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4th Annual Antitrust in the Financial Sector Hot Issues & Global Perspectives Conference: Fireside Chat: Antitrust Issue for the Financial Sector

Webinar - 09 September 2020*

Webinar organised as part of the #AntitrustInTheFinancialSector Webinars Series by Concurrences.

Panel Discussion

Moderator, Richard Taffet (Morgan, Lewis, & Bockius) introduced the panelists and began the discussion by pointing to two financial sector developments that may implicate antitrust issues: (1) the ever-increasing reliance on new technological solutions for delivery of products and services throughout the value chain; and (2) the increasing non-horizontal merger activity involving firms seeking to leverage their complementary strengths to either strengthen their position in one market or gain share another market. He identified MasterCard/Finicity and Visa/Plaid as examples of non-horizontal mergers that may raise antitrust concerns.

"WE HAVE TO TAKE INTO ACCOUNT IN ANY PARTICULAR CASE 'WHAT ARE THE FACTS WE ARE SEEING; WHAT IS A REMEDY THAT WORKS FOR THIS CASE?' "

NOAH JOSHUA PHILLIPS

Mr. Taffet turned to Commissioner Noah Phillips (Federal Trade Commission) and asked whether non-horizontal mergers including MasterCard/Fincity and Visa/Plaid impose any specific or particular analytical difficulties in analyzing competitive implication, or whether existing tools such as the Hart-Scott-Rodino filings, are sufficient to weigh potential anticompetitive effects? He also asked, whether it would make a difference if those acquisitions or transactions involve common ownership issues in the investment community other issues related to financing by private equity or other investment sources? The Commissioner replied that agencies do have tools to analyze potential competitive harm that may arise out of these transactions. He pointed to the Vertical Merger Guidelines, which makes it clear that they are not limited to vertical mergers, but also encompass diagonal transactions, or acquisitions by non-competing companies. Agencies are concerned about areas where one player in the market can harm its rivals and harm the competitive process by limiting access entirely or conditioning access in such a way that reduces competition and harms consumers.

> SEE SPEAKERS' PRESENTATIONS, VIDEO AND TRANSCRIPT ON CONCURRENCES.COM WEBSITE (CONFERENCES > 09 SEPT. 2020)

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> **“INDUSTRIAL POLICY, ALTHOUGH BEING A SOLUTION, SHOULD NOT BE IMPLEMENTED AT THE EXPENSE OF ENTRANTS ON MARKETS; THE SUPPORT TO INCUMBENTS REQUIRES TO SUPPORT POTENTIAL ENTRANTS ALSO.”**
> **SARAH ALLEN**

Assistant Attorney General Sarah Allen (National Association of Attorneys General Antitrust Task Force, Richmond, Virginia), expressed her overall satisfaction with the newly-revised Vertical Merger Guidelines and reviewed some of the comments that states made about the Guidelines, including market definition, theories and types of harm, presumptions of harm, and the safe-harbor procompetitive benefits. For market definition, the states advocated for the Guidelines to include complementary products in vertically adjacent markets in its “related products” definition, not just traditional upstream and downstream products. (which the final version now includes). This issue came up in the *UnitedHealth/DaVita* merger, where UnitedHealth, the largest Medicare Advantage provider in Colorado Springs, acquired DaVita’s two large physician groups in that area. This could have allowed the physicians to raise their rates to rival Medicare Advantage providers in the area. There, Colorado imposed a behavioral remedy and required UnitedHealth to lift its exclusive contract with another key hospital and physician provider in the area for at least three and a half years, and required DaVita to contract unchanged with Humana, which was UnitedHealth’s main Medicare Advantage competitor in the area.

