



Spring Meeting Recap: High Tech Enforcement Update

*Author: Wyatt Carlock*¹

Panel Overview

The Spring Meeting featured a panel exploring the several high-profile lawsuits against tech companies brought by state and federal enforcers alleging anticompetitive conduct in various product markets. Panelists discussed the challenges of coordination and the policy considerations relating to the enforcement actions. The panel was moderated by Shelley J. Webb, Vice President, Legal, Intel Corporation. The speakers at the panel were Paula Blizzard, Supervising Deputy Attorney General, Antitrust Section, Office of the Attorney General, California; Frederic Jenny, Chairman, OECD Competition Committee; James Lloyd, Antitrust Chief, Office of the Attorney General, Texas; John Newman, Deputy Director, Bureau of Competition, Federal Trade Commission.

Why the Public is Focused on High Tech

The panel opened with a discussion on why there has been such keen interest by enforcers, regulators, and the public on recent high-tech cases. Ms. Blizzard started the discussion by first defining the “Big Tech” companies as Google, Apple, Meta, Microsoft, Amazon (“GAMMA”). She theorized that the main driver for why those companies have sparked so much regulatory interest is because of the power that those companies have in our lives. She went on to explain that huge portions of the world are concerned with GAMMA because when those services go down, people realize that they cannot live without them. Ms. Blizzard wrapped up by describing how big tech companies have touched all facets of our lives, and people are slowly realizing that those companies may need to be reined in.

Mr. Newman expressed that while the GAMMA companies were the first companies to jump to mind, it can be easy to forget that antitrust laws have an important role to play across all categories of technology. He referenced the recent *Surescripts* case and explained how all digital technology cases can help teach us about various harms felt throughout the market. Mr. Newman explained that enforcement actions against high tech companies have shown the public that the agencies will go after companies that cause consumer harm, that enforcers are not afraid to challenge non-horizontal mergers, that enforcers recognize that non-horizontal mergers can cause harm in a variety of ways, and that enforcers will consider mergers holistically.

Mr. Jenny then discussed the high-tech cases from the European perspective. He began by recognizing that there has

been a particular focus in Europe on dominance. He attributed the enforcer’s focus to the low standard of proof for the Commission to establish dominance and foreclosure. He pointed out though that while, as of now, the Commission need only show a possibility of foreclosure, the recent *Intel* case may indicate that the Commission is moving towards adopting more of an effects-based standard.

Deep Dive on Big Tech Matters

The panel then moved towards each panelist taking turns discussing recent enforcement actions against Google, Apple, Meta, and Amazon.

Google

Mr. Lloyd started the discussion by talking about several cases brought against Google. First, he addressed the DOJ/multistate case brought against Google as a search engine. He described how the DOJ and a multistate group purposefully brought a narrow case that was focused on the Google’s monopolization of internet search and search advertising by acquiring default status on search access points. He also discussed a related suit brought by another multistate group that expanded claims to include vertical search markets. Mr. Lloyd also referenced two other multistate lawsuits—one of which alleged that Google used monopoly power to control in-app purchases on Android devices and other alleged it used monopoly power to control internet display advertising.

Meta

Mr. Newman tackled the number of actions that are currently pending against Meta around the world. He explained how there were two broad categories of cases brought against Meta. The first category he discussed were the data and privacy related cases brought in European and US courts. He specifically highlighted the US District Court decision in January that held that a consumer class adequately alleged that Meta made false representations about data collection practices. The second category he addressed were the European and US cases related to mergers and acquisitions. There, he talked about the UK’s order for Meta to divest GIPHY, which is set for a hearing later this month. He also addressed the simultaneous lawsuits filed by the FTC and New York alleging that Meta’s acquisitions of Instagram and WhatsApp were anticompetitive.

Apple

Mr. Jenny discussed the European cases brought against Apple. During this section of the panel Mr. Jenny focused on the complaint brought by Spotify in European courts addressing anti-steering provisions. In particular, Mr. Jenny talked about the challenges facing the European court in defining the appropriate market and also the challenges that

¹ Wyatt Carlock is an antitrust associate in the Washington, D.C. office of Baker Botts L.L.P.

Apple faces because, under the European standard, Spotify does not have to prove actual exclusion from Apple's actions.

