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The Global Competition Landscape: A Conversation With Sharis Pozen

Skadden recently welcomed Sharis A. Pozen, former Acting Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, as a new partner in the firm's Washington, D.C. office. Sharis discusses her DOJ experiences and her view of the trends to watch in antitrust enforcement, and offers thoughts on how to engage with authorities.

1. You are best known for the challenge to the AT&T/T-Mobile merger. Can you walk through some of the highlights and significance of that matter?

While we received a lot of attention for suing to stop the merger, it was clear to the Division from the beginning that, under the Horizontal Merger Guidelines, the proposed transaction was presumptively anticompetitive. When the Division reviewed whether the potential benefits of the proposed transaction outweighed the likely competitive effects, the parties did not present us with evidence that convinced us otherwise. The DOJ also coordinated and communicated well at all levels, from the front office to the staff, with the FCC — a rapport initially established during the review of Comcast/NBC Universal. The FCC has the engineering expertise that helped analyze the parties' arguments on several crucial technological issues. In-house attorneys should be aware of this close relationship as they contemplate transactions that involve both agencies.

A common question is why did we sue when we did? It should not have been a surprise that the DOJ challenged this transaction. The Division communicated with both parties extensively throughout the process, had completed its review, possessed all of the required information, and staff had devoted extra time reviewing the alleged efficiencies. We also were very concerned that T-Mobile was being diminished as a competitor in the marketplace, given the pending merger and the media attention around it.

Another question is whether the DOJ was influenced by the promise of job growth or by the many commercials in the Washington, D.C. area focusing on this issue. We were aware of the political discussion that involved jobs but, in an antitrust analysis, job growth only is relevant to the extent it would bear on increasing competition and, in turn, innovation and growth.

2. What are the hot sectors in antitrust?

Health care, media, technology and communications, and financial services all are industries where we have seen merger and nonmerger antitrust activity; for financial services, there even has been cartel behavior. Whether it is because of consumer trends, innovation or government regulation, these industries have seen changes and will continue to be areas where the antitrust laws will be highly relevant in the near future. The intersection of intellectual property and antitrust also is likely to be active, as we have witnessed in the public statements of government officials around the world on standard essential patents and through related, ongoing litigation.

*If you have any questions regarding the matters discussed in this memorandum, please contact **Sharis A. Pozen** at 202.371.7555, sharis.pozen@skadden.com or call your regular Skadden contact.*

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3. What are the competition trends in the health care industry in particular?

Health care will remain a focus of the Division and the FTC. Both have engaged in significant enforcement activities aimed at insurers and providers. I don't see this changing in the coming years: Given the importance of health care and its effect on the U.S. economy, both agencies will likely remain vigilant in their efforts.

One area that should be interesting to watch is the formation and operation of Accountable Care Organizations (ACOs). I was part of the team at DOJ and FTC that issued guidelines on the antitrust approach to ACOs. It should be noted that the agencies left plenty of room to challenge those ACOs that the government believes will lead to harm to competition.

Another area to watch is the formation of health insurance exchanges under the Affordable Care Act. I believe the U.S. antitrust agencies also will be involved in working inter-governmentally in the formation and operations of the exchanges to ensure these entities do not somehow affect the competitive dynamics of a given geography or state.

4. You mentioned global patent litigation. What antitrust implications, if any, would these battles have?

We are seeing significant sums of money being used by technology companies and nonpracticing entities to acquire patents. The entities are using those patents to bolster their claims or defenses in demands for patent licensing or in litigation, if a licensing agreement is not reached.

When I was at the Division, we reviewed a trio of acquisitions of patent portfolios — Google/Motorola Mobility, the Rockstar Bidco/Nortel portfolio and CPTN Holdings/Novell —with an eye toward whether the acquiring entity would have the "incentive and ability" to use the patents to substantially lessen competition. While we concluded that the acquisitions themselves likely wouldn't lessen competition substantially, we cautioned that the Division would still be monitoring how the acquirers used those patents.

There also are ways to use patents to lessen competition and stifle innovation. In the patent litigations we're seeing, one of the central questions has been whether the holder of a patent that is essential to an industry standard (*e.g.,* 3G, WiFi) can enjoin the party using the patent when the parties do not come to a licensing agreement — even though the holder made a commitment to license the patent on fair, reasonable and nondiscriminatory terms. One side claims patent infringement, and the other claims anti-competitive abuse of the standard essential patent.

But this isn't the only question in this rapidly evolving area of the law. Enforcement agencies, here in the U.S. and in the EU, also are monitoring how companies use these patents. They will be looking more broadly at whether companies are using their patents to leverage their market power into a related market, bringing sham patent infringement claims to stifle competition, using market power in tying disparate patents or products together, or engaging in other predatory conduct.

5. We are seeing an increase in the number of private damage actions in the United States. What role do you believe agencies should play in promoting those? Will the increase hurt leniency programs?

As the agencies are not involved directly in these actions, they have a fine line to walk. However, private damage actions can impact their work. For example, a key issue emerging in Europe is whether private claimants can access leniency documents. The fundamental issue is whether the leniency applicant can be worse off with the private damage claimants because they chose to cooperate with the government.

The U.S. has the Antitrust Criminal Penalty Enforcement and Reform Act, which allows leniency applicants to cooperate with claimants in exchange for a limit of single (as opposed to treble) civil damages. So the incentives start to align in the U.S. for a leniency applicant to cooperate with the DOJ and claimants — and benefit from it. While agencies desire restitution for the victims of antitrust violations, the greatest detection and deterrence tool can be the leniency program. Therefore, international competition authorities should continue to be mindful of protecting the success of their leniency programs and maintaining the appropriate incentives to attract leniency applicants. In this vein, the European Commission has recently expressed its intent to propose EU-wide legislation to give leniency applicants predictability.

For clients, a coordinated global approach to both government cartel inquiries and private litigation may be the most efficient approach. Ensuring that one has a consistent strategy that includes consideration of such issues as confidentiality and privilege under the various laws and regions is critical.

6. What do you think is the best way to engage with antitrust authorities in Washington? Can you give examples of what you saw that worked and what didn't?

I think you need to find a way to engage constructively. Certainly make your affirmative case through marshalling the facts and case law. But if there are weaknesses, then it's best to admit them and explain their relevance, rather than try to deny the obvious. It also helps to be respectful of the government's process, which can take time. The government has a job to do, and things move along smoother if you help them do that job.

You also have to play it straight with the government. If you don't, it can lead to significant issues and delay in a particular case and have a lasting impact on any future matter you or your client have before the government. While at the Division, we had a situation where the parties were not cooperative in a nonreportable investigation. They met with Division staff on a Friday, once again not bringing the relevant documents and information requested, and then proceeded to close the transaction, without telling the Division, over that weekend. On Monday they told staff that the deal was closed.

The result? The Division sued on Tuesday; we believed the transaction substantially reduced competition. We eventually worked out a solution to resolve our concerns, but not without a lot of resources being expended on both sides, including for a court appearance. I would characterize that as misguided. Government attorneys have long memories and do not forget such events.

7. On the international front, what do you see as the competition challenges going forward? How do you view efforts to increase cooperation among antitrust authorities to address these challenges?

The traditions, processes and procedures for antitrust reviews vary in different countries. There are a variety of antitrust regimes based on the culture and tradition of a given country. And most mergers or nonmerger investigations occur in multiple jurisdictions, all within the same time frame. It will continue to be important to interact with the various competition authorities in play on a given matter at the right time and in the right way. This will be a particularly significant challenge with some of the emerging competition regimes, such as the BRIC countries.

The DOJ has done a lot to increase cooperation and communication with international competition authorities. Of course, this is an area where there always is more that can be accomplished. Ensuring that the International Competition Network remains viable and relevant, increasing agency involvement in the Competition Committee of the Organisation for Economic Co-operation and Development, engaging the business community to learn about their experiences with international authorities – these are conscious, ongoing efforts that are needed to foster successful international cooperation.

That said, the Division's level of coordination and communication with competition authorities internationally is tremendous and should not be underestimated by parties appearing before multiple competition authorities. The DOJ has extraordinarily close relations with a number of international antitrust authorities, as is evidenced by the references to such in many public statements and speeches by the leaders of those organizations.

In particular, of great importance was the Memorandum of Understanding (MOU) that the DOJ and FTC signed with the China's antitrust agencies while I was in the leadership of the Division. It was a challenge, given that China has three antitrust agencies, and we wanted to ensure we coordinated with all three agencies. The MOU provides for specific high-level communication among the DOJ, FTC and China's three agencies, as well as additional cooperation and communication. This effort will continue to be important as global businesses attempt mergers that fall within China's review. In addition, the MOU that was signed on September 27 among India's competition authority, DOJ and FTC is a great achievement. It also will allow regularized coordination and cooperation among these agencies. As India works through the issues it will face as it establishes its regimes, businesses will have to be mindful of its nascent processes.

Again, communication between the private sector and the U.S. government is key. As they proceed with engagements through the MOUs, businesses need to keep U.S. agencies informed of their experiences with these regimes.

8. Any predictions on what we'll likely see from the U.S. antitrust agencies in the coming year?

The DOJ has a strong team in place under Joe Wayland, my successor and now Acting Assistant Attorney General in charge of the Antitrust Division. If President Obama wins a second term, then Bill Baer, the White House nominee, hopefully will be confirmed quickly as Assistant Attorney General. I think Bill will continue on the same track. You'll have another steady, experienced hand at the DOJ.

At the FTC, the White House has named Professor Joshua Wright as its nominee to replace Commissioner J. Thomas Rosch. Many of us will watch that confirmation process with interest and, if confirmed, see Professor Wright's antirust expertise brought to the Commission. Professor Wright holds both a Ph.D. in economics and a JD. He also has written extensively on a variety of antitrust topics, including criticisms of recent enforcement efforts of the FTC and DOJ as "overly aggressive." Thus, as a FTC commissioner and economist he will likely emphasize empirical evidence and economic theory as he approaches enforcement recommendations.

If there is a new administration we likely will see some slight changes to the approach to competition issues. For example, vertical mergers may face fewer challenges, and defenses, such as likely entry or efficiencies, may be more readily accepted than they have been.

And there's no question both agencies will continue to vigorously enforce the antitrust laws.