Assistant Attorney General Allen also pointed out areas where the Guidelines could be improved. She thought that the document could have made it more explicit that market definition is not always useful for its own sake, but rather as a tool to identify anticompetitive effects. She observed that the final version removed the proposed four-part test for when vertical mergers may warrant investigation, but it did not sufficiently flesh out why these transactions may pose competitive harm. That states’ comments had also addressed different theories of vertical harm, such as eliminating potential or nascent competition, two-tiered entry, and bargaining leverage, but the Guidelines frame them mostly in context of raising rivals’ costs and input foreclosure. Finally, she mentioned that agencies removed the proposed safe harbor and reduced the discussion of elimination of double marginalization, but it did not address remedies. She pointed out that even though structural remedies are preferred, behavioral or conduct remedies can be especially useful in vertical cases only if they can be appropriately monitored or measured for compliance. Despite these limitations, Assistant Attorney General Allen commended the agencies for pursuing cases with vertical theories of harm and noted *AT&T/Time Warner*, and *Sabre/Farelogix* as examples of cases that had potential harm from a firm bargaining leverage.

Mr. Taffet then asked Commissioner Phillips about the role that a transaction’s source of financing plays in the competitive analysis of a merger. The Commissioner replied that in contexts where a divestiture is the proposed remedy, the source of financing is relevant in assessing whether a divestiture would maintain the level of competition that existed ex ante. Agencies would want to know that the money is there and that there is a degree of certainty that the purchaser intends to remain in business and would be capable of operating the asset at that level of competition or better. He also thought that the agencies are right to consider the source of financing in transactions.

Turning back to some of the comments regarding market definition, Mr. Taffet asked for the panelists’ views of the Supreme Court's analysis of two-sided transaction platforms in *American Express* (*Amex*) and the significance of the decision as technology advances in all sectors.

Assistant Attorney General Allen acknowledged the importance of market definition, but stressed that it is simply a means to the ultimate goal of assessing the harm of a transaction. She stated that Amex and Sabre highlight the dangers of legal formalism and place too much emphasis on market definition at the expense of the actual circumstances of each case. She observed that determining whether a market qualifies as a two-sided transaction platform raises the burden on the plaintiff to establish a prima facie case. She suggested looking back to the practical indicia factors enumerated in Brown Shoe when products are defined in zero-price digital markets, and not to rely solely on quantitative price features using the Small Significant Non-transitory Increase in Price (SSNIP) test. She mentioned high switching costs as an example of qualitative non-price characteristics and stated that any reasonably reliable and available evidence, including all evidence of consumer substitution should be taken into consideration. Additionally, the Small Significant Non-transitory Increase in Quality (SSNIQ) test, which measures consumer switch based on changes in quality, or the Small Significant Non-transitory Increase in Cost (SSNIC) test, which measures changes in cost consumers pay for a free good, are potential ways to measure non-price competitive effects.

Commissioner Phillips stressed the importance of examining the realities of the markets in any case and using the Brown Shoe factors, especially on the plaintiff's side. As for his views on Amex, the Commissioner did not read it to say that when it comes to a merger case involving a two-sided market, a firm must operate on both sides for a merger to be problematic. He also disagreed with the district court's conclusion of Sabre/Farelogix, which involved nascent competition.

"PUBLIC HEALTH AND SAFETY IS OBVIOUSLY THE NUMBER ONE THING, BUT ALSO PRIVACY. I THINK THAT EVENTUALLY THERE MAY HAVE TO BE A LEGISLATIVE CHOICE MADE ON SOME OF THESE PRIVACY ISSUES, AS TO WHICH ONE IS GOING TO COME OUT ON TOP."

SARAH ALLEN

Mr. Taffet then posed a question on ascertaining competitive effects and gave the following scenario: Company *A* is a dominant firm in an upstream market and it acquires Company *B*, a supplier of an important competitive input for firms in the upstream market, Company *A*'s competitors. How should the upstream dominant firm's control over the important competitive input be evaluated in determining potential anticompetitive effects? Should it be required to provide access to that input to upstream, competitors or its potential competitors?

