Antitrust & Trade Regulation Report™

Source: Antitrust & Trade Regulation Report: All Issues > 2009 > 04/03/2009 > Special Report > Enforcement: ABA Antitrust Spring Meeting Ends With Enforcers' Views on Challenges

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Enforcement

ABA Antitrust Spring Meeting Ends With Enforcers' Views on Challenges

The officials in charge of federal, state, and European Union antitrust enforcement on March 27 looked toward the future of competition law enforcement in a struggling global economy, and they examined and assessed the role to be played by law enforcement during the final session of the 57th Spring Meeting of the American Bar Association's Section of Antitrust Law in Washington, D.C.

The section's leadership posed questions to: Acting Assistant Attorney General Scott D. Hammond, Acting Chief of the Justice Department's Antitrust Division; Federal Trade Commission Chairman Jon Liebowitz; New York Assistant Attorney General Robert L. Hubbard, who chairs the Multistate Antitrust Task Force of the National Association of Attorneys General; and European Competition Commissioner Neelie Kroes.

The questioners included: Section Chair James A. Wilson, of the Columbus, Ohio, office of Vorys Sater Seymour & Pease LLP; William C. MacLeod, of the Washington, D.C., office of Kelley Drye & Warren LLP; and Roxane C. Busey, of the Chicago, Ill., office of Baker & McKenzie LLP.

Wilson invited each enforcer to provide an update on his or her agency's activities.

FTC Forecast

Leibowitz quipped that the future of the FTC can be summed up in two elements: continuity; and change. After attendees chuckled at this mutually exclusive proposition, he promptly modified the latter element to challenge.

The continuity will take the form of building on the many accomplishments of former agency chairs. This would include about 30 enforcement actions in the past 12 months on the competition side and the first preliminary injunction won by the FTC in six years.

Another area certain to garner the agency's continued attention, he added, is health care—on both the consumer protection and competition fronts. Leibowitz mentioned that, within the health care realm, the FTC's "highest priority going forward" involves "pay for delay" agreements where potential generic manufacturers are paid by patent holders to stay out of the market. The FTC engages a two-pronged approach to these cases: litigating cases; and seeking remedial legislation.

The FTC also plans to continue its efforts in the unilateral conduct arena—involving both Sherman Act §2 and FTC Act §5. Notwithstanding the outcome in the *Rambus* case, it will continue to stay active in the standards-setting area, Leibowitz pledged.

The commission, he continued, faces a numerous challenges moving forward. Among them, the relationship between the FTC and the division. Leibowitz recalled a number of policy, "not personal, disagreements" between the agencies. He is "very optimistic that Christine Varney will be a terrific assistant attorney general" to lead the division. Leibowitz predicted that the agencies "will be much, much, more in sync," and he looks forward to "a speedy confirmation." Once that happens, there may be a collaboration on the §2 report and on horizontal merger guidelines.

Litigation also presents a challenge for the FTC based on "the hostility of some courts, not all, to antitrust enforcement." He surmised that a potential driver for this hostility may lie in "treble damage lawsuits and class actions." Leibowitz added that "those restrictions placed on private plaintiffs also affect [the FTC]."

Leibowitz asserted that the commission plans "to use all the tools that we have in our arsenal … to try and stop anticompetitive behavior." He also sought to assure antitrust practitioners that "we are never going to prejudge a matter, we are always going to go with the facts," and the doors are always open for collaboration.

Cooperation

Kroes indicated that current EU and U.S. cooperation is excellent.

As far as the current economic crisis goes, "Europe is in the same boat" as the U.S.; however, in Europe, "it is a matter of context, not outlook." The economic crisis "has brought state aid control to center stage. It is remarkable how many issues are connected to state aid control." This climate merely underscores the importance of keeping a handle on state aid.

Kroes noted that the founding fathers of the European Economic Community were aware of the significant role of competition policy and how state aid fits into that policy. Although this vision was a product of the efforts of the founding fathers, she quipped that the founding mothers were at home advising them.

The commission's job in tacking this crisis, she stated, is to ensure a "level playing field" in the financial services sector. Furthermore, the commission must overcome obstacles in restructuring. Essentially, the commission must pose the question:

"What type of competition do we want to have in the future?"

It is important to keep concerns about competition policy to a minimum; therefore, continued enforcement and intervention are critical components. The commission's scrutiny must be "just as intense" now as before the economic crisis.

States' Roles

Hubbard noted that the various state attorneys general have continued to work with DOJ and the FTC in enforcement, and he expects "these relationships to continue." He pointed out that the states and the FTC and DOJ have "done sweeps together," which are very helpful for state enforcers.

There is "lots of stuff going on" at the local level, Hubbard emphasized. While most of the enforcement action news is on the federal level, he observed, "plenty is going on at the state level."

