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Q&A: Crowell & Moring's Daniel Sasse

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Crowell & Moring partner Daniel Sasse leads the antitrust practice at the firm's Orange County, California office. Ringing in the new year with *GCR*, he shares with us his take on the most compelling issues facing the competition bar both in the US and abroad.

What do you think are the most interesting issues in antitrust right now?

There are many from which to choose. The ability of US companies to pursue damages from foreign suppliers for price-fixing on products sold in the US is probably at the top of the list for those of us who spend a significant amount of our time litigating cartel cases. It is interesting to think that Congress passed the FTAIA to protect US companies from being sued abroad under the Sherman Act when their foreign competitors might not be sued and could therefore have an unfair advantage. Now, it appears that some US courts may turn the Act on its head and use it as a shield to protect foreign cartelists to the detriment of US companies, when it was originally intended to level the playing field between US and foreign companies.

Of course, we (Crowell & Moring) are currently involved in the *Motorola* litigation on this point in the Seventh Circuit. It will be interesting to see the final resolution of that matter. Given the unusual progression of that case, we may well hear from the Seventh Circuit en banc or the Supreme Court before that case is done. But even aside from the *Motorola* case, the scope of antitrust rights is going to be litigated for years to come until either the Supreme Court or Congress offers guidance.

Is there any antitrust litigation you are following closely besides the cases you are working on personally?

I am quite interested to see what the Second Circuit does with the settlement in the credit card Interchange Fee Antitrust Litigation. The court is under pressure to find a practical solution to decades of litigation, but the scope of the 23(b)(2) injunctive class release is really unprecedented. Pairing a future release that never sunsets with a damages class is creative, but presents some significant constitutional issues for the Second Circuit. In a similar vein, the Department of Justice litigation against American Express is fascinating. While American Express has framed this case as a question of market power (as well as a question of survival), the Department of Justice's focus on pricing power, if successful, could significantly change how we counsel clients with smaller (traditionally thought of as non-dominant) market shares.

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What issues are you keeping an eye on internationally? How will they affect the practice of antitrust law?

Of course everyone is following the EU's actions towards Google, which could turn into one of the biggest competition stories of the decade. And the growth or potential growth of private damages actions in Europe is something that we are closely monitoring. The competition bar has been predicting the rise of civil damages cases in Europe for more than a decade, and we have been litigating private damages cases in Europe for more than a decade, but these cases continue to move at a glacial pace.

The Canadian government's recent consideration of the highly anticipated Price Transparency Act could also have a significant impact on US companies doing business in Canada. The proposed legislation would amend the Competition Act to authorise the commissioner of competition to conduct inquiries to determine the reasons why a product or class of products has a higher selling price in Canada than in the US and to require the commissioner to make public reports on completed inquiries. This could lead to a sort of international version of the Robinson-Patman Act between Canada and the US and could have a significant impact on how lawyers counsel clients.

If you could give one piece of advice to the DoJ or FTC, what would it be and why?

The agencies do a lot of straight horizontal merger work, and bread and butter horizontal conduct work, but have not tackled as often the very difficult rule-of-reason cases where markets need guidance. Of course, the bar and business needs to be careful what it wishes for in this area. This is different from inviting the agencies to bring bad cases or more cases based on more aggressive theories. (Nor is it the same as suggesting they bring more disgorgement cases).

Whom do you most admire in the antitrust community right now, and why?

In addition to my own mentors at Crowell & Moring, Randy Smith, Kent Gardiner and Art Lerner, I have tremendous respect for the California Department of Justice and the antitrust section of the California Attorney General's office. Kathleen Foote and her team have been leaders among state attorneys general and have managed to file important cases, even with limited resources.