AntitrustConnect Blog

Many Speeches to Review as Experts and Public Debate Antitrust Policy

Steven J. Cernak (Bona Law PC) · Tuesday, September 27th, 2016

Like students going back to school, members of the antitrust community returned last week from summer vacations and started debating the finer points of antitrust policy at various conferences. As is often the case, the highlights included speeches by top antitrust enforcers. And there were plenty of speeches – multiple speeches by each of the FTC Commissioners plus remarks from the Antitrust Division head and European enforcers. So with all those tea leaves to read, which should you review? Below, I highlight the two speeches that received the most coverage here in the U.S., plus two other thoughtful ones that should not be overlooked.

As reported earlier, several commentators and even the Administration, have implicitly or explicitly blamed lackluster antitrust enforcement for sluggish economic growth, rising industry concentration, and stubborn income inequality. At a conference at Georgetown last week, both FTC Chairwoman Edith Ramirez and Acting Assistant Attorney General Renata Hesse responded to those critics.

Saying that she was showing her Southern California roots, Ramirez likened the FTC to a lifeguard at a beach, diving in only to stop "an anticompetitive merger or anticompetitive conduct [that] can distort the competitive process and harm consumer welfare." She detailed how the FTC had jumped in often during her tenure to head off antitrust violations, including challenges to 44 proposed mergers. But she also pointed to the limited role for FTC antitrust enforcement: If companies have gotten bigger or industries more concentrated – suggestions she disputed – those conditions might not have been created through actions that violated the antitrust laws and that the FTC could have prevented.

Hesse's speech later at the same event made many of the same points to critics blaming antitrust enforcement for what they see as bad market outcomes: "the ultimate concern of antitrust law has always been protecting competition." Any "big-is-bad view takes aim … at the wrong target for antitrust enforcers" even if the "big" is equated to "market power" because "markets can become concentrated for benign reasons." On the other hand, Hesse also described the "ultimate goal of antitrust" as "economic fairness" and equated such fairness to "properly functioning competitive markets." Other commentators have already taken Hesse to task for use of the term "fairness" because it has been used in the past – and is used today in other jurisdictions – to justify government intervention in the market to change outcomes deemed by some to be undesirable.

While those two speeches garnered most of the press coverage, two speeches by FTC

Commissioner Maureen Ohlhausen are also worthy of review. While on their faces, the topics of the two speeches seemed to be such technical antitrust topics as U.S./EU convergence and standard essential patents, both really were broad statements on what the proper goal of U.S. antitrust enforcement should be: Protection of the competitive process. The goal might be slightly (or more) different in other jurisdictions, even if similar terms are used, because of differing histories and context. Those differences in perspectives might explain different enforcement actions.

While Ohlhausen was not directly responding to the public critics as were Ramirez and Hesse (she has done so in an earlier speech), she certainly was implicitly when she defined the right question for U.S. antitrust enforcers to ask as "not whether negative effects are present, but whether they flow from a discrete act that injured the competitive process. Not everyone seems to agree with – or appreciate – that proposition, however."

To me, Ohlhausen's comments – and many of those made by Ramirez and Hesse – are perfectly consistent with an interpretation of U.S. antitrust law that has been around for decades. If that interpretation is or was the consensus, then it is now subject to severe criticism both from outside and, perhaps, within the antitrust community. Those of us who support Ohlhausen's views need to continue to participate in those debates.

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