On the consumer protection front, Hubbard pointed out that states have been doing a lot of work in the predatory lending area "for quite a long time" and have had significant successes on this front. Hubbard also stressed the work being conducted by states in fighting credit scams and debt collection abuses, which are increasing due to the poor economy.

Hubbard also touted the states' "defensive battle" in fighting off preemption. He was surprised, but pleased, that the states "prevailed" in the recent Supreme Court case finding no federal preemption in *Altria Group v. Good*, 128 S.Ct. 1119 (2008), 95 ATRR 593. Other defensive battles also have gone the states' way, and he expressed hope that this trend will continue.

DOJ's View

Hammond observed that, in his short time as acting division chief, he has not been in one clearance dispute with the FTC. He acknowledged that they do happen, and he offered a solution moving forward to address the problem: the division "will look at all §2 cases criminally" and will do the same with all mergers.

All joking aside, Hammond acknowledged that the transition of the division's leadership has been a "hot topic this week."

Hammond suggested that there would be continuity in the criminal enforcement area. "We've built on our successes of the past," and, in his opinion, the biggest developments over the past year in the division have their root in the *ADM* case. That case was the first step in a long road that has culminated in the enforcement currently being seen around the world today.

After it obtained a plea agreement in the then-record setting $100 million fine and full cooperation from ADM officials in DOJ's ongoing investigation, Hammond explained, the division "put together highlights" of the case and "took our show on the road." The division explained to enforcement and other officials in jurisdictions around the world the effects of cartels on the economy and how to fight those cartels. "We brought countries in," he noted, "because we needed to build relationships" with enforcers to improve the fight against cartels affecting the U.S.

The division "set out to develop a strong network of international enforcers," and, since then, the division has built on its own success as well as the successes of other jurisdictions, he insisted.

Hammond often considers the biggest developments in U.S. anti-cartel enforcement "often are developments in other jurisdictions." Thus, he suggested that the most significant change in U.S. anti-cartel enforcement over the past year "is that jail sentences were imposed in the UK" against the marine hose executives. The jail terms imposed in the UK, he noted, were as strong or stronger than those imposed in the U.S.

Looking forward, Hammond suggested that "it will be a competition to see" which jurisdiction will be the next to step up. He pointed out that several countries now have strong anti-cartel enforcement regimes and that several more are considering the adoption of criminal sanctions for cartel behavior.

"The DNA for all of these developments," he asserted, are found "in the policies put in place by the U.S. in the '90's."

Increasing Jurisdictions

Busey questioned whether the division's enforcement decisions are affected by the increasing number of jurisdictions that adopt criminal sanctions for cartel behavior.

Hammond explained that, if the division is "satisfied" that enforcement abroad is adequate or equal to that of the division, such a situation would be amenable. However, he noted that such an occurrence is rare because (1) "the U.S. usually is out in front" of these issues and (2) "this is a maturation process." He suggested that it "may take time for other jurisdictions" to be able to impose an adequate fine or jail term that would satisfy the division.

Hammond suggested that, "if violators are sentenced" to a term of imprisonment that is the same they would be exposed to in the U.S. or longer, then the division would have no need to intervene. Noting the marine hose case, a recent example of such an occurrence, Hammond offered that he would "like to see this happen in more jurisdictions."

Private Enforcement

When asked the status of the EU's White Paper on Private Rights of Action, Kroes responded that it was agreed upon last Wednesday.

"We are counting our blessings" because the issue triggered "wide debate." Although there was no dispute that victims of competition law infringement deserve compensation, there was a fear that the EU would implement the U.S. litigation system with a treble damage recovery mechanism.

This approach was accepted because it is not "excessive," Kroes explained diplomatically.

RPM

Busey, a former chair of the section, noted that the Supreme Court, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), recognized that there were some circumstances where resale price maintenance (RPM) did not harm consumers. She asked the panel whether any of them could "envision any situation where RPM did not harm consumers."

Hubbard suggested that there are situations where RPM is established by a company but, due to competition, the program fails and there is no harm to consumers. But, of course, he noted, there are those situations where it does harm consumers, and he suggested that "you need to look at the harm" to make a determination.

Hubbard submitted that one of the beneficial effects of *Leegin* is that 'it is nice to be actually asking this question, 'what are the harms?' " He contended that there are a lot of issues surrounding RPM that must be addressed, but he believes that "we are making progress."

Leibowitz responded that "reasonable people can disagree on this issue."

He observed that former Chairman William Kovacic is a supporter *Leegin* but that he and Commissioner Pamela Jones Harbour are not. He mentioned that workshops culminating in a report are very helpful in shaping policy. "Even after *Leegin*, it is still clear that you can bring RPM cases." Leibowitz added that, "if the legislation passes, it will be used as another tool in our arsenal; if it doesn't, we're still going to be involved."

