# AntitrustConnect Blog

## U.S. Agency Heads Discuss Antitrust Enforcement Priorities

Jeffrey May (Wolters Kluwer) · Friday, October 4th, 2013

Two of the most significant conferences on the antitrust calendar were held last week. Georgetown Law Center featured its Seventh Annual Global Antitrust Enforcement Symposium on September 25, and Fordham Law School's 40th annual international antitrust law and policy conference took place on September 26 and 27.

FTC Chairwoman Edith Ramirez and William Baer, Assistant Attorney General at the Department of Justice Antitrust Division, delivered remarks on their latest enforcement priorities at both programs.

In case you missed these great programs, here are some brief summaries of the enforcers' presentations.

**Global Antitrust Enforcement**

Chairwoman Ramirez kicked off the Georgetown program with a discussion of the globalization of antitrust enforcement.

She talked about the challenges facing antitrust agencies as they review international mergers and investigate anticompetitive conduct. In that context, she announced the release by the FTC and Department of Justice Antitrust Division of a joint model waiver of confidentiality, along with a Frequently Asked Questions (FAQ) document to accompany the model waiver.

In her remarks, Ramirez noted that the provision of confidentiality waivers can facilitate cooperation among agencies investigating a civil matter and assist in expediting the merger review or conduct investigation. However, she noted that experience has shown that it sometimes takes lengthy negotiations to reach these agreements. Ramirez also suggested that the joint model waiver will bring greater consistency and efficiency to the FTC's waiver practice.

Ramirez noted that waivers are especially helpful where a large merger must be reviewed by dozens of agencies around the globe. Waivers are also now used in conduct investigations.

Procedural differences among antitrust authorities can be another enforcement challenge, according to Ramirez. There are times when investigations may languish at an agency or where an agency might fail to meet with stakeholders in an effort to resolve a matter, the chairwoman noted. There also is concern where foreign jurisdictions take into consideration factors beyond pure competition goals in their analysis.

Noting that international antitrust cooperation is “pervasive and productive,” Ramirez said that in the last year the agency has worked with more than 50 agencies on 26 competition investigations. The chairwoman hinted about another impending international cooperation agreement between the U.S. antitrust agencies and a foreign counterpart. However, she did not identify the other country involved in the negotiations.

**Effective Remedies at the Antitrust Division**

In his first opportunity after nine months on the job to deliver formal remarks, Bill Baer discussed the importance of achieving effective outcomes in Antitrust Division enforcement actions at the Georgetown program. In remarks, entitled “Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes,” delivered on September 25 , Baer proclaimed that remedies in antitrust actions must ensure competitive markets and deter illegal behavior going forward.

In the merger area, a remedy should effectively resolve the competitive concerns identified and protect the competitive process, according to Baer. This sometimes means that a full-stop injunction is the only right law enforcement outcome, as with AT&T, Inc.’s proposed acquisition of T-Mobile USA, Inc. in 2011. Baer said that the Antitrust Division’s decision to block the transaction was “the right call.” There was no negotiated disposition that would work, and the parties ultimately decided to abandon the AT&T/T-Mobile merger.

Recent litigation in the merger area provides other examples of the Justice Department’s willingness to litigate. However, litigation is not the preferred option, Baer said. Effective remedies can be achieved through settlement discussions. Merging parties should not wait until the 11th hour, however, to present a last, best offer in their negotiations with the Antitrust Division, Baer warned. “Early and constructive engagement with the division regarding remedies often allows the merging parties to close a transaction sooner and on terms they find palatable.”

Baer cited the proposed consent decree resolving a challenge to Anheuser-Busch InBev’s $20 billion acquisition of Grupo Modelo as an example of the Antitrust Division’s commitment to achieving effective and tailored merger remedies, and the time required to reach a procompetitive outcome. The initial fix proposed by the parties was perceived by the Justice Department as a “non-starter,” and the government filed suit. Ultimately, however, a settlement ((CCH) Trade Regulation Reporter ¶51,016) that effectively preserved competition was reached.

“The decree contains provisions that experience has taught us can be important to an effective merger remedy—including structural relief, an upfront buyer that we were able to vet fully before finalizing the settlement, a monitoring trustee, and conveyance of the intellectual property and know-how needed to ensure the buyer’s effectiveness,” said Baer.

The same principles apply for relief sought in challenges to consummated acquisitions and mergers, according to Baer. There are, of course, unique challenges where parties have already begun the integration of assets.

“We look to remedy an unlawful consummated deal in a fashion that restores a meaningful competitor and deprives the acquirer of unlawfully obtained market power,” Baer said. “An effective remedy may need to include assets beyond those previously held by the acquired firm.”

