

Key Takeaways From the Antitrust in the Technology Sector Seminar

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On January 28, 2013, Skadden's Antitrust and Competition Group and Compass Lexecon hosted our annual seminar on Antitrust in the Technology Sector, with an emphasis on policy perspectives and insights from the enforcers. Attendees heard directly from technology insiders and enforcement officials from the United States and the European Union, including Julie Brill, commissioner of the Federal Trade Commission and Alexander Italianer, director general of the European Commission's Directorate-General for Competition. In addition to two panel discussions, the seminar included lively Q&A between the panelists and the audience.

Economic and Legal Perspectives on Monopolization and Dominance Investigations

Dr. Italianer shared insights on the European Commission's enforcement of the antitrust laws in high-tech markets. Such markets are often characterized by rapid innovation, declining production costs, access to standards, interoperability and network effects. In these types of markets, Dr. Italianer noted, it is particularly important to proceed with care and caution in order to strike a balance between preserving incentives to innovate and simultaneously safeguarding a level playing field and preserving consumer welfare. Dr. Italianer also discussed the current hot topic of how to treat standard essential patents (SEPs) with FRAND commitments and, while recognizing that injunctions can be anti-competitive, he stated that a cautious approach is recommended. He described his agency's "excellent working relationship" with U.S. antitrust authorities and concluded by reiterating that while high-tech markets are not immune from antitrust review and the EC will intervene where justified, it is committed to a cautious approach based on objective criteria for intervention.

The discussion panel on monopolization and dominance issues included Bruce Sewell, Apple's general counsel, Dr. Italianer, Richard J. Gilbert, senior consultant at Compass Lexecon and Skadden partner James Venit, and was moderated by Skadden partner Sharis Pozen. The discussion covered a wide range of topics, from the commonalities and differences between the U.S. and EC antitrust processes to how to achieve the right balance when dealing with innovative markets and IP issues.

Mr. Sewell challenged the antitrust axiom that price is a proxy for healthy competition in high-tech markets, citing the example of the disruptive innovation Apple brought to the PC business and noting that focusing too narrowly on price can produce disincentives to innovate. He also suggested that equating market share with market dominance, or conflating competition with innovation, can be dangerous in such markets, where there may be real and present challenges from paradigm-shifting technologies.

Dr. Gilbert agreed that in high-tech industries high market shares do not necessarily equal market dominance and noted that dominance is often the result of competition in these industries. At the same time, he pointed out that there is no hard evidence that creating market share is good for innovation. The panel concluded with a discussion of SEPs as an area where issues of market power, innovation and the appropriate levels of antitrust intervention are in flux.

Observations on Developing Trends and Theories in Merger Enforcement

Commissioner Brill led the audience through the issues presented to the FTC in the recent IDT/PLX merger investigation as a means of sharing her enforcement philosophy and, in particular, her views on high-tech mergers. She highlighted the importance of customer feedback, parties' ordinary course documents, and past evidence regarding entry and repositioning in a market. She shared three "lessons" for the audience: First, the FTC will market test arguments such as "technology leapfrogging" or "market inflection points" in the real world. Second, low-tech enforcement tools such as documents and customer evidence are equally useful in high-tech markets as they are in rust belt markets. Finally, in high-tech markets, while price matters, it can rank behind the impacts a merger may have on innovation competition and customer service.

In addition to Commissioner Brill, the panel included Dr. Kai-Uwe Kühn, chief economist of the European Commission's Directorate-General for Competition, Dr. Gilbert and Skadden partner Ingrid Vandenborre, and was moderated by Skadden partner Alec Chang. The panelists addressed issues such as the recent personnel changes at the FTC and DOJ, mergers and other agency activities related to IP and high-tech industries, the importance of economic analysis in merger investigations and antitrust regimes in jurisdictions beyond the U.S. and EU.

Commissioner Brill reminded the audience that IP issues are a bipartisan matter that the FTC has been focused on for some time. With respect to the debate over SEPs with FRAND obligations, both she and Mr. Italianer, earlier in the seminar, expressed the view that the role of the antitrust regulators is not to determine what are appropriate FRAND rates; however, the issue of whether injunctions are appropriate is one that is under consideration by both regulators and courts.

Dr. Kühn discussed concerns relating to high-tech mergers such as the potential for a reduction of innovation and foreclosure incentives in vertical mergers or joint ventures. He cited the recent example of the EC's investigation of the mobile payment applications joint venture, where the EC opened a Phase II investigation but ultimately cleared the transaction. Dr. Kühn described this as an example where taking longer and going deeper into the facts led to the right conclusion. Dr. Kühn also emphasized the importance of economic analysis as an integral part of merger enforcement and explained that the regulators use the best evidence at hand, whether qualitative, quantitative or both, depending on the particular case.

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Dr. Gilbert agreed that not every economic tool is appropriate for every case. He pointed out that, particularly with respect to patents, applying “normal” antitrust rules can be more difficult — for example, how does one determine what is a competitive price or perform a market share analysis for a given patent?

Ms. Vandenborre discussed the implications of antitrust review processes in other jurisdictions. Commissioner Brill spoke about the FTC’s robust efforts to reach out to jurisdictions with new competition regulations and also emphasized the benefits of close cooperation between agencies on matters where parties have agreed to the appropriate waivers.

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