BATES WHITE
ECONOMIC CONSULTING

2023 HAL WHITE ANTITRUST CONFERENCE

Summary of panel discussions

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On June 5, Bates White hosted its annual Hal White Antitrust Conference, bringing together a distinguished group of antitrust practitioners, academics, and enforcers to hear two panels covering topics at the frontiers of antitrust enforcement. The first panel discussed the pending update to the Merger Guidelines, while the second focused on the impact of the 2018 Supreme Court decision in *Ohio v. American Express*. A summary of the discussions can be found below.[1]

I. PANEL 1: THE RULES OF THE GAME: THE NEW MERGER GUIDELINES

1.A. Summary

The first panel at the conference discussed the impending release of the updated Merger Guidelines by the Department of Justice (DOJ) and Federal Trade Commission (FTC). The panelists included Renata Hesse, Partner at Sullivan & Cromwell; Mandy Reeves, Partner at Latham & Watkins; Bruce Hoffman, Partner at Cleary Gottlieb; Nancy Rose, Professor at MIT; Creighton Macy, Partner at Baker McKenzie; and Joe Farrell, Partner at Bates White and Professor at the University of California, Berkeley. Nicholas Hill, a Partner at Bates White, moderated the panel.

Following the FTC and DOJ's joint announcement of a review of the Merger Guidelines in January 2022, antitrust practitioners have speculated about the likely contents of the updated Guidelines. Given their apparently imminent release, this panel provided a helpful overview of the role of Guidelines in merger review and likely changes to the description of horizontal and vertical mergers. This offered the panelists an opportunity to share their views on what the new Guidelines should and should not include.

1.B. Looking backward

The discussion began with a look back to the 2010 Horizontal and 2020 Vertical Merger Guidelines. There was widespread agreement that the 2010 Guidelines were an improvement over the 1992 Guidelines because they provided a greater degree of flexibility, incorporated recent advances in the academic literature (especially related to unilateral effects), and reflected the best practices that the agencies used at the time. Multiple panelists noted that the 2010 Guidelines enhanced the agencies' ability to bring and win cases.

There was also agreement that the 1984 Non-Horizontal Merger Guidelines do not reflect current thinking about vertical mergers and that it is unfortunate that courts still occasionally cite to them. For example, a district court's 2018 reference to the 1968 Guidelines in AT&T-Time Warner was one impetus for the release of the 2020 Guidelines. Though the Obama Administration did not release updated Guidelines and the Trump Administration did, according to the panelists, the two administrations were largely in agreement on the appropriate treatment of vertical mergers. The case-specific nature of vertical merger evaluation can make Guideline drafting challenging, but panelists agreed that the relative scarcity of vertical merger case law makes Guidelines especially important.

There was discussion on how the Guidelines should treat elimination of double marginalization (EDM) in vertical merger cases. One panelist noted that EDM as a first-order efficiency is symmetric to the loss of competition as a first-order harm from horizontal mergers and should be treated as such in the Guidelines. Another panelist disagreed, as firms can eliminate double marginalization outside of the merger context and the efficiency therefore should not be credited as merger specific.

[1] Views expressed by panelists represented their personal perspectives and not the views of any institutions. This summary does not attribute views to any individual panelist or other participants.

Some panelists expressed a concern that the Guidelines could become a political football and that altering them in each administration could threaten their legitimacy. One panelist expressed optimism that both parties could agree on an essential consensus core that could be tinkered with on the margins with changes in administration.

I.C. The structural presumption

The structural presumption (i.e., the threshold of concentration over which a merger is deemed likely to enhance market power) was loosened in the 2010 Guidelines; panelists expect that to be tightened in the new Guidelines. Panelists were divided on their view of this change. On one hand, it is difficult for the agencies to file and win cases when the level of concentration is below that specified in the 2010 Guidelines, and the current presumption reflects that fact. On the other hand, recent empirical research has suggested that changes in concentration may be more important than levels and that even mergers below the presumption can cause price increases.

Panelists also remarked that many cases are not brought when the level of concentration is near the structural presumption because the agencies lack necessary resources and must prioritize the cases they file. Another panelist mentioned that the presumption is a necessary but not sufficient factor in the decision to sue and the facts of the case are vital, while a third opined that the loosening of the presumption could force more mergers to the litigation stage and therefore create more case law.

