FTC Chair Discusses Merger Guidelines, Other Agency Efforts

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The FTC's efforts to substantially revise the Horizontal Merger Guidelines for the first time since 1992 were among the recent agency accomplishments touted by FTC Chairman Jon Leibowitz in remarks delivered last week to attendees of Georgetown Law School's Fourth Annual Global Antitrust Enforcement Symposium and Fordham Competition Law Institute's International Antitrust Law & Policy Program.

In September 2009, Chairman Leibowitz set out four major goals for the agency:

(1) ensuring a cooperative relationship between the FTC and the Department of Justice;

(2) working with the Department of Justice Antitrust Division to revise the Horizontal Merger Guidelines;

(3) changing the way the agency looks at monopolization cases; and

(4) expanding its use of Section 5 of the FTC Act to bring cases involving unfair methods of competition.

In his recent speeches in Washington, D.C. and New York City, the agency head gave himself a report card on the progress made toward those goals. While proud of the agency's accomplishments, Chairman Leibowitz said the appropriate mark on the report card was “incomplete,” since the agency “has the ongoing and never finished obligation to protect the public interest.”

The Justice Department’s support for FTC efforts to end pay-for-delay pharmaceutical settlements—one of the agency’s highest priorities—was cited as an example of the meaningful progress made toward strengthening the relationship between the two federal antitrust agencies. The agency’s recent settlement with computer chip giant Intel Corporation after eight months of litigation was highlighted as one of the FTC’s major monopolization cases.

Chairman Leibowitz also said that the Intel case was a good example of the agency’s use of its authority under Section 5 of the FTC Act to prohibit unfair methods of competition. “The unfair methods of competition provision is meant to go beyond the antitrust laws, as an additional protection for competition and consumers.”

With respect to the new Horizontal Merger Guidelines (**CCH Trade Regulation Reporter ¶13,100**), which were issued in August, Chairman Leibowitz said “we have been meticulous in revising these Guidelines to reflect the way we actually analyze cases, and to ensure that we use the best tools available to analyze the anticompetitive effects of a merger.” According to the chairman, the new guidelines “incorporate many of the insights of modern antitrust law, more sophisticated economic thinking, and global enforcement experience.” As examples, Chairman Leibowitz pointed to the detailed explanation of the economic basis of unilateral effects in the new guidelines and the agencies’ recognition that market definition, while important, is not necessarily the starting point for merger analysis.

EconomistsPerspective

The lead economists from both federal antitrust agencies were on hand at the Fordham conference to provide insights on the process of revising the Horizontal Merger Guidelines. At a September 23 Fordham panel on the topic of unilateral effects in merger analysis, FTC Bureau of Economics Director Joseph Farrell defended the guidelines against assertions that the agencies moved away from market definition in light of a series of court losses on the issue and that the new guidelines make it more difficult to counsel clients.

At a Fordham panel the next day on the topic of antitrust in the digital market, Economics Deputy Assistant Attorney General Carl Shapiro explained that the new guidelines did not signal the abandonment of market definition. He said that the Justice Department expects to define the market if a case goes to court. He explained that, as part of the revision process, the Antitrust Division went to the legal sections and asked how the 1992 guidelines were working and what changes would be helpful. The difficulty of starting merger analysis with market definition was especially apparent in the Networks and Technology Enforcement Section, which deals with online and high tech issues. While the Antitrust Division staff will eventually determine the market definition issue, it is not necessarily the starting point in practice or in the new guidelines, according to Shapiro.

The FTC chairman's remarks, as prepared for delivery on September 21 at the Georgetown Law Center, are reproduced at **CCH Trade Regulation Reporter ¶50, 259.**