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Enforcement

ABA Chair's Showcase Probes Effects Of Faltering Economy on Enforcement

Antitrust enforcers, practitioners, and academicians gathered to discuss the future of antitrust policy and enforcement in light of recent economic and political developments, and they explored whether change is needed—or likely—at the 57th Annual Antitrust Section Spring Meeting during the March 26 Chair's Showcase Program.

Section Chair James A. Wilson, Chair of the Section of Antitrust Law of the American Bar Association, and a partner in the Columbus, Ohio, office of Vorys Sater Seymour and Pease LLP, moderated the session.

Panelists included John Fingleton, Chief Executive of the UK's Office of Fair Trading; Robert Willig, professor of economics and public affairs at Princeton University; Harvey Goldschmid, the Dwight Professor of Law at Columbia University; and Roxann E. Henry, of the Washington, D.C., office of Howrey LLP.

Wilson observed that the past year has been one of "transformation" that was broader than "anyone has anticipated." Among the changes is a resurgence of Part III, Part IV litigation in the Federal Trade Commission, as well as a divergence between the U.S. antitrust agencies. "But with Christine Varney" slated to take over at DOJ, Wilson opined, "maybe there will be some convergence."

He noted that, after *linkLine*, 2009 WL 454286 (U.S. 2009), "there are questions about what is left of §2 in Supreme Court jurisprudence" and that there are "noises" about possible congressional action to "reverse *Leegin*," 551 U.S. 877 (2007).

All these changes come in the midst of economic crisis, raising the question of the effectiveness or need for antitrust, Wilson posited.

More Enforcement?

Goldschmid criticized the current level of enforcement, suggesting that, much as with mergers, "nothing was happening with §2."

In urging greater levels of enforcement in the §2 area, he pointed out that our "nation, since its beginning, has feared centralization of the economy. Section 2 was the answer." Over the past eight years, however, "there has been no enforcement" of §2 at all.

Goldschmid suggested that antitrust enforcers in the U.S. have "become overly cautious and overly worried about false positives." This is exemplified, he contended, in *Trinko*, 540 U.S. 398 (2004). In that decision, "Justice Scalia is very laudatory of the monopolist's rights" to set prices and expressed "no concerns about the price" to the consumer of monopoly behavior.

On merger enforcement, Goldschmid suggested that a major study of the competitiveness of U.S. markets would be appropriate. Right now, he contended, we don't really know how our markets work, or even if they are working. "When there is an atmosphere of wanting regulation," he suggested, that is the time "to step back and look at how the markets work."

Henry took exception to Goldschmid's assessment of merger enforcement. She offered that it is not as easy as Goldschmid suggests to get a merger through the vetting process.

She pointed out that, when looking at the facts of recent mergers that facially appear to be violative but still were approved, one can discover that the "agencies in general have done a fine job" in looking at the facts particular to a merger. Henry also suggested that, because of greater transparency at the agencies, many mergers are not ever brought. These mergers "are not counted" when looking at the enforcers' report card.

Willig urged the federal enforcers to "take back their role" of driving the judiciary. To do so, he suggested, "will bring clarity to §2." Willig opined that this Supreme Court "seems comfortable with *Brooke Group*"; why not expand on this?

EU/U.S. Divergence?

Fingleton observed that the main area of divergence between the two jurisdictions is in the area of dominance.

However, he suggested that there is "not necessarily as much disagreement on §2 and Article 82" as recent discussion would suggest.

To address this, Fingleton submitted that more cases need to be brought in order to find more areas of clarity. Fingleton also posited that perhaps it is "time to move from the language of convergence" to a convergence "with informed divergence." He pointed out that "you can't expect different countries to all have the same response" to a particular set of facts. He reminded that "false positives and false negatives work differently in different countries."

Failing Economy

In response to Wilson's question on how the faltering economy affects antitrust, Willig suggested that it might be "useful to systematize mergers and merger enforcement." He also proposed adding a new section to the Merger Guidelines. "Merger Guidelines §5.3, the failing economy defense."

Under this defense, Willig explained, a merger that but for the failing economy would not be approved is approved if it meets certain criteria. In times of "protracted economic recession," it may be "sensible to accept anticompetitive effects" of a merger to offset social harms—such as lost jobs and lost cash flow.

To meet this failing economy defense, merging firms would be required to show: (1) that the acquisition will work to avoid a systematic effect, that it will not make the problem larger; and (2) whether the anticompetitive impact is tolerable or whether the harms to competition will outlast the recession. If so, then the merging entities cannot use the "failing economy" as a defense to an attack on an anticompetitive transaction.

Willig suggested that "there should be adjustments to our analysis because of the economy."

Fingleton cautioned that the "public interest test" is "a slippery slope." He observed that, in the EU, enforcers have "come a long way to get away" from that test. However, Fingleton conceded that "we may have to revise some of our assumptions."

Fingleton observed that, where you have the government "trying to step in" to solve problems, the solutions generally "are not very well thought out." Government officials don't necessarily understand the way markets work.

Goldschmid worried that, under a failed economy defense, there is "a lot we don't know about these mergers."

Role for Antitrust?

Wilson observed that the government has given an unprecedented amount of aid to companies such as AIG (AIG), and he questioned the panel what effect, if any, this "government ownership" has on the role of antitrust.

After Goldschmid clarified that the government is not "running AIG," Willig pointed out that, when the "government essentially guarantees the next round of bailouts," CEOs are likely to "act in a not-efficient way." He urged that we "not forget the role that antitrust can play."

Fingleton pointed out that it is important that the government contemplate how it will exit from the companies it is bailing out, suggesting that "this is where this is going to get messy." He also stressed the importance of dispelling the "myth that competition caused this problem" as opposed to a lack of standards.

Goldschmid, agreeing, suggested that "the need to understand this economy is very real." Antitrust advocacy in this environment, he added, "is particularly important."

Global Enforcement

Wilson questioned the panel on the issues that "global antitrust" should be concerned about.

Fingleton stressed the need for consistent application of the law, combined with competition advocacy and continued "flexibility and mobility of competition officials to address" varying situations.

Internationally, Fingleton suggested that the International Competition Network (ICN) needs to continue its progress, and he urged continued cooperation among the various national agencies.

Both Willig and Goldschmid agreed that convergence is possible and that the current levels of cooperation should continue.

Henry, noting the "robust" efforts by the U.S. agencies against cartels, nevertheless suggested that "maybe we need to stop, take a look around, and make sure that it is as robust and successful as we think it is." She pointed out that application of the U.S.-style anti-cartel enforcement may not work in all countries, and she questioned whether the U.S. system is the best for the rest of the world.

Fingleton pointed out that anti-cartel enforcement "is one of the things the U.S. does well," and he agreed with Henry that the U.S. "needs to be cautious" when exporting its system. He reminded that "it takes a long time to establish" a strong anti-cartel enforcement system, and he cautioned against raising expectations of fledgling enforcers.

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