Commissioner Phillips replied that regardless of whether access to data is involved, agencies would want to know whether the dominant firm will have the ability or incentive to either choke off access to the input or somehow condition access to the input in a way that harms competition, and ultimately, consumers. In terms of remedy, the Commissioner brought up *Nielsen/Arbitron* as an example where the parties were required to permit access to data as a condition for merging. He mentioned that some commentators propose compelling interoperability as a remedy, but this fails to take into account some of the incentives that drives innovation. The Commissioner also agreed with Assistant Attorney General Allen that while structural remedies are preferred, there may be times where behavioral remedies may be appropriate. For example, in *Staples/Essendant*, the FTC compelled a firewall as a remedy to prevent Staples from obtaining information of its competitors' cost of doing business.

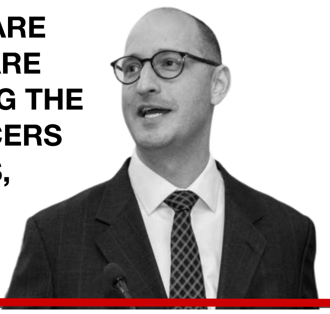
Assistant Attorney General Allen added that in a non-merger context, parties should be forced to undo exclusive contracts, which Vyera was compelled to do after it entered into exclusive arrangements with suppliers of an active pharmaceutical ingredient and foreclosed potential generic competitors. She did not go so far to say that parties should be forced to do business with companies they do not want to do business with in a merger context, but thought that in a case like Vyera, it is easier to impose such remedies.

Mr. Taffet turned to Commissioner Phillips for his views on new analytical tests, such as SSNIQ or SSNIC. Commissioner Phillips thought that that SSNIQ test makes sense analytically, but cautioned that in assessing quality degradation, we need to be careful not to be swayed by our subjective preferences and examine whether there is truly a downgrade in quality. Attorney General Allen added that the legislature may eventually have to balance some of the privacy issues with the competitive issues, and determine which one is going to come out on top. Commissioner Phillips agreed with the Assistant Attorney General and added that sometimes what we are looking at is not a competition failure, but rather some kind of market failure or a structural economic relation that we do not have in a competitive or free market. It is up to legislative judgment to balance the interests.

Mr. Taffet asked the panelists to discuss analytical tools used to assess the potential anticompetitive effects of a "killer acquisition," where a firm buys a new entrant and either allegedly steals the technology or buys the company to foreclose entry. Assistant Attorney General Allen answered that there are some indicators – such as company documents; track record of entry with new products; the acquiring company's history of acquisitions – to determine the potential competitive effects of such mergers. She noted that these kinds of acquisitions have always been around, and that the tools that the agencies employ are sufficient to assess possible competitive effects of the merger.

"WE WANT TO BE CAREFUL THAT WE ARE REALLY SEEING WHAT WE THINK WE ARE SEEING AND WE ARE NOT JUST TAKING THE PREFERENCES, LET'S SAY OF ENFORCERS OR PLAINTIFFS' LAWYERS OR JUDGES, WHATEVER, OF WHAT THEY WOULD RATHER SEE."

NOAH JOSHUA PHILLIPS



Commissioner Phillips distinguished between nascent competitors from a "killer acquisition," which is an acquisition made solely to remove competition, and pointed out that acquisitions of failing firms may be a tough issue when assessing "killer acquisitions."

Mr. Taffet asked the panelists to comment on some of the current advocacy and legislative efforts in connection with "reimagining antitrust law," in the modern digital and technology-heavy markets, referencing the work of Professor Herbert Hovenkamp and Senator Warren and Senator Klobuchar's respective proposals.

"I THINK WITH THE RAPID DEVELOPMENT OF FIN-TECH, THE FACT THAT BANKING IS INCREASINGLY MOBILE AROUND THE WORLD, THIS IS A REALLY IMPORTANT SPACE TO WATCH."
NOAH JOSHUA PHILLIPS

Commissioner Phillips stated that the key questions ought to be, "What problem are you trying to solve?" and then, "What are the solutions that best lead to resolving that problem?" He warned against coming up with simple solutions, such as banning all mergers, that do not effectively address the issues.