Amazon

Ms. Blizzard discussed how California's unfair competition law is changing the landscape of state antitrust enforcement. To make her point, she highlighted a recent California court decision that held that a party does not have to show that a company violated antitrust laws to hold that company liable under Californian competition law. Instead, the court held that a company can be held liable so long as the court can find that the company violated the spirit of antitrust law. Ms. Blizzard used that California decision as a springboard to discuss two recent Amazon cases. First, she discussed a case brought in Washington that survived a motion to dismiss. Second, she discussed a case brought in the District of Columbia under state law. She ended her discussion by emphasizing that bringing cases under state law is the future of antitrust enforcement.

Coordination Among Enforcers

Using Ms. Blizzard's point about state law as a segue, the panel then discussed the recent coordination amongst antitrust enforcers when bringing these actions. Mr. Lloyd opened by discussing the remarkable degree of cooperation between enforcers. But in some ways, he said, it is a necessary reality because enforcers have to work alongside partners to help untangle the mess of antitrust matters. Even with the unsurprising political backdrop that has taken hold in antitrust, he emphasized that it is important that enforcers continue to work together to bring cases that comport with antitrust law.

Mr. Jenny and Mr. Newman also jumped in to discuss coordination efforts. Mr. Jenny started by discussing how European enforcers are not doing a good job coordinating enforcement. He questioned whether enforcement is going to be consistent across European countries. Mr. Lloyd contrasted Mr. Jenny's point by discussing the benefit of coordination in the US. He also applauded the targeted, measured approach that has resulted from the coordinated litigation. He advocated for continuing to use this targeted litigation approach as opposed to turning towards the sledgehammer of legislation.

Differences Between Litigation and Legislation

Mr. Lloyd's comment about litigation vs. legislation sparked a debate on the panel. Ms. Blizzard took the pro-regulation position and said that people who fear regulation are misreading history. She pointed out that any time there is innovation, regulation is quick to follow. To conclude her opening remarks, she discussed how the ability of regulation to rapidly implement change is preferable to the slow-moving changes that litigation brings about.

Mr. Lloyd responded that he agrees that there will absolutely be regulation in the high-tech industry. The real questions, in his mind, are what is the right level of regulation and how are people going to decide where regulations ultimately end up? Ms. Blizzard agreed with Mr. Lloyd's point but cautioned that people should not be afraid of regulations. To support her point, she pointed out that California has some of the strictest privacy laws in the U.S., and those regulations have not destroyed the Californian economy. She went on to argue that, in the context of the big tech companies, she is not worried about how those big companies will deal with regulations. Rather, she is concerned with any regulations that may impact startups who do not have the funds to figure out how to comply with new regulations.

Is the Consumer Welfare Standard Working for High-Tech?

For the final topic, Mr. Newman started off by pushing back on the premise of the question "is the Consumer Welfare Standard working for high tech?" Mr. Newman pointed out that there is no concrete definition of the consumer welfare standard, and that the standard can have completely different meanings depending on the person. To make his point, he asked if "consumers" meant final consumers or intermediate consumers? Ultimately, Mr. Newman concluded that no matter how enforcers use antitrust law, the enforcers cannot lose sight of the congressionally mandated starting point of competition.

Ms. Blizzard joined this conversation by agreeing with Mr. Newman that the consumer welfare standard is not a one size fit all approach. In addition, Ms. Blizzard reminded the audience that there are multiple antitrust laws on the books and enforcers do not need to rely solely on the Sherman Act.

Mr. Jenny agreed with Ms. Blizzard's and Mr. Newman's points. He added that the consumer welfare standard does not seem anchored to a particular economic principle. Mr. Jenny wrapped up his remarks by pointing out that regulations will have to evolve to understand how competition in high-tech is different from past industries.

Conclusion

The big technology companies have come under increasing antitrust scrutiny around the world. The panelists disagreed on the best approach to address the ever-evolving technology industry, but all agreed that antitrust laws need to adapt to address the challenging antitrust issues high-tech companies present. There was a spirited debate as to whether that adaption should be through coordinated litigation, state led enforcement, or regulation, but the panelists were unanimous in agreeing that the high-tech industry is ripe for antitrust enforcement.