Key Takeaways

Antitrust in the Technology Sector: Policy Perspectives and Insights From the Enforcers

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On January 26, 2016, Skadden's Antitrust and Competition Group and Charles River Associates hosted the sixth annual seminar "Antitrust in the Technology Sector," with an emphasis on policy perspectives and insights from government enforcers. Attendees heard directly from counsel, economists and enforcement officials from the United States and the European Union, including Commissioner Maureen Ohlhausen of the Federal Trade Commission (FTC); Cecilio Madero Villarejo, deputy director-general for antitrust at the European Commission's (EC) Competition Directorate-General; and Giulio Federico, a member of the Chief Economist Team responsible for mergers at the EC's Competition Directorate-General.

Keynote Remarks by Commissioner Ohlhausen

Commissioner Ohlhausen's remarks drew parallels between recent actions taken by the FTC and fairy tales. In "Goldilocks and the Three Tech Mergers," the commissioner recounted NXP Semiconductor's acquisition of Freescale Semiconductor as "this porridge is too hot" — a three-to-two merger in which the FTC concluded the parties were each other's closest competitors for radio frequency (RF) power amplifiers and NXP ultimately agreed to divest its RF power amplifier assets to a commission-approved buyer. Zillow's acquisition of Trulia was, on the other hand, a "this porridge is too cold" transaction, which raised interesting issues involving product market definition and the two-sided nature of certain technology markets, and which the FTC ultimately concluded was not likely to lessen competition. Finally, the commissioner dramatized as "not porridge at all" the merger of Steris and Synergy, which the FTC unsuccessfully moved to block based on a theory of potential competition. Commissioner Ohlhausen shared her view that the appropriate standard for a potential competition case is the demanding requirement of clear proof that independent entry would have occurred but for the merger. She noted that such a rigorous standard would avoid the tendency to second-guess business judgment, a shortcoming of earlier potential competition cases brought by the agencies.

Commissioner Ohlhausen also led the audience "into the Muir Woods," stating that "[w]hen the agency seeks to go off the well-defined road of antitrust law and into the uncharted woods of standalone Section 5 [enforcement], it should lay down a better path than it did in its recent policy statement." She noted that Section 5 enforcement is an area of particular interest for the technology sector given the FTC's recent focus on technology firms and highlighted the risk that failure to give clear guidance could dampen incentives by such firms to compete vigorously.

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Developing Trends and Theories in Merger Enforcement

The panel on merger enforcement included Giulio Federico, of the Chief Economist Team at the EC's Competition Directorate-General; DeAnn Work, senior vice president, senior deputy general counsel and corporate compliance officer at Broadcom; and Carl Shapiro, Transamerica professor of business strategy at the University of California, Berkeley Haas School of Business; and Skadden partner Steven Sunshine. Skadden partner Maria Raptis moderated the panel. Discussion topics ranged from enforcement levels in the U.S. and EU to strategies for clearing mergers that present antitrust issues and trends regarding remedies.

There was general consensus that enforcement levels are up moderately around the world, including in the U.S. and EU. Federico noted that 2015 saw the highest number of in-depth investigations stemming from routine reviews in the EU since 2001. At the EC, most investigations involve "bread and butter" horizontal mergers that present unilateral effects issues; intervention on the basis of coordinated effects or vertical theories of harm are becoming rarer. Federico shared his view that the EC's modes of analysis are converging with U.S. standards in areas such as unilateral "nondominant" effects and evolving toward a recognition that harm may occur even where merging parties are not each other's closest competitors.

Sunshine agreed that antitrust merger enforcement levels are at a high point but noted that there are a number of important factors to consider. For example, parties generally have robust antitrust advice even prior to engaging in transactions, and regulatory agencies have developed high levels of industry expertise. Thus, while some high-profile investigations have been lengthy, many others that would have received second requests, or closer examination, in prior years now clear the regulatory review process relatively quickly. On the other hand, the agencies are enforcement-minded, have developed their litigation talent and are willing to take cases to court.