One panelist mentioned that it would be difficult for the courts to accept any kind of vertical presumption, as the harm from vertical mergers is not necessarily commensurate with the parties' shares.

I.D. Coordinated effects

The panelists agreed that it is especially important to screen mergers based on their likelihood to facilitate coordination, as US law does not prevent tacit collusion. But the tools used for evaluating coordinated effects have lagged behind those used for unilateral effects, and this is one area where panelists welcomed further improvements in the draft Guidelines. This is especially important, given recent literature on the pervasiveness of tacit collusion. One panelist noted that the European Union has stronger rules on coordination and could be a good starting point when thinking about this topic.

I.E. Upstream harms

The panel concluded with a discussion of the recent uptick in antitrust actions related to upstream harms, especially labor issues. Questions on the effects of consolidation on workers' wages that were once relegated to the margins are now in the limelight. There was some back-and-forth on whether upstream harm cases need to consider downstream effects on end consumers when determining a loss of competition. One panelist mentioned the DOJ's recent successful challenge of the Penguin Random House-Simon & Schuster merger as a prime example of the government's ability to pursue upstream harm cases under the Guidelines as currently written.

II. PANEL 2: LOOKING BACK ON FIVE YEARS OF THE SUPREME COURT AMEX DECISION

II.A. Background

This panel discussed the Supreme Court decision in *Ohio v. American Express* (2018) and the impact it has had since. Panelists included Peter Barbur, Partner at Cravath, Swaine, and Moore working on antitrust matters, including the Amex matter; David Lawrence, Policy Director for DOJ's Antitrust Division; Tara Reinhart, Partner in Skadden's Antitrust/Competition Group and former chief trail counsel for FTC's Bureau of Competition; and Michael Whinston, Sloan Fellows Professor and Professor of Economics at MIT and Partner in Bates White's Antitrust and Competition practice. The panel was moderated by Pauline Kennedy, a Principal at Bates White.

The Department of Justice (DOJ) and several state attorneys general filed a civil lawsuit in the US District Court for the Eastern District of New York alleging that Amex's nondiscrimination provisions in its merchant agreements violate antitrust laws. Amex is a transaction platform. Both cardholders and merchants use Amex payment products (credit and charge cards) to complete purchases at the point of sale. Merchants pay Amex a fee for each transaction. Amex uses some of this fee to provide benefits including rewards and other services to cardholders. The DOJ alleged that Amex's "anti-steering" rules, which prevent merchants that accept Amex from steering customers to alternative credit cards with lower transaction fees, were anticompetitive. The E.D.N.Y found in favor of the DOJ. Amex appealed, and the Second Circuit reversed the district court's determination and remanded the case "with instructions to enter judgement in favor of Amex." This ruling was appealed to the Supreme Court, which affirmed the Second Circuit's judgement in favor of Amex.

II.B. Trial in District Court

The panelists began with a discussion of the case that was presented at E.D.N.Y. Judge Nicholas Garaufis, who decided the case in favor of the plaintiffs, was one of the first judges to wrestle with the issue of two-sided markets in antitrust. Both sides in the case agreed that credit card networks operate a two-sided transaction platform. They disagreed on what this implied for market definition. Judge Garaufis' opinion noted that the two-sided platform comprises at least two separate, yet deeply interrelated, markets: a market for card issuance and a network services market, which sells acceptance services to merchants. The court concluded that the relevant market for its antitrust analysis in this case is the market for General Purpose Credit and Charge (GPCC) card network services.

The panelists noted that Judge Garaufis's opinion noted that the two-sided nature of the GPCC industry necessarily affects courts' antitrust analysis. He further noted that factors such as indirect or cross-platform network effects—i.e., cardholders prefer to use cards that are accepted by more merchants, and merchants prefer to accept cards that are carried by more cardholders—lead to spillover effects, and to compete effectively, networks must account for the interdependence between the demands of each side of the platform and strike a profit-maximizing balance between the two.

Panelists concluded that, ultimately, Judge Garaufis recognized Amex as a two-sided platform. The record from the District Court case found that Defendants have market power, largely because cardholders insist on using their cards. Panelists also noted that even though this was in some sense a pricing case, the record did not ultimately preserve a way to estimate a price that accounted for both sides of the market.

II.C. Appeal to Circuit and Supreme Court

After discussing the District Court case, the panelists turned to the appeals process. They noted that the original trial produced a long record and many findings of fact. As a result, defendants focused on the conceptual issues of the case and gaps in the record, rather than disputing specific findings of fact.

