ANTITRUST IN THE FINANCIAL SECTOR: HOT ISSUES & GLOBAL PERSPECTIVES

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Press Reports

Reports by Global Competition Review

Hot hot hot topics: The Tipline for 3 May 2018

The mid-Atlantic region of the US seems to have gone directly from early spring to mid-summer, as temperatures jumped from near-freezing lows last weekend to an expected high in the 90s today. We have a story on Bruce Hoffman's latest remarks on the "hot topics" of common ownership and data, plus one senator's letter-writing campaign on mergers, and a judge's scolding of lawyers in one of the biggest class actions in the US.

The Headlines

The acting director of the Federal Trade Commission's bureau of competition is a former debater, and he dusted off the skill of speed speaking at the Concurrences conference yesterday. With an eye toward letting the audience get out into the temperate New York night, Bruce Hoffman raced through two of the more hotly debated topics in antitrust today: the effect investors' common ownership of companies in the same sector has on how much those companies compete; and data as an asset of competitive concern in mergers and monopolisation. Although he spoke in his

personal capacity, Hoffman indicated scepticism within the US antitrust agencies about either of these as a theory of harm.

News & Notes

Also speaking in New York last night, Andrew Finch discussed a subject he said is "close to my heart": the application of antitrust law to the financial sector. Back in 2005 when he was in private practice, Finch said, he'd made a business development suggestion of offering antitrust compliance training to banks, but had been told that banks didn't really have antitrust problems.

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Of course, Finch touted the benefits of compliance, noting that two banks have had fines reduced in light of changes to their compliance programmes. As for credit for programmes that existed at the time a violation occurred, he said, the DOJ has long taken the view that the involvement of employees in illegal conduct creates a rebuttable presumption that the company lacked an effective antitrust programme. But Finch also noted the Antitrust Division's recent roundtable on compliance, and said the agency is "in the process of assessing" that feedback about how best to recognise corporate compliance efforts, including whether and how existing programmes might merit credit. This process is still in an early stage, he emphasised.

To read the full report, visit GCR's website
https://globalcompetitionreview.com/article/usa/1168935/hot-hot-hot-topics-the-tipline-for-3-may-2018

FTC sceptical of common ownership and data theories, says Hoffman

By Pallavi Guniganti

Neither investors with small holdings in multiple competing companies nor most conduct or merger scenarios that involve data present clear antitrust concerns to the Federal Trade Commission, the acting director of its bureau of competition has said.

Speaking in his personal capacity last night at a conference in New York, Bruce Hoffman addressed the "hot topics" of common ownership and data.

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He noted that the FTC and the Department of Justice's antitrust division submitted a paper to the Organisation for Economic Cooperation and Development last December on behalf of the US, which highlighted those uncertainties.

The paper distinguished common ownership from cross-ownership, which it defined as a company holding an interest in a competitor. Common ownership of multiple competing companies in a sector by one investor often occurs at institutional investors, particularly index funds that claim to balance investment among all the companies traded on a given stock exchange.

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Data

Data is another "area of great uncertainty", Hoffman said. He has previously cast doubt on theories – relied on in both the conduct and merger review contexts – that consumers pay with their data for services in a way that makes data equivalent to money.

"We don't really know how valuable or predictive that data is in any given circumstance," he said, as it is used mainly for correlations, and without causality there is no predictive power.

One key question for antitrust is whether companies compete with each other using the data, he said. If so, is the data "really a key differentiator" that competitors can't replace? "If not, then the data itself is not the driving competitive issue," Hoffman said.

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He described the Supreme Court as being unsure about whether essential facilities doctrine exists. He also said that the high court's Trinko ruling has limited the Aspen Skiing precedent to situations where the defendant had a pre-existing course of conduct where it made its assets accessible to a rival.

This view of dominant companies' duties may not be true elsewhere, as indicated by the European Court of Justice's ruling in Intel, Hoffman said. "But in the United States, there are significant limitations on how we would think about dealing with a single firm getting more data, and from that data becoming more competitive."

Hoffman was the closing speaker at a conference sponsored by Concurrences and held at Fordham law school in New York.

To read the full report, visit GCR's website
https://globalcompetitionreview.com/article/usa/1168931/ftc-sceptical-of-common-ownership-and-data-theories-says-hoffman

Report by Bloomberg Law

Justice Dept. Mulls Credit to Price Fixers With Compliance Plans

By Eleanor Tyler

The Justice Department is considering whether it may be time to trim fines or other punishments for cartel participants if those companies had internal anti-price fixing compliance plans during the time of the violation.

Regulators want to improve voluntary antitrust compliance in U.S. companies to prevent violations, but the DOJ to date has never given credit for existing compliance programs in cartel cases. Antitrust lawyers have long argued that because there is no chance to receive leniency for internal compliance plans, top-notch compliance often eludes companies until after they have a violation.

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But Principal Deputy Assistant Attorney General Andrew C. Finch told antitrust lawyers May 2 that the agency is reconsidering its long-standing position barring credit for compliance programs that were in place when a cartel violation is discovered.

"Whether and under what circumstances" to allow a reduction in fine or otherwise credit an existing program is under review, he told a Concurrences Review conference on antitrust issues in the financial sector at Fordham University Law School.

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The DOJ, on rare occasions, has given companies credit for a systematic overhaul of compliance programs after they were caught in a cartel prosecution. But even that policy is relatively new, and only a few companies have managed to meet the high standard for penalty reductions.

The first company to get credit for a complete turnaround following a cartel violation was Barclays PLC in 2015 in connection with the foreign exchange cartel investigation. The DOJ asked the Connecticut federal court in 2016 to reduce Barclays' fine based on its wholehearted embrace of compliance after its participation in the forex cartel came to light. The court followed the DOJ's recommendation in 2017 and imposed a reduced fine.

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To read the full report, visit Bloomberg Law's website
https://www.bna.com/justice-dept-mulls-n57982092630/