Professor Shapiro pointed out the high degree of harmony and coordination between the U.S. agencies and the EC on horizontal mergers, although he noted that the respective models for coordinated effects is not yet as closely converged. There is somewhat more divergence on remedies, with the EC more willing than the U.S. agencies to apply regulatory remedies. In Professor Shapiro's view, the current overall levels of enforcement are "in a pretty good place."

Work described a number of strategies that companies can implement when faced with antitrust reviews by regulators around the world. She noted the importance of educating the regulators on the parties' businesses and the benefits of spending significant time upfront with key internal business leaders and antitrust counsel in order to prepare and strategize effectively. Other tips included raising potential remedies with business people early in the process and anticipating possible customer complaints about a transaction.

Keynote Remarks by Deputy Director-General Madero

Deputy Director-General Madero focused his remarks on issues technology firms doing business in Europe have encountered. He discussed the importance of establishing a single digital market in Europe and described a number of challenges to overcome in order for the European single market to work as well as it should. With respect to technology and the pace of innovation, he acknowledged that digital technology is changing the world at a remarkable speed, and it can be difficult for competition rules to keep up. However, he stressed that with respect to single market issues such as agreements preventing retailers from selling across borders, competition laws can and should be used to address these practices.

Regarding high-tech markets, the deputy director-general described the arguments typically made at each end of the spectrum: that there is no role for competition regulation in such fast-moving innovation markets, and that there are many essential technology platforms to which competitors need access. The reality, he said, is somewhere in the middle. Technology markets often present characteristics such as lock-in and switching costs and may in certain cases be prone to creating dominance and fostering the abuse of market power. He noted that established competitive and economic analysis tools are well suited to deal with such abuses of market power. Finally, Deputy Director-General Madero touched on the issues of data protection and privacy and emphasized that competition rules should not be used to fix issues that should be governed by privacy laws; however, he cautioned that the EC will not ignore genuine competition issues presented by so-called big data.

EU and US Antitrust Enforcement in the (Single) Digital Market

Participants on the second panel were Kai-Uwe Kühn, professor of economics at the University of East Anglia and deputy director of the Center for Competition Policy; Steven Tadelis, professor of economics at the Haas School of Business; and Skadden partner Simon Baxter. Skadden partner Ingrid Vandenborre moderated the panel.

Baxter began his remarks by acknowledging the challenges EC regulators face in responding to many different constituents with varying opinions. He noted that many tech companies already have received voluminous questionnaires from the EC

with respect to the Digital Single Market strategy and related inquiries. He predicted that "old" antitrust rules will be applied in new ways to new forms of commerce, which will require businesses to be nimble in a fast-moving landscape.

Professor Kühn expanded on the background to the single market initiative, describing factors such as long-standing differences among member states in their approaches to antitrust analysis and enforcement, and the recent damages directive allowing for private damages litigation. In his view, aggressive enforcement by national courts that often apply subjective standards rather than effects-based economic analysis has resulted in reduced innovation by private businesses. On the other hand, innovation — and in particular the speed of innovation — relies heavily on experimentation in order to determine what works, and this process can be hampered by overly burdensome regulatory restrictions.

Professor Tadelis addressed the related topics of technology-based platforms, intervention and innovation. While there is no single definition of a "platform," he took the audience back to the trade fairs that emerged in the 1500s — marketplaces that brought buyers and sellers together to engage in trade. He discussed a number of new technology platforms in the digital economy such as social networks, marketplace platforms and ride services and emphasized the common characteristics of fierce competition and dizzying pace of innovation. Important factors that contribute to competition and speed of innovation include easy access to capital and multihoming, a setup in which a computer or device is connected to multiple networks. Tadelis' conclusion was that a "wait and see" approach to regulation might allow some anticompetitive conduct but would be preferable to irreversibly dampening innovation.