Luke M. Froeb Appointed Chief Economist at DOJ Antitrust Division

July 28, 2017

The Antitrust Division of the U.S. Department of Justice has announced Luke M. Froeb as the next Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division – colloquially, the Antitrust Division's "chief economist."

Froeb, who has already started in the job, will supervise the Economic Analysis Group's work on the Antitrust Division's investigations. Froeb brings substantial experience to the post. Early in his career he was a staff economist at the Antitrust Division. Later, from 2003 to 2005, he served as Director of the Bureau of Economics at the Federal Trade Commission ("FTC").

Froeb received his A.B. in Economics from Stanford University in 1978 and his Ph.D. in Econometrics from the University of Wisconsin in 1983. He is currently a Professor at Vanderbilt University's Owen Graduate School of Management.

Froeb is joining several Deputy Assistant Attorneys General already at the Antitrust Division, among them Andrew Finch (who is currently the Acting Assistant Attorney General for the Antitrust Division), Bryson Bachman (who has prior Antitrust Division experience, including litigating the *Anthem/Cigna* trial), and Don Kempf (whose background is also in litigation). It is unclear when the full Senