Key Takeaways

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

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Skadden's Antitrust and Competition Group and the economics firm Charles River Associates recently hosted the eighth annual "Antitrust in the Technology Sector: Policy Perspectives and Insights From the Enforcers" seminar in Palo Alto, California. The seminar provided the opportunity to hear directly from enforcement officials, counsel and economists about current and future antitrust issues impacting the technology sector.

Seminar speakers and panelists included Bruce Hoffman, acting director of the U.S. Federal Trade Commission's (FTC) Bureau of Competition; Kris Dekeyser, director for policy and strategy at the European Commission's Directorate-General for Competition (EC); Tommaso Valletti, chief competition economist of the European Commission's Directorate-General for Competition; Kai-Uwe Kühn, senior consultant to Charles River Associates and professor of economics at University of East Anglia and deputy director of the Centre for Competition Policy; Stanford Law School professor Douglas Melamed; Pilar Garcia, deputy general counsel of Broadcom Limited; and Charles River Associates Vice President John Hayes. Skadden panelists were partners **Giorgio Motta**, **Maria Raptis**, **Steven Sunshine** and **Ingrid Vandenborre**.

Keynote Remarks: Kris Dekeyser

Mr. Dekeyser began the conference, held on January 30, 2018, by highlighting trends in EC antitrust enforcement, including enforcement actions involving U.S. corporations. Mr. Dekeyser stated that the EC applies the same antitrust principles to all companies doing business in Europe, irrespective of industry or "nationality," and that the idea that U.S. companies are of particular interest is more likely reflective of the fact that companies based in the U.S. are leading specific industries, such as technology. He summarized specific enforcement trends, beginning with mergers and explaining that 90 percent of the EC's merger enforcement actions have been based on unilateral effects on prices, the most straightforward theory of harm. With respect to less popular theories, he explained that in the past two years, four cases have been brought under a "harm to innovation" theory and two under a coordinated effects theory. With respect to nonmerger enforcement, Mr. Dekeyser stated that, over the last five years, some 56 percent of the EC's decisions sanctioned hardcore cartels while dominance cases (*e.g.*, Amazon e-books and Google's search-based practices) represented roughly 25 percent of all decisions.

Mr. Dekeyser also focused his remarks on the role of big data in antitrust. He stressed that competition law is remarkably adaptable and, at this stage, there likely is no need for new, data-specific rules. Instead, he said that enforcement agencies like the EC should

keep their ears to the ground to identify what factors must be assessed when considering a competition analysis related to technology industries and data; some factors he identified were the presence of network effects, gatekeeper effects, switching costs and multisided markets. Mr. Dekeyser also explained that merger control and competition analysis is about preserving the parameters of competition, including not only price, output, choice and innovation but also quality. Competition concerns could surface in cases where the merger likely results in the loss or degradation of the quality of data protection.

Finally, Mr. Dekeyser identified scenarios in which the EC may impose fines based on investigation-related conduct. Specifically, he cited Facebook's providing of misleading information during the WhatsApp deal that triggered EC penalties. He also referred to ongoing gun-jumping proceedings.

Keynote Remarks: Bruce Hoffman

Mr. Hoffman's keynote address focused on how enforcers should behave in innovative industries such as technology. Responding to calls for increased enforcement against technology companies, Mr. Hoffman noted that while the agencies are always alert for antitrust concerns, it's important to actually look at what the facts show. For example, the available evidence does not appear to indicate that the purported monopoly power of Facebook or Google has resulted in increased prices charged for online advertising. Mr. Hoffman used the empirical point to make a larger statement about antitrust enforcement: that competition law should not be expanded to cover wages (in and of themselves, as opposed to effects on wages from the acquisition of exercise of market power, which is a legitimate antitrust concern), speech or other areas that typically have not fallen within its purview. He also stated that legislators and regulators should not consider abandoning a consumer welfare standard when assessing competitive conduct. In this respect, he explained that decades ago, U.S. antitrust enforcement had not focused on consumer welfare, resulting in enforcement that prioritized competitors over competition and arguably caused inefficiency in the marketplace.

Yet Mr. Hoffman made clear that technology companies do not get a free pass. He explained that the goal is not to have a one-size-fits-all approach; technology companies will be evaluated based on the facts of the specific industry and case, and enforcement action will be taken where the facts warrant it. In this respect, Mr. Hoffman stressed that the FTC has always focused on nonprice elements of competition — such as quality, output and innovation — and will continue to do so in the technology industry.

