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Dr. StrangeGov or: Antitrust Enforcers Should Stop Worrying and Learn to Love Big Business

Minding Your Business on **April 3, 2023**

As this year's roundtable of enforcers demonstrated, big business is probably antitrust enforcers' greatest fear. Spring in Washington means Cherry blossoms and antitrust. And last week, 3,700 antitrust lawyers and government officials from around the globe descended on Washington to visit the Cherry blossoms and discuss how they need more government intervention to make the economy work for everybody and need to bring ever more "plausible" cases in order to nudge and push the courts along.

The good news though is that many of these same enforcers recognize that courts are not ready or willing to accept a more aggressive antitrust enforcement regime; that courts are largely standing in the way of any immediate and major changes to antitrust doctrine and law; and that courts and not enforcers have the final say.

Some specifics:

Doctrinal changes: According to current leadership, today's more complex and concentrated economy requires more antitrust enforcement resources and a shift away from the "narrow" application of the antitrust laws and "unduly high" burdens of proof that characterized the most recent generation of "Chicago School" antitrust enforcement. Today's antitrust leadership sees the Chicago School doctrine as a "radical departure" from historical antitrust enforcement. Today's antitrust leadership sees an expanded prosecutors' toolkit and *criminal prosecution* to be fit where it has never been; and in "righteous cases" based on labor market claims and monopolization claims. And while losses mount, the agencies see " wins" in an Orwellian read of "favorable" elements of those decisions and tout a pipeline of more such prosecutions to come. Today's antitrust leadership sees merger remedies as the exception rather than the rule, and would rather see deals stopped than fixed. Today's antitrust leadership sees merger due diligence as potential gun jumping claims under the HSR Act. Today's antitrust leadership sees ESG best practices as potential antitrust violations. And following the historic "whole of Government" antitrust Executive Order, today's antitrust leadership have allies across the federal government at the Department of Transportation, the Surface Transportation Board, and Federal Communications Commission, The Federal Maritime Commission, and others.

No clear road for safe information exchanges: With the Antitrust Division's withdrawal of a series of guidelines largely addressing practices in the healthcare industry but which served as an important template for in-bounds information exchanges more generally, parties across all industries are left exposed to potential enforcement actions for practices that have become standard. Citing worries about how aggregated data can potentially be disaggregated with today's AI tools, agency officials are unwilling to offer any bright lines. In response, more detailed and analyses of such exchanges will be necessary to account for and assess what data is being exchanged, how it is being used, and what the potential impact is.

RPA is back with a bite: Robinson Patman Act enforcement, ignored for too long according to the agencies, is undergoing a resurgence. The agencies have promised "Returning to Fairness" and potentially activating criminal enforcement authority provided by the RPA. Session panelist and one of the chief RPA enforcement proponents, FTC Commissioner Alvaro Bedoya said that the Act is essential to protect not only small business, but consumers from what the agency has called "unfair practices", "secret discounts", and "secret rebates" available only to the large and powerful. Viewed largely as an antitrust oddity or misfit designed in the depression era to protect inefficient small businesses, RPA enforcement slowed to a trickle decades ago, and then stopped completely following the last agency case brought in 2000. And while private claims are available under the Act and have been brought more recently, most have failed given the numerous defenses available – a record the agency may find hard to best.

Algorithmic pricing is in the crosshairs: Yesterday's price check is today's algorithmic pricing bot. Enforcers are on a hiring spree to bring on technology specialists, data scientists, and professionals at all levels to create cartel detection mechanisms and analyze how pricing is done in a world where AI tools can be set to run with little or no human oversight or involvement. The message and guidance from the agencies is that companies and their employees are ultimately responsible for the activity of such tools and that a "set it and forget it" strategy can be a recipe for antitrust exposure. Just as businesses are charged with continuously monitoring and enforcing antitrust compliance for their employees, the same level of monitoring and diligence is required for price setting tools, especially pricing solutions touted by developers with claims they can help "avoid price wars."

Private equity, once the darling-child of antitrust enforcers, is now persona non grata: Clayton Act Section 8 enforcement for interlocking directorships between competing companies not under common control is in full swing, with 15 directors having stepped down from board positions in the face of DOJ opposition, and anywhere from 12 to 20 or more open and pending investigations according to different agency heads. The private equity business model of carefully and expertly moving needed capital into sectors where managers have deep industry expertise is derided by government officials as “roll-ups”, “serial acquisitions”, “debt fueled strip and flip”, “quietly amassing market concentration under the radar”, and one that “uniquely harms competition.” The agencies today are firmly and unabashedly skeptical of private equity divestiture buyers that are “not in it for the long haul.”

What it means:

Antitrust enforcers in the U.S. at the federal and state levels, along with enforcers in the world’s leading economies and most important markets are trying to usher in renaissance of antitrust enforcement and are hurting business and those same economies along the way. While it may be “plausible” that the companies responsible for some of the greatest technological achievements to improve lives in the history of the world are slowly destroying opportunity for the masses, it’s not credible. And because of the wisdom and strength of our system of government, the wisdom of the courts stands ready to guard against radical and unwarranted change to an economy that is the global gold standard. Still, enforcement posture and priorities matter, and for many businesses that do not have the wherewithal to stand up to government enforcers and have their day in court, the agency’s word can sometimes be the last word. That’s why good and strong advocacy today means more than ever, and why having an ear to the ground and knowing the antitrust and the agencies’ playbook can make the difference between an enforcement action and a successful merger or business plan.

Stay tuned and stay close as we work hard for our clients and help them achieve winning business strategies even when it means running the antitrust gauntlet to get to the other side.

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