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News

ANTITRUST NEWS: FTC Commissioner Ohlhausen Discusses International Cooperation, Warns That Agencies Are Watching

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FTC Commissioner Maureen K. Ohlhausen kicked off Northwestern University Law School's Fourth Annual Chicago Forum on International Antitrust Issues this morning with an update on developments in international antitrust cooperation and convergence. Ohlhausen, who before becoming a commissioner was one of the original planners of the Northwestern program, told the audience that interagency cooperation is critical to improving antitrust analysis and avoiding inconsistent outcomes that could harm innovation and economic development.

In her [remarks](#), Ohlhausen identified seven principles to foster cooperation: (1) agency transparency and accountability, (2) mindfulness of other jurisdictions' interests, (3) broader and deeper engagement by agencies across jurisdictions, (4) dialogue on all aspects of international competition and enforcement, (5) respect for different legal, cultural, and political paradigms, (6) trust in different agencies' actions, and (7) greater convergence of competition regimes. With respect to the first principle, Ohlhausen said that one of her chief goals as a commissioner is to advocate for transparency at the FTC and competition agencies around the world.

Ohlhausen explained that cooperation among jurisdictions on antitrust matters will not always lead to identical results across jurisdictions. She pointed to the review by 11 competition authorities in 2011 and 2012 of hard disk drive acquisitions by two U.S.-based buyers, Western Digital and Seagate Technology. In this matter, the Chinese imposed an additional behavioral remedy while the FTC and European Commission (EC) imposed a structural remedy, requiring the sale of certain disk drive manufacturing operations. "[M]ore diligent work on the seven principles" might lead to more consistent outcomes in the future, it was suggested.

Universal Music's 2012 acquisition of EMI was identified as a good recent example of cooperation between the FTC and EC. In that case, although the FTC closed its investigation without seeking a remedy, the EC sought a partial divestiture. However, the EC remedy was reasonable because it addressed different market conditions in the music business in Europe.

Ohlhausen also discussed five characteristics of a “model” competition regime. These regimes (1) focus on competition-based factors as opposed to non-competition factors, such as industrial policy, national security, and employment; (2) focus on consumer welfare; (3) abide by commonly-accepted timing requirements, merger reporting thresholds, and other best practices in merger notification and review; (4) are transparent with parties in terms of agency analysis and process and with the public in terms of disseminating data about its enforcement decisions; and (5) aspire to international cooperation.

A number of multilateral and bilateral cooperative efforts also were highlighted. The commissioner said that these efforts were “bearing fruit.”

Ohlhausen talked about the FTC's work with the International Competition Network (ICN) on formulating best practices for the world's competition agencies. It was noted that several competition authorities have modified their practices to conform to these ICN guidelines.

Other multilateral efforts include the FTC's participation in the OECD Competition Committee's dialogue on “agency infrastructure” and the agency's decision to join the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules System—a self-regulatory initiative in which businesses can adopt an enforceable code of conduct designed to protect consumer data moving between the U.S. and other APEC members.

On the topic of bilateral engagement, Ohlhausen said that the working relationship between U.S. and India competition authorities is “off to a good start and heading in the right direction.” Last September, the Department of Justice and FTC entered into a Memoranda of Understanding with the Competition Commission of India and its parent agency, the Ministry of Corporate Affairs.

“In terms of case cooperation, in the last year the FTC had over 50 substantive case-related contacts with foreign counterparts, including cooperation on over 23 merger matters and 3 conduct investigations,” Ohlhausen said.

In addition to case cooperation, the FTC has offered significant technical assistance to a number of foreign competition authorities, it was noted.

In closing, Ohlhausen cautioned that the world's leading competition authorities need to be mindful that new competition regimes could possibly misinterpret their enforcement actions. They must consider the “new competition regimes out there and of the different cultures those agencies represent.”

As an example, Ohlhausen pointed to the FTC's recent action against Google for seeking injunctive relief against willing licensees that allegedly infringed its standard essential patents (SEPs). In that matter, the FTC ordered Google to cease and desist from seeking injunctive relief and provided a procedure for it to follow in licensing its SEPs. Ohlhausen dissented from the decision.

After the FTC announced the matter, Ohlhausen was at a conference in China at which a presenter drew some conclusions from the case. Ohlhausen was troubled by the presenter's reasoning that the FTC's Google SEPs decision meant an "unreasonable" refusal to grant a license for a SEP to a competitor should constitute monopolization under the essential facilities doctrine and that the conduct should be remedied under compulsory licensing.

"[W]e must remember that we are living in a world in which every action by the FTC, the DOJ, [the European Commission's Directorate General for Competition] and other more experienced agencies is watched by more than 120 counterparts around the planet, many of which are just starting to find their way as enforcers," Ohlhausen advised.

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