CPI TALKS…

…with New York Attorney General Letitia James

In this edition of CPI Talks we have the pleasure of speaking with Ms. Letitia James, Attorney General of the State of New York.

Thank you, Ms. James, for taking this time to talk to CPI.

1. **Antitrust enforcement involves, by necessity, coordination between federal and State agencies. What, in your view, should be the approach to interagency cooperation in a contemporary context? How can States and Federal agencies better coordinate in the 21st Century?**

We have always worked collaboratively with our federal counterparts and continue to do so today. We often work, together, on many important cases, and frequently reach the same conclusions, as we did in our *Facebook* and *Google* investigations. But each state and each federal agency has independent enforcement authority and responsibilities. When we reach different conclusions on an antitrust matter, we may decide to exercise our independent authority by filing a lawsuit, coming to an agreement with a party, or taking another action.

One recent example is the *T-Mobile/Sprint* merger — a merger of two of the four mobile network operators in the United States. New York led a coalition of states investigating the merger, while the U.S. Department of Justice ("DOJ") conducted its own investigation. Both the States and the DOJ determined that the merger, as originally proposed, would be anticompetitive and illegal. While a small number of fixes satisfied the DOJ, we were not persuaded, and sued to block the merger. Still, yet, the fact that state and federal authorities took different positions in the *T-Mobile/Sprint* merger has not prevented us from collaborating extensively with both the DOJ and the Federal Trade Commission ("FTC") on many other matters, including an antitrust lawsuit against Daraprim, in addition to a number of other merger reviews and conduct investigations.

2. **What should be the enforcement priorities of antitrust agencies in the 21st Century? Is the technology sector rightly the focus of enforcement priorities? What other sectors merit particular scrutiny?**

The technology sector, an intrinsic part of our modern infrastructure, is certainly one of our enforcement priorities, as the conduct of internet and technology firms affects how consumers and businesses in our state live and work. But it is not our only enforcement priority.

While we look carefully at all potentially anticompetitive conduct and mergers that have an impact on New Yorkers, we are particularly focused on firms and conduct that have a nexus to the state. Certain sectors are always front and center, such as health care in all its aspects: providers, payors, pharmaceuticals, and medical devices.

We are also prioritizing antitrust enforcement in labor markets. We are investigating allegations of anticompetitive conduct affecting workers, such as no-poach and non-compete agreements, and we examine the potential effects of proposed transactions on labor markets when conducting merger reviews.

Additionally, we are constantly monitoring developments in all major sectors of the economy, with particular emphasis on those that have a special nexus to New York.

Finally, we are looking forward to passing different types of legislation to ensure our states laws reflect the market realities of the 21st century.

3. Specifically, with regard to the technology sector, in December 2020 you announced that you led a multistate Federal lawsuit against Facebook for potential violations of the Sherman Act. What are your principal allegations against Facebook? What kind of remedies do you envisage against Facebook, and how would these remedies cohere with potential legislative reforms at the Federal level?

We led this lawsuit against Facebook with two principal causes of action. First, that Facebook violated Section 7 of the Clayton Act — the provision condemning mergers that may substantially lessen competition — by its predatory acquisitions of Instagram and WhatsApp. The second is that Facebook unlawfully maintained, and still maintains to this day, its monopoly power in personal social networking through a "buy or bury" pattern of exclusionary conduct, which includes both Facebook's anticompetitive acquisitions and its open-then-closed approach to third-party developers on the Facebook platform. Additionally, our complaint details how Facebook's illegally maintained monopoly power allows it to diminish privacy protections and degrade quality for consumers, unconstrained by the competitive process.

We sought equitable remedies necessary to restore competition in the social networking space. These remedies were entirely consistent with the remedies sought by the FTC in a parallel lawsuit that the agency filed on the same day we filed our complaint.

On June 28, the judge in our case granted Facebook's motions to dismiss both our lawsuit and the lawsuit filed by the FTC, and, on July 28, we filed a notice of appeal. The judge's decision, however, has not diminished our scrutiny of anticompetitive practices in tech markets. For instance, we recently filed our second antitrust lawsuit against Google, involving anticompetitive conduct in mobile app distribution and in-app payment processing.

4. Similarly, New York is participating in a lawsuit, along with 34 other states, claiming that Google engages in exclusionary practices. Can you articulate the main claims against Google. How does this lawsuit relate to parallel suits brought against Google by another coalition of States, and the Department of Justice?

Our primary allegation is that Google unlawfully maintains, to this day, its monopoly in general search services and related advertising markets using a series of restrictive and problematic agreements and arrangements. That claim is similar to the one laid out in the DOJ's lawsuit, with which the states' case is consolidated. The key difference between the two lawsuits is that we have some additional claims. One relates to a search engine marketing tool that Google uses to impede rivals in the search market, and the other relates to Google's anticompetitive conduct — aimed at excluding competition from specialized search engines in certain vertical segments, like local, or travel.

Another group of states has brought a separate lawsuit against Google challenging its conduct in the AdTech market.

Separately, we recently co-led a multistate group in filing our second antitrust lawsuit against Google in six months. In this suit, we focus on the tech giant's illegal and anticompetitive conduct that has sought to maintain the company's monopoly power in the mobile app distribution and in-app payment processing markets. Once again, we are seeing Google use its dominance to illegally quash competition and profit to the tune of billions. Through a series of exclusionary contracts and other anticompetitive conduct in the Google Play Store, Google has deprived Android device users of robust competition that could lead to greater choice and innovation, as well as significantly lower prices for mobile apps. The company's conduct has ensured that hundreds of millions of Android users turn to Google, and only Google, for the millions of applications they may choose to download to their phones and tablets. Additionally, Google is squeezing the lifeblood out of millions of small businesses that are only seeking to compete

5. New York State Senator Michael Gianaris recently proposed a Bill that would, among other things, set a new legal antitrust standard — mirroring EU rules — of "abuse of dominance" — and permit class-action lawsuits on this basis in New York. What is your view on this proposal? Is there a risk of disharmony between other States and Federal enforcers if differing standards are adopted at a State level?

For over 100 years, state and federal antitrust laws have served as critical protections for consumers and small businesses from unchecked corporate power that seeks to choke off competition and limit consumer choice. New York's antitrust laws remain essential to these protections. This legislation would help to meet the needs of today's economy and the need for additional tools to combat threats to competition. We must ensure that we have the ability to effectively curtail harmful market dominance, and Senator Gianaris' legislation aims to do just that.

State and federal antitrust enforcement agencies share a common goal: to promote and protect competition. In that sense, we are totally harmonized. States may choose to legislate more broadly than Congress if they deem it necessary to ensure that their residents have the benefits that flow from competition. States and federal enforcers are still very much in sync, this may just mean that states have concluded that more aggressive enforcement or broader protections are necessary. This is not uncommon, and states often lead the way in advancing new and stronger protections for consumers and small businesses.

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