U.S. Antitrust Chief Sees Need for Convergence on Single-Firm Conduct

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The fall conference season is in full swing. Just this week, top officials from the federal antitrust agencies are speaking at Georgetown Law School's Ninth Annual Global Antitrust Enforcement Symposium, Fordham Law's 42nd Annual Conference on International Antitrust Law and Policy, and the Merger Practice Workshop sponsored by the ABA Section of Antitrust Law and George Washington University. Yesterday, addressing the Georgetown program, William Baer, Assistant Attorney General in charge of the Department of Justice Antitrust Division, called on antitrust enforcement agencies around the globe to find common ground on enforcement actions involving monopolization or single-firm conduct.

Competition authorities have made significant progress "converging toward common approaches on many substantive antitrust issues," Baer told attendees. However, progress on reaching a consensus to address allegations of anticompetitive single-firm conduct has been comparatively slow." Agencies need to continue their work determining what it means for a firm to be dominant and what exclusionary conduct rises to the level of anticompetitive conduct.

"There is broad consensus that market power—some call it dominance—should be at the heart of any unilateral conduct violation," Baer noted, adding that market shares are only one tool for assessing market power. "Market power created through competition on the merits should be rewarded, not condemned."

Baer pointed to intellectual property rights as an example. “Lawful intellectual property rights should be respected because they spur incentives for innovation and reward greater business acumen,” the official said. “Bad behavior that inflates the value of otherwise lawful intellectual property should be subject to antitrust scrutiny, for example, when a patent holder fails to honor its voluntary promise to a standards-setting organization to license a standards-essential patent on a fair, reasonable and non-discriminatory basis.”

“Aggressive, beneficial competition and anticompetitive exclusionary conduct can look very similar,” Baer warned. Enforcers need tools to distinguish between the two and to develop a shared vocabulary and better understanding of the analytical framework best suited to distinguishing between them, he added. “Some types of aggressive pricing behavior, for example, may disadvantage competitors but provide significant benefits for consumers,” Baer said. “Deterring such competition harms the competitive process and leaves consumers worse off.”

“Even if differences between our laws and traditions prevent full convergence on the treatment of single-firm conduct, we should be able to reach common ground on underlying principles and approaches,” the assistant attorney general noted. “It is important to have these discussions outside the context of particular enforcement actions.”

Collaboration among the competition authorities “on cartels, mergers and procedural fairness can help guide the way” for convergence on single-firm conduct, according to Baer. On the cartel front, he noted that, “in 2014 alone, at least 19 different jurisdictions levied criminal fines or administrative penalties against cartel conduct totaling more than $6.5 billion.” Recent coordinated efforts to review Applied Materials’ proposed merger with Tokyo Electron and General Electric’s proposed acquisition of Alstom SA also were highlighted as examples of cooperation in the merger area. Baer also pointed to “progress towards consensus on ensuring transparency, procedural fairness and even-handed application of antitrust principles.”