Too Big to Fail

When asked whether antitrust law should be used to address the concept of "too big to fail," Leibowitz explained that these laws do not ask whether a merged entity is "too big to fail"; instead, antitrust law asks whether the merged firm will be able to exercise market power, raise prices for consumers, and substantially lessen competition.

In his experience, Leibowitz has "yet to see a merger that we've cleared … that in any way invoked the 'too big to fail' doctrine." He opined that this might be a legitimate issue in the banking area "where we don't have jurisdiction." Leibowitz deferred to Kroes on this issue "because she has far more jurisdiction than we have—at the moment." If merger guideline revisions are called for down the line, they will be based on discussions "with all of the stakeholders and keep our minds open."

The concept of "too big to fail" is "not a general line," according to Kroes. However, she declared that a firm is "never too big to restructure."

Fines

When asked why fines for cartel behavior are so high in the European Union, Kroes countered that "they are certainly not too high"; after all, we are talking about cartels. Perhaps, they "are not high enough."

At the end of the day, she insisted, these firms should know their conduct is against the law and that there are consequences for their actions. Kroes mentioned that lately she has noticed that the fines alone are not the only deterrent. CEOs do not want to be plastered all over the front pages of newspapers for bad behavior, and "shareholders don't want to be associated with companies that are not following the rules."

The fine calculation, she added, takes into consideration the duration of the challenged conduct, the market involved, and whether the firm is a repeat offender.

The FTC "is an agency, for the most part, without fining authority." Leibowitz opined that "if we had fining authority for consumer protection violations and maybe for antitrust violations, … we would be able to more effectively stop anticompetitive behavior [and] stop consumer harm." He noted that 47 attorneys general have fining authority and, without such power, "it is very hard to have an effective deterrent."

Effects of Economy

Turning the discussion to anti-cartel enforcement and the imposition of fines on violators, Wilson asked Hammond whether, when faced with industries in distress, the troubled economy "play[s] a role in the calculus" of fines.

Hammond explained that it does. If a fine would jeopardize the existence of a company, that is a consideration. But, he noted, "this is true no matter the economy."

He explained that the division has a "rigorous process" for determining the fine amounts to be recommended for violators, which factors in several variables including the ability to pay. However, Hammond cautioned that, when the division makes a determination of a fine, "we are not going to take a penny less." The division "will not be soft" simply because of tough times.

Hammond also added that, for companies aiming to be cost conscious, now is "not the time to be taking funds from corporate compliance."

The EU's approach, Kroes noted, is "slightly the same" as the division's approach. However, she added, the 10 percent of turnover—which has been available for decades—"is, in most cases, far from reach." In an effort to address the "financial woes" of the current climate, "we are just blaming ourselves," but the truth of the matter is that "we are all to be blamed … some are more involved than others."

Patents

A video question asked whether strategic patent assertion will continue to be a priority for enforcement by the FTC—"particularly in the post-*Rambus* legal environment."

Leibowitz began by pointing out that "we don't really like to admit at the FTC that we are in a post-*Rambus* era, but I suppose we are."

The FTC, he declared, intends "to stay very, very actively involved in this area." The examination will require additional

consultation, review of more standard setting cases, use of §5 to pursue "problematic anticompetitive standard setting," as well as workshops on patent matters. All these factors, he stated, will provide guidance for future actions.

Reverse Payments

Wilson asked Leibowitz and Hubbard to comment on reverse payments—in light of the fact that the FTC "has not done well in the courts"—and he queried whether legislation is an alternative pursuit.

After acknowledging the FTC's reverse payment track record in the court, Leibowitz added that the agency is "moving forward in this area for a variety of reasons." He noted that Varney's testimony before the Senate Judiciary Committee during her confirmation hearing in early March reflects that she is "clearly supportive of the FTC's position in this area."

Leibowitz also mentioned that, despite judicial hostility, President Obama supports ending these pay to play deals that hurt consumers by preventing them from getting generic drugs in a timely manner. He added that the legislative avenue is another "cleaner, better" approach and that the FTC is firmly behind this effort. Regardless of whether the issue is addressed through the courts or through legislation, "these deals are anticompetitive," and legislation should ban them.

Hubbard stated that NAAG supports the FTC's efforts to curb "pay for delay" and that NAAG has offered its support to President Obama's position that such payments are violative of antitrust law. "Pay for delay" is pretty clearly offensive.

Hubbard wondered whether the "restraint in *Cardizem* has failed," and he remarked that "so much money is sloshing around" this area that perhaps the patent system needs to be fixed.

EU Inquiries

When asked about the future of sector inquiries in the EU, Kroes remarked that she is "delighted to have this instrument" because it is "great to find out if a market is functioning well" in one Member State or over the whole single market.

These inquires, she stressed, are focused on national markets and enable the commission to discover where enforcement is needed.

ISSN 1523-2824