However, he questioned the notion that enforcement agencies should take more aggressive action against technology companies simply because they are at the forefront of today's economy. He pointed to two transactions — Zillow and Trulia, and Amazon and Whole Foods — that involved important technology companies but after investigation were found not to raise competitive concerns. He also questioned the knee-jerk reaction to the role of big data in the technology industry, explaining that the implications of data possession in competition law and economics is quite complex and not necessarily susceptible to broad generalizations. For example, he noted that while some have contended that permitting more use of personal data automatically equates to reduced quality, this may not necessarily be the case, since different people may attach different value to the privacy of their personal information, and there can be benefits to allowing access to or use of that information. Similarly, he noted that while there has been concern that algorithms and artificial intelligence could increase coordinated interaction among firms and thereby raise prices, theory and research to date have not yet substantiated these concerns and in fact have shown in some cases that absent human intervention, machines have not been able to coordinate to achieve oligopoly outcomes. What all this suggests is that antitrust agencies need to take technology issues very seriously but also need to avoid leaping to broad conclusions in favor of carefully developing an understanding of the facts.

Hot Topics in Mergers and Monopolization

Mr. Sunshine, Professor Melamed, Professor Kühn and Ms. Garcia discussed hot topics in mergers and monopolization. Ms. Raptis moderated the discussion. The panelists discussed two main questions: (1) What are we to make of complaints of increased consolidation in many industries, and (2) what are we to make of recent enforcement-related statements by the U.S. Department of Justice (DOJ), including the idea that the current antitrust rules governing FRAND (fair, reasonable and nondiscriminatory terms) licensing for standard essential patents (SEP) must be changed?

As to the first question, the panelists discussed whether the empirical evidence demonstrates that increased consolidation has really occurred across all markets. Even assuming it has, they stressed that the true question is about the effect of the consolidation. Professor Kühn, for example, explained that a recent study found that increased levels of concentration is actually reflective of increased efficiency, as inefficient firms have been forced to shutter while firms with higher technical and operational ability have remained. Likewise, Mr. Sunshine explained that in many purportedly consolidated markets, consumers have reaped a host of benefits, pointing to the mobile handset industry and the popularity of smartphones as an example.

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With respect to the current U.S. enforcement environment, some of the panelists were skeptical of recent DOJ statements — *e.g.*, that no-poach agreements and patent transfer agreements should be treated criminally, that *Illinois Brick* should be repealed, that behavioral remedies are insufficient in vertical merger cases — but emphasized that, other than the DOJ's challenge of the Time Warner/AT&T merger, many of the other proposed policy ideas were simply statements made in speeches, not actual changes to governing law or enforcement strategy. Along those lines, Professor Melamed took specific issue with a recent speech in which the DOJ suggested that the most serious antitrust problem regarding FRAND requirement is the possibility that standard-setting organizations (SSOs) are exercising monopsony power and forcing patent holders to accept inadequate compensation for technologies claimed by their patents. He said the speech was not well-reasoned and was potentially dangerous because it could deter SSOs from strengthening FRAND requirements; innovation and economic welfare would be better served by making clear that the antitrust laws require SSOs to adopt FRAND-type rules that are effective in preventing exploitation by SEP holders of the monopoly power that standard-setting often creates.

Both Professors Kühn and Melamed also opined on big data, claiming that the competition questions over big data are not conceptually new and should be decided based on the facts of specific cases. Professor Kühn referenced Uber as an example, explaining that despite Uber's access to data, copycat companies have been able to enter the marketplace around the world. In short, he viewed the call for new data-specific rules as nothing more than a shortcut to minimize the much-needed factual investigations that should be required before bringing an enforcement action.

Mergers: Vertical, Conglomerate and Innovation Theories of Competitive Harm

Mr. Valletti, Mr. Hayes and Ms. Vandenborre discussed theories of harm in recent merger enforcement actions. Mr. Motta moderated the discussion. Much of the discussion centered around the "harm to innovation" theory. For example, Mr. Valletti explained his role in the recent Dow/DuPont merger enforcement, including in developing the EC's harm-to-innovation argument. Mr. Valletti explained that the inquiry in a harm-to-innovation case should not be solely on what overlapping pipeline products exist; instead, the focus should be on whether the two companies are generally competing to develop early research — even if that research has not yet taken the shape of specific projects. He also opined that "efficiencies" submissions on the issue of innovation should show more than simply headcount reductions or cost-savings. Mr. Hayes explained that, when assessing a potential innovation theory, any concerns should be guided by product market competition, using existing product competition as a guide if possible.

Ms. Vandenborre identified the EC's theories of harm in relation to innovation as novel when comparing the approach to the language in the EU's merger guidelines that refer to product pipelines. She explained that expanding the innovation analysis beyond specific pipeline products — and instead looking at overall research and development competition — makes it difficult to advise clients because drastic uncertainty occurs when counsel and client cannot perform a traditional pipeline overlap analysis to assess potential competitive concerns. She also raised questions about the type of evidence offered in innovation cases, pointing out that the EC appears to rely heavily on documentary evidence but has not advanced more traditional economic metrics and models to support the theory.