Panelists noted that although two-sided markets were new to the courts, there was substantial economics literature on the topic, and defendants incorporated the economic intuition from this literature in the appeal. Panelists again noted that the matter involved Amex's pricing and that defendants disputed how to conceptualize

and calculate the relevant price—whether to focus on one side of the market or embrace the two-sided structure. The panelists felt that defendants' focus on a two-sided price helped them prevail in the Second Circuit.

Panelists commented that defendants successfully argued that you cannot prove price effects in a two-sided market without analyzing both sides of the transaction.

II.D. The economics of Amex

Panelists were asked whether the courts got the economics of two-sided markets right. One panelist noted that when a court opinion cites economic literature, that makes economists optimistic. The panelists spoke positively about portions of the Supreme Court opinion that address the importance of indirect network effects and externalities.

Panelists also discussed the distinction drawn in the Supreme Court opinion between instances where indirect network effects are substantial and strong and those where they may be weaker. Panelists noted that it is not necessary to consider *all* effects of conduct when evaluating antitrust claims—for example, in merger cases, we generally do not consider impacts outside of the relevant market; or in price-fixing cases, we don't consider the possibility of pro-competitive justifications for the conduct. But in this case, the Supreme Court stated that an antitrust analysis should evaluate both sides of Amex's market because the interactions between them are "very strong."

II.E. The legacy of Amex

The remainder of the panel focused on how the Amex decision has been applied since 2018.

II.E.1. How broadly should the decision be applied?

Panelists noted concerns that had been expressed around the time of the Supreme Court decision regarding the likelihood that the Amex decision would be applied broadly, thereby allowing companies to escape antitrust scrutiny by characterizing themselves as two-sided platforms. However, panelists expressed the view that even though some companies are attempting to present a two-sided defense, courts have generally been careful and not overly broad when deciding how the Amex precedent applies.

II.E.2. Applications in other litigation

The panelists discussed several two-sided platform cases that have cited to the Amex decision, including Sabre-US Airways (2022), Delta Dental (2020), and Epic-Apple (2021) and Sabre-Farelogix. The Sabre-Farelogix matter was discussed in some detail.

Sabre-Farelogix was a proposed merger between Sabre, a global distribution system (GDS) used to book air travel, and Farelogix, which developed technology that is an input to an alternative booking solution that airlines have used to directly market their own fares. The DOJ sued to block the transaction in 2019. Though a US District Court initially ruled in favor of the merging parties, the merger was ultimately halted when it was blocked in the United Kingdom. The DOJ successfully vacated the US District Court opinion after the transaction was abandoned.

The panelists discussed the difficulty involved in challenging this merger as a horizontal case. Although the software Farelogix developed could potentially challenge the role of GDSs in the bookings space at some point in the future, it did not actually compete in booking transactions at the time of the proposed merger. The DOJ adopted a market for "booking services" as the relevant antitrust market. Like the Amex decisions, market definition became a contentious issue in the case. Closely related to this was whether the market should be conceptualized as two-sided. The panelists noted that the Sabre-Farelogix opinion cited Amex to explain how competitive effects need to be analyzed on both sides of the platform and whether the merger would increase overall prices accounting for this. Panelists agreed that the more controversial application of Amex regarded the question of whether one-sided platforms could ever compete with two-sided platforms. Several panelists commented that this was misguided. But any concerns that the Sabre opinion improperly applied Amex are now dissuaded since the decision was ultimately vacated.

II.E.3. Other platform contexts

The panelists continued the conversation by noting how platform markets can differ from vertical or horizontal structures. As a consequence, it was necessary to bring platform cases and new economic markets to the courts and let them wrestle with how to apply the law. Though the Amex decision involved a lot of case-specific fact finding, the panelists noted that this legal ruling is actually fairly narrow and is helpful for understanding the case law and clarifying the steps necessary in a rule of reason case. As the law continues to catch up to newer economic phenomena, the courts are obtaining a more solid understanding of how to apply the case law to modern platform markets.

The panelists further discussed competition through disintermediation and technological improvements. One panelist noted that at the DOJ, they often think about how to conceptualize a fancy new product in relation to the current product. The panelists all discussed that a "better mousetrap" can displace the incumbent product, and these contexts require careful thinking about how the new entrant does or does not constrain the current players.

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