As for relief in civil non-merger cases, Baer pointed to the injunctions obtained in the recent federal/state e-books price fixing case. Baer noted that the case against Apple for conspiring with

publishers to fix e-book prices was the first civil conduct case that the Antitrust Division had tried to decision in some time. The settlements with the publishers that came before the trial against Apple brought competition back to the e-book market and benefitted consumers, in Baer's view. The final judgment ((CCH) 2013-2 Trade Cases ¶78,506), which was imposed on Apple after it was found to have violated the antitrust laws, "stamps out any lingering effects of the conspiracy, prevents Apple and others from engaging in similar conduct in the future, and ensures that Apple put in place the training and internal compliance controls needed to avoid a recurrence."

Baer noted that a key element of the injunction is the designation—over Apple's strenuous objection—of an external compliance monitor. This relief was necessary, according to the antitrust chief, because "Apple's senior executives and in-house counsel helped orchestrate the price-fixing scheme."

It was pointed out that monitors have also been imposed as remedies in criminal enforcement actions. Following the successful prosecution of AU Optronics Corporation (AUO) for its role in a conspiracy to fix the price of liquid crystal display (LCD) panels, the trial court, at the Antitrust Division's recommendation, imposed an order requiring the firm to retain an independent corporate monitor to develop and implement an effective antitrust compliance program. This condition of probation was imposed in addition a $500 million fine. The monitor was appropriate in this case, according to Baer, because "AUO's standard operating procedure was collusion."

In conclusion, Baer pledged that, during his tenure as Assistant Attorney General, "the Antitrust Division will continue to emphasize effective outcomes and be open to new ideas that remedy anticompetitive conduct and guard against any recurrence."

**Enforcement Focus on Anticompetitive Effects**

Baer reassured attendees of Fordham Law School's 40th annual international antitrust law and policy conference the following day that the Antitrust Division was focused on conduct that has anticompetitive effects. The agency was not focusing on technical violations of the antitrust laws. Whether the agreement is a *per se* violation of the antitrust laws or would be evaluated under more detailed rule of reason analysis is not the Antitrust Division's concern at the outset of the investigation, according to Baer.

Even where conduct appears to be *per se* illegal, the Antitrust Division investigates a conspiracy's impact on consumers, he said. The agency does not lose sight of the agreement's competitive effects.

The Antitrust Division assesses the competitive landscape and the nature of the conduct alleged. It considers the agreement's purpose and whether it is ancillary to a proper business purpose. Some agreements serve no purpose other than to suppress competition, Baer noted. Whether the parties to the agreement collectively have market power also is considered.

The Antitrust Division's attention to consumer harm can be observed in both litigated actions and actions resolved by consent decree. Even where the Antitrust Division reaches a settlement with participants of an alleged conspiracy to restrain trade, the agency has and will provide an explanation of the anticompetitive effects of the challenged conduct, Baer noted.

The antitrust chief also explained the Antitrust Division's decision to pursue rule of reason theories even where the conduct appears to be *per se* illegal. The rule of reason analysis informs the court

of the anticompetitive effect of the challenged conduct. It also gives the court the option of assessing the evidence in a rule of reason context in the event the court disagrees with the per se approach, he added.

**Antitrust in High-Tech Markets**

Ramirez spoke at Fordham on September 27. She told attendees that antitrust enforcement actions are appropriate responses to abusive standard setting practices. Antitrust agencies are legitimately concerned about the impact on competition of "patent hold-ups" by holders of standard essential patents (SEPs) that have committed to a standard setting organization (SSO) to license the SEPs on fair, reasonable, and non-discriminatory (FRAND) terms, she noted. The chairwoman disagrees with the view held by some, including Commissioner Joshua Wright, that the FTC should avoid getting involved in the contracting practices of SSOs.

Patent hold-ups occur when an SEP holder seeks higher royalty rates or other more favorable terms after its technology has been adopted by a standard setting organization (SSO). SSOs are reviewing their policies to address this issue. However, the FTC will continue to be vigilant in this area, and is watching for improper exercises of market power, Ramirez said. The chairwoman noted that the "public and private stakes are high."

At the Fordham program, Ramirez also announced that the FTC was kicking off its study of Patent Assertion Entities (PAEs), under its FTC Act section 6(b) authority. The agency is seeking public comments on a proposal to gather information from approximately 25 companies that are in the business of buying and asserting patents. The FTC intends to use this information to examine how PAEs—sometimes called "patent trolls"—do business and develop a better understanding of how they impact innovation and competition.

After considering the public comments, the FTC will submit a request to the Office of Management and Budget (OMB) for clearance of the FTC's proposal to issue compulsory process orders seeking information from the PAEs.

Back in June, Ramirez proposed conducting the investigation under the agency's FTC Act section 6(b) authority. At that time, the chairwoman said that the agency was "on the watch" for PAEs that attempt to induce payments from small businesses on the basis of patents in which they have no ownership interest or standing, or on the basis of an expired patent.

The FTC's request for public comments on the study was published in yesterday's *Federal Register.*