73rd Antitrust Law SPRING MEETING

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AMERICAN BAR ASSOCIATION
Antitrust Law Section

Counseling on Unilateral Conduct

(it's really hard)

Jonathan Jacobson

US standards - always vague, always changing

- ✓ Little law until the highly interventionist *Alcoa* in 1945
- ✓ *Telex* (1975) slowed the condemnation process
- ✓ *Brunswick* (1977) clarified that antitrust law protects competition, not individual competitors
- ✓ *Berkey* (1979) overruled *Alcoa*, but still said that monopolists "are tolerated, not cherished"
- ✓ *Trinko* (2004) overruled even that, saying that monopolies can "produce innovation and economic growth"
- ✓ Yet for the past 5 years, we've seen the agencies (but not the courts) return to the 60s
  - ***So how to counsel?***

Enter the EU and other nations

- ✓ The EC, followed quickly by many other nations, began ramping up dominance enforcement at the turn of the millennium, particularly against US tech companies
- ✓Europe now has a Digital Markets Act, which imposes extraordinary prohibitions and requirements on designated "gatekeepers," almost all of which are US tech companies
- ✓ The DMA makes counseling a bit easier as the prohibitions and requirements are spelled out, but there is still the very hard task of analyzing when the prohibitions and requirements actually apply
- ✓ The disconnect between US courts and US and international enforcers makes counseling multinationals extremely difficult

Conflicting rulings

- ✓ US courts ruled that Coca-Cola's free provision of coolers to convenience stores did not require space be allocated to Pepsi despite Coke's 75-80% share in the regional market
  - ➢The EC required Coke to allocate 20%
- ✓ The US FTC upheld Google's shopping search rankings in part because users preferred seeing vendor sites (offering products for sale) to "comparison shopping" sites, which force an extra step in the online purchasing process
  - ➢The EC fined Google € 2.4 billion for the same conduct

Self-Preferencing

- ✓ These conflicts arise in part because of different views of so-called "self-preferencing"
- ✓ In Europe and some other places, "gatekeepers" and other arguably "dominant" firms are being told not to prefer their own stuff on their own platforms
  - ➢ Preferring your own stuff on your own platform is called competition
  - ➢ Pulling your punches to benefit rivals is the opposite of competition
- ✓ There are no standards for this rule and, even if there were, this is telling firms to act *irrationally*
  - ➢ And yet acting contrary to one's own economic interests is often cited as grounds for finding a conspiracy!

So what to do?

- First, **determine whether the client is or plausibly could be alleged to be dominant**. Assume tiny markets. In the U.S., dominance begins at least with a 30-50 percent share in an attempt case, and roughly 70 percent or higher for actual monopolization. In the EU and many other countries, 40 percent is considered dominant. If the client has been designated as a gatekeeper, dominance is conclusively presumed.
- Find out how risk averse the client is. **Advice must be geared to the client's risk tolerance**.
- If the client is international, **can the proposed action be taken differently in different areas of the world** to reduce risk?
- **Identify more conservative or different approaches that can result in less harm to rivals while not destroying the business goal.** In the US, the courts may be more permissive. But generally erring on the side of conservatism – and, sadly, competing less aggressively – is the safer course these days given the approach taken by enforcers around the world.
- **The goal is always to get to "yes."**