

Q&A With Dechert's Michael Weiner

Law360, New York (March 07, 2013, 2:21 PM ET) -- Michael L. Weiner, based in New York, serves as co-chairman of Dechert LLP's antitrust and competition practice. He provides strategic advice, resolves government investigations and effectively litigates for clients with antitrust issues in a broad range of industries. He has experience in the telecommunications and technology industries and also handles litigation work, including price-fixing and other antitrust class actions in the insurance, real estate brokerage, art auctions and magnesite industries. He is a former council member and officer of the American Bar Association's Antitrust Section.

Q: What is the most challenging case you have worked on and what made it challenging?

A: Perhaps the most challenging matter on which I have worked was in representing Yahoo! a few years ago in a proposed limited search "backfill" arrangement with Google, which followed Microsoft's unsolicited offer to purchase Yahoo! but ultimately did not get done, followed by a proposed complete outsourcing / sale of Yahoo!'s search business to Microsoft, which did successfully close.

The challenges on the Yahoo!/Google deal were multifaceted. First, the business terms of the so-called YahooGoogle arrangement were extremely complex, and the proposed implementation of the backfill arrangement by Yahoo! was in development throughout the course of the review period, making it difficult to tell a consistent story to the agencies or to advertising customers. We faced a large and talented Antitrust Division staff that was skeptical of anything that seemed to give Google more search volume, even though it was of real benefit to Yahoo!, and the deal also attracted the attention of a large number of state attorneys general.

We understood that Microsoft, AT&T and other firms were engaged in active campaigns opposing the deal, and we saw the results of their efforts with a variety of reports and white papers commenting on the transaction. The details of the review process were being followed by the business press and bloggers with a seemingly unusual degree of inside information being disseminated on a daily basis. And, after Microsoft withdrew its earlier offers to acquire Yahoo!, Google was very quick to withdraw from its proposed deal with Yahoo! at the first mention of a possible monopolization claim by the Antitrust Division — leaving the Yahoo! team with a limited "backfill" deal that we thought was pro-competitive and very defensible, but with no partner willing to pursue it with us.

In contrast, notwithstanding the fact that it represented, for practical purposes, something very close to a 3-to-2 deal in Internet-wide search, the Yahoo!/Microsoft deal presented far fewer challenges in both the U.S. and the EU. While that deal received a close examination, we were able to persuade the U.S. Department of Justice and the Directorate-General for Competition of the European Commission of its potential pro-competitive benefits, and the deal closed a few months after it was signed.

Q: What aspects of your practice area are in need of reform and why?

A: Here's one that is a bit idiosyncratic, but is deserving of attention. I call it "regulatory purgatory." In a merger transaction that has become unduly mired in a lengthy second request process, from the perspective of the parties to the transaction, it is sometimes viewed as helpful to certify the parties' substantial compliance with the second request, and let staff know that the parties intend to close the deal at the expiration of the back-end waiting period. That's perceived as a serious threat, except in the case of certain regulated industry matters that must receive approval from another agency, such as telecom deals that are subject to review by the Federal Communications Commission. In the case of the FCC, that agency typically does not act until they have received the results of the Antitrust Division's analysis. But the parties cannot compel the Antitrust Division to act, because they cannot credibly threaten to close the deal. Why not? Because the FCC has not acted. And why hasn't the FCC acted? Because they're waiting for the DOJ to act. As noted, this situation is a bit unusual, but it does happen — and it shouldn't.

Q: What is an important issue or case relevant to your practice area and why?

A: The application of the Sherman Act to foreign firms engaging in conduct abroad is an issue of growing importance in the antitrust field, as well as potentially in international relations in general. As evidenced by cases such as Vitamin C, Minn-Chem and Animal Science, there are a number of these matters that are working their way through the courts at present. The issues they raise, including the application of the Foreign Trade Antitrust Improvements Act, foreign sovereign compulsion, and international comity are important. Also important are the trade issues they raise, and their implications for transitioning economies.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: I'll name two, from whom I learned a lot as a younger lawyer. Steve Axinn (Axinn, Harkrider & Veltrop), for whom I worked extensively in the first ten years of my career. Steve combines intellect, creativity and aggressiveness — and I learned a lot just sitting in his office listening to him speak to clients on various matters. And John Harkins (Harkins Cunningham), whom I worked with in a joint defense matter back in the late 1980s. John's status as a perennial superlawyer is earned not only by his reasoned judgment, but also by an overall decency and respect for others that is admirable.

Q: What is a mistake you made early in your career and what did you learn from it?

A: As a six-month associate at my former firm, I was asked to ghost-write for two partners an article for publication on recent developments with regard to the actual potential competition doctrine — the concept that Section 7 of the Clayton Act may be violated by acquiring a firm that was not a current competitor in the marketplace, but which was working on entering the market. I wrote a draft, concluding that the doctrine was likely to win increasing judicial acceptance, and submitted it one of the partners, who thanked me very much, complimented my writing, and went off to try a case without bothering to read my draft conclusion.

I found the legal issue very interesting, since there is an argument that an actual potential competitor — as opposed to a "perceived" potential competitor — has no current marketplace impact on an existing firm who is not aware of the entry plans in the works. In that regard, some have argued that the acquisition of the actual potential competitor could not result in a "lessening" of competition — but, at most, in the prevention of competition that might start at some point in the future.

What I did not know is that my firm was making that precise argument on behalf of a very important client, who was more than a little displeased to read this article taking a contrary view. The lesson? A familiar one, most likely. Leave nothing to chance. Don't trust that the partner will carefully read what you write before sending it out. And equivocate in published articles — you never know what positions you may find yourself advocating!

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