Finally, the panelists discussed the role that economic evidence or theory plays in court today. Assistant Attorney General Allen observed that increasingly, judges are having a difficult time determining which party's economist is right. What then becomes more important, and always has been important, is the qualitative evidence from business documents mentioned earlier. She also stated that courts are bound by their precedent and cannot easily adopt the innovative economic approaches some scholars are advocating for in the modern digital economy.

Commissioner Phillips, however, gave some hope in bringing economic theories in court. Although the FTC had a period when it continuously lost hospital merger cases, courts began ruling in favor of the agency after the Commission did a deep dive into the economics of hospitals and brought the economic evidence to court.

The panelists closed the discussion by noting the rapid developments in the fin-tech industry as an interesting and exciting time to test out antitrust theories.

Questions & Answers

One attendee asked whether transactions such as Visa/Plaid or Mastercard/Finicity are examples of "killer acquisitions." Mr. Taffet replied that he did not see either transactions to be "killer acquisitions", but observed that there potentially could be some antitrust issues with how they will use the data, how access will be impacted to the pipes for access to consumers, how the platforms will be supported or not.

Another attendee mentioned recent studies suggesting that common ownership in concentrated markets can be harmful to competition, and asked whether this has changed how the FTC or the states look at M&A Financing. Assistant Attorney General Allen replied that she does see problems with common ownership in concentrated markets and mentioned interlocking directorates. Commissioner Phillips answered that in terms of financing, if it were equity financing and the purchaser also owned a competitor, it would be an antitrust concern. However, he was uncertain about debt financing transactions where the purchaser has some sort of other equity interest. He did note the oddity with the common ownership theory because it is predicated on a notion that management takes into account the shareholder's good as opposed to the firm's good when in fact over the decades, studies in corporate law shows that management neglects shareholders.

A third attendee asked whether the panelists thought that in some cases, private equity buyers should be preferred for divestitures, as stated by the Justice Department's Guidelines on Merger Remedies. Commissioner Phillips commented that such may be the case depending on the context, but noted that he was unsure on what the exact quote is from the Guidelines. He explained that in divestitures, the FTC wants to know that the financing is actually there and at least have reason to believe that the asset is going to retain competition or perform better competitively. Mr. Taffet thought that the preference for private equities arises due to the flexibility of available financing. In his personal experience in the divestiture context, the ideal situation from a remedy standpoint is one that will allow some operating company to be able to operate the divested entity competitively, to the extent that the deal can get done.

Assistant Attorney General Allen added that enforcers would want to know that the buyer also has the expertise in that market to remain competitive. She suggested that if a company has to work that hard to find some kind of divestiture buyer to make the deal happen, then perhaps,it would be wiser to call off the deal.

"I THINK WHAT THEN BECOMES MORE IMPORTANT, AND WHICH SHOULD HAVE ALWAYS BEEN THE MOST IMPORTANT, IS CONTEMPORANEOUS BUSINESS DOCUMENTS... THAT IS THE BREAD AND BUTTER OF YOUR CASE."

Sarah Allen

Finally, an attendee asked the panelists how to address situations where a dominant upstream company's subsidiaries become a dominant in different sectors via acquisitions. Commissioner Phillips stated that it would depend on the particular facts and clarified that the U.S. antitrust law does not necessarily disfavor a firm's entry into another sector just because it is dominant in one sector. He explained that the agencies mainly assess the potential foreclosure effects and possible increase in rivals' costs as a result of the transaction. Assistant Attorney General Allen echoed the Commissioner's thoughts and likened the scenario in the question to Intuit/Credit Karma, which involves a vertical merger with a small horizontal overlap between the parties in the self-preparation tax product