (Kathleen Konopka, deputy attorney general), New York (Elinor Hoffmann, acting chief of the Antitrust Bureau), and Virginia (Sarah Oxenham Allen, senior assistant attorney general) participated in three separate discussions.

The most prominent theme from the panels was that increasingly, states have been driving antitrust and consumer protection cases independently from enforcement efforts by federal regulators.

For example, several states, including California and New York, brought their own challenges to the T-Mobile/Sprint merger. A key lesson, the speakers said, was that if the state and federal agencies have differing views on whether or how to challenge anti-competitive conduct, parties are likely to see increased rather than decreased enforcement. State enforcers explained that where the federal government is not adopting policies that the states believe are in the interests of their consumers, it is the obligation of the states to take the lead in enforcing the antitrust laws.

Speakers on the panels also emphasized that COVID-19 would not deter enforcement efforts, noting that state agencies are particularly watchful of price-gouging and collaborative ventures under these circumstances. With respect to the latter, ventures that may be necessary or efficient now could ultimately impede competition. The key post-pandemic inquiry will be whether pro-competitive benefits continue to be realized from such collaborations. The panel identified several other areas of focus, including pharmaceutical cases, technology cases, and the intersection of antitrust and labor laws, specifically noncompete and no-hire agreements that affect low-income workers.

Speakers noted that the more uniform legal landscape of federal antitrust law and the experience generally possessed by federal judges facilitates the consolidation of multistate actions in federal court.

With respect to working collaboratively together, one speaker noted that states are savvy to firms that attempt to play individual states off one another in the hopes of winding up with a better deal. Because of open lines of communication between the states' agencies, this is rarely a winning strategy.

In contrast to collaboration between the states on antitrust cases, the panelists noted that consumer protection enforcement efforts are more splintered: The law varies by state and disparate litigation strategies emerge, sometimes tied to the individual state's priorities or resources.

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

Part 2: Merger Enforcement Takeaways

Part 3: Consumer Protection Takeaways

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