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Global enforcement trends and priorities: An update from the 2019 ABA Spring Meeting

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Representatives from antitrust enforcement agencies around the world converged in Washington, D.C. last week to attend the American Bar Association's 67th Spring Meeting of the Section of Antitrust Law. Over 3,000 delegates attended the conference, including government officials from a number of international antitrust agencies. Represented agencies used this opportunity to communicate their enforcement priorities, as well as weigh in on key issues in merger review, antitrust litigation, and cartel enforcement. We provide key highlights below.

Merger enforcement

Close scrutiny of vertical mergers will continue

Vertical mergers remained a hot topic at this year's Spring Meeting. In the wake of the D.C. Circuit's recent affirmance of the district court's decision not to block the AT&T/Time Warner merger and the Federal Trade Commission's (FTC) votes to allow the Staples/Essendant and Fresenius/NxStage deals to go forward, officials from both agencies stated they will continue to closely scrutinize deals that present potential vertical issues. Department of Justice (DOJ) officials emphasized that the D.C. Circuit in AT&T/Time Warner acknowledged that the fundamental theory of vertical harm presented by DOJ was valid, that vertical mergers can harm competition, and that harm can also be shown by demonstrating nonprice effects (e.g., decreased product quality and reduced innovation). FTC Chairman Joe Simons likewise emphasized the willingness of the FTC to challenge deals on the basis of vertical theories where the documents, testimony, and economics work support such a challenge.

FTC and DOJ officials also discussed that they are considering efforts to revise the vertical merger guidelines, which were last revised in 1984 and are widely acknowledged to be of limited relevance today.

Officials from antitrust agencies outside the United States echoed much of what was said by DOJ and FTC officials. In particular, panelists acknowledged that while vertical theories of harm are similar in both the European Union and the United States, other jurisdictions such as China may scrutinize these issues even more closely.

Merger review timing remains a mixed bag

Another issue that was addressed was the timing of merger reviews in the United States. DOJ officials reported on the agency's progress in implementing new policies first announced by Assistant Attorney General Makan Delrahim in September 2018 to streamline merger reviews.

According to Antitrust Division Deputy Assistant Attorney General Barry Nigro, since the policy change was announced, the agency has opened 30 investigations, all of which are already closed or are on track to close within six months.

The FTC also clarified its perspective with respect to timing agreements. While noting that timing agreements are not required and that negotiations are not conditioned on the execution of a timing agreement, Bureau of Competition Director Bruce Hoffman made clear that if a party does not enter into a timing agreement, the FTC will treat the matter as though both sides are preparing for litigation.

The FTC's Technology Task Force will closely examine acquisitions of nascent competitors

FTC Chairman Joe Simons also discussed the new Technology Task Force within the FTC's Competition Bureau, initially announced in February, to target digital platforms and technology issues, including in particular the acquisition of nascent competitors. He noted that the Technology Task Force, which currently has 17 dedicated staff attorneys, will examine both consummated and unconsummated mergers.

Antitrust litigation

Technology companies are receiving increasing scrutiny

Tech issues were one of the major themes of this year's Spring Meeting.

From discussions of the indirect purchaser rule in the *Apple, Inc. v. Pepper* case before the Supreme Court to broader discussions of whether and to what extent regulators and courts should intervene in the operations of global technology companies, tech was a major focus of the panels. As many speakers noted, the outcome of *Apple v. Pepper* will affect not only technology companies but also any company that offers a platform for selling goods or services.

If the Supreme Court decides in favor of plaintiffs, platform-based businesses could face suits from multiple interrelated groups of users. Antitrust Division Principal Deputy Assistant Attorney General Andrew Finch indicated that DOJ has begun thinking about whether standards like the indirect purchaser rule should be applied mechanically, or if it makes sense to step back and look at the purpose of the rule. As many authorities conduct investigations into a wide range of tech companies' practices, from Google's shopping service to Facebook's data-gathering arrangements, the effects of changing legal standards will have far-reaching implications for everyday consumers, the economy, and other companies. Staying on top of these changes is imperative for all companies.

Companies facing a surge in state antitrust enforcement should consider early advocacy to address the policy concerns underlying investigations

Several panelists noted an increase in state antitrust litigation. States are also coordinating their enforcement efforts more than ever, with an uptick in large multistate cases. According to the state enforcers who attended the Spring Meeting, state enforcement priorities have been (1) investigations where the federal agency investigation has stalled; (2) cases that are instrumental to state policy (like the generics cases); and (3) cases of particular importance to state constituents such as data security and health care investigations. The National Association of Attorneys General (NAAG) continues to be active, starting a new task force within NAAG to review technology and antitrust related issues. State enforcers indicated a willingness to work with defense counsel who wanted to address the policy concerns underlying investigations. Defendants faced with state enforcement action should consult experienced antitrust counsel who can assist in assessing how to defend against investigations, particularly multistate coordinated efforts.

Companies should stay abreast of FTC guidance and state consumer protection laws

Consumer protection lawyers have been busy recently with both state and private enforcement on the rise. The FTC prioritized four key enforcement efforts: (1) privacy and data security; (2) actions against brands, influencers, and associated third parties that are not complying with the FTC's social media guidance; (3) deceptive pricing cases, such as where a retailer lists a higher price of an item along with a lower sales price, or where consumers allege that surcharges are hidden; (4) investigation of companies falsely offering student debt relief. It is important for companies to remain up-to-date with FTC guidance and state consumer protection laws, particularly if they collect consumer data, engage in social media advertising, or have a pricing structure that is not fully transparent to consumers.

Cartel enforcement

Throughout the Spring Meeting, antitrust and competition agencies around the world emphasized their commitment to investigating and prosecuting cartels. Several countries announced new or enhanced cartel enforcement regimes generally, while other agencies described specific improvements to their leniency regimes.

Given the globalization of cartel enforcement, companies need to ensure antitrust compliance globally

Several agencies either announced their first cartel enforcement action or said they were actively looking to bring their first case. Malaysia Competition Commission (MyCC) CEO Iskandar Ismail announced the resolution of the MyCC's first bid-rigging case and Australian Competition and Consumer Commission (ACCC) Chair Rod Sims explained that after years of ramping up, the ACCC is ready to bring cartel enforcement actions. Other jurisdictions, like Myanmar, Brunei, and Thailand, have recently passed new or updated competition laws that expand their cartel enforcement ability. Companies should review their compliance programs globally to ensure that they are in compliance with every region in which they operate or their goods are used.

Leniency remains a key component of cartel enforcement programs

Agencies around the world emphasized the continued importance of leniency programs as an enforcement tool. Multiple agencies described changes designed to enhance the effectiveness of their leniency programs or announced new or updated leniency programs altogether. For example, Japanese Fair Trade Commissioner Reiko Aoki explained that instead of providing a reduction in fines for the first five companies to come in for leniency, the Japanese Fair Trade Commission would now provide a fine reduction for all companies that self-reported cartel conduct. The Philippine Competition Commission described its newly instituted leniency program.

DOJ, however, recognized that as the number of jurisdictions with leniency programs grows, so does the cost for companies to apply for leniency. DOJ is developing a "best practices" guide for working with leniency applicants in cross-border investigation to increase the efficiency of cross-border investigation as well as to avoid duplicative fines and penalties.

The European Commission has new digital cartel-detection tools and DOJ is focused on government procurement cases

European Commissioner for Competition Margrethe Vestager announced that the European Commission is investing in digital tools to help detect cartels and has created a new whistleblower tool for agencies to alert the commission to cartel conduct. The DOJ provided two key updates. First, DOJ Deputy Assistant Attorney General for Criminal Enforcement Richard Powers emphasized that companies must timely cooperate with investigators to receive credit at

sentencing. Timely cooperation is considered cooperation that begins at the start of the investigation. To timely cooperate, companies do not have to admit guilt but rather must work with investigators to uncover key facts. Second, DOJ is prioritizing the prosecution of companies whose anticompetitive conduct harms the government.

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