

Key Takeaways From

Antitrust in the Spotlight: Planning and Executing a Deal During Obama's Second Term

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On May 22, 2013, Skadden presented a webinar titled: "Antitrust in the Spotlight: Planning and Executing a Deal During Obama's Second Term." The webinar, led by partners **Sharis Pozen**, **Steve Sunshine** and **Cliff Aronson** in Skadden's Antitrust Group and **Tom Greenberg** in Skadden's M&A Group, explored topics that included recent changes and enforcement trends at the U.S. antitrust enforcement agencies, current market practices relating to antitrust provisions in M&A agreements, navigating the international enforcement regimes, the role of economic experts and intellectual property issues in antitrust.

Recent Changes and Enforcement Trends at the U.S. Antitrust Agencies

Sharis began the webinar by discussing personnel changes at the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC). Sharis gave brief background on new DOJ Assistant Attorney General Bill Baer and new FTC Chairwoman Edith Ramirez, and she noted that merger enforcement continues to be a focus of both agencies.

Steve then gave an overview of recent merger enforcement by the DOJ. He discussed how the groundwork for future merger enforcement was laid during the first Obama administration. In particular, revisions to the agencies' Horizontal Merger Guidelines in 2010 and increased hiring of attorneys with significant litigation experience have increased the DOJ's willingness to litigate high-profile mergers such as AT&T/T-Mobile and H&R Block/TaxACT. Steve also pointed out that this recent history of success and enhanced litigation experience, plus an experienced antitrust practitioner like Bill Baer as the Antitrust Division's leader, will likely further the division's willingness to go to court, as evidenced by recent Baer-led merger challenges.

Cliff discussed recent merger enforcement trends at the FTC. He discussed how the FTC adopted an aggressive enforcement approach under the previous chairman, particularly in health care, that he expects to continue in the near term under Chairwoman Ramirez. However, Cliff also noted that there are several important vacancies at the FTC that must be filled, including a commissioner position and possibly the head of the Bureau of Competition, which could change the tone of the FTC's enforcement approach.

Sharis, Cliff and Steve then discussed the trend at the DOJ regarding vertical mergers. They noted that vertical mergers involve firms that do not operate in the same markets and may not result in an overlap between the assets of the merging parties. These types of mergers can raise the issue of whether the merged entity has the ability and incentive to foreclose competitors. They noted that several vertical mergers were the subject of consent agreements at the DOJ, including Comcast/NBC and Google/ITA. Sharis and Steve discussed that the common themes in this enforcement activity included ensuring that the inputs being acquired or that were part of the transaction were still available to other parties on similar terms, and that

Antitrust in the Spotlight: Planning and Executing a Deal During Obama's Second Term

although consent agreements were imposed, the transactions were cleared. Tom discussed some of the contractual issues involved when vertical antitrust issues are present.

Current Market Practices Relating to Antitrust Provisions in M&A Agreements

Tom discussed the role that antitrust considerations play in drafting and negotiating transaction agreements. He emphasized at the outset that each transaction is different and requires its own approach, taking into account the specific antitrust risks presented and the parties' relative negotiating leverage, to allocate antitrust risk between the parties using provisions such as efforts covenants, conditions, termination rights and remedies. Tom explained that parties to a transaction should focus on what they specifically are required to do, or not required to do, to close the transaction. In particular, he noted that while sellers have an interest in obtaining a strong divestiture commitment from buyers to help assure closing certainty, buyers should be cautious in agreeing to broad divestiture requirements to avoid being put in a position where they may be required to divest business lines, assets or products that could significantly reduce the value of the transaction to them. Tom also discussed the increasing use of reverse break-up fees as a way to "bridge the gap" between what a buyer is willing to commit to and the risk that those commitments are not sufficient to prevent the government from stopping a transaction from going forward. Tom also noted that the average size of such reverse break-up fees had crept up in recent years.

Cliff discussed the perception that the agencies use antitrust provisions in an agreement as a roadmap for challenging the transaction. Cliff said that while the agencies will examine the agreement, parties should not forego adequate antitrust protections out of fear of an enforcement action. Steve and Sharis both added that the roadmap concern varies from case-to-case and it is one reason why the antitrust and corporate lawyers work closely together to draft the agreement. Sharis, Steve, Cliff and Tom also added that parties must take into account the agencies' concerns with "gun-jumping" when drafting an agreement, and in particular the interim covenants governing the operation of the seller's business between signing and closing. Steve emphasized that the appearance of gun-jumping can color and side-track the agencies' review of a transaction.

Navigating the International Enforcement Regimes

Tom and Sharis discussed the importance of identifying and evaluating international antitrust filing requirements prior to signing the agreement. Tom emphasized the importance of structuring the closing conditions and termination provisions of the agreement to realistically account for global filing obligations. He further explained that in transactions subject to antitrust review in a number of jurisdictions, parties have been tailoring the agreement provisions to address varying antitrust risk and timing in specific key jurisdictions. Steve specifically noted the potential complexities of dealing with China's antitrust agency, MOFCOM, in terms of the length of the review and the different interests involved.

Antitrust in the Spotlight: Planning and Executing a Deal During Obama's Second Term

The Role of Economic Experts

Cliff explained the importance of hiring an economist in transactions that may raise antitrust concerns. He noted that economic analysis is a critical part of the agencies' evaluation of both horizontal and vertical transactions, and he pointed out that both the DOJ and FTC have economists on staff who are involved heavily in deciding whether to challenge a transaction. As a result, parties to a transaction that raises significant antitrust concerns should get an economist involved early in the process. Steve added that economists can be a very important tool when used as part of a broader argument in favor of the transaction.

Intellectual Property Issues in Antitrust

Steve noted that several recent antitrust enforcement cases have involved patents and patent pools. He highlighted that in a recent transaction involving Bosch, the company agreed to not take certain actions with respect to standard essential patents, patents incorporated into a standard within an industry, that the FTC believed would limit competition. Cliff then discussed a transaction in which Novell sold a number of patents to a consortium of competitors. The transaction was highly complex and required an extensive review by several antitrust agencies, including the DOJ and the German Cartel Office, ultimately resulting in an agreement whereby members of the consortium agreed to refrain from certain conduct or declined to receive certain patents in order to mitigate antitrust concerns. Both Steve and Cliff added that IP issues involving competitors are typically analyzed under Sections 1 or 2 of the Sherman Act in addition to Section 7 of the Clayton Act. Sharis noted that DOJ recently reviewed three significant patent portfolio merger matters and cleared them, but published a Closing Statement pointing to Standard Essential Patents (SEPs) as an issue for consideration when assessing competitive dynamics of such transfers. Steve then pointed out that both the DOJ and FTC appear to be focused on the competition policy issues surrounding SEPs and their assertion by competitors against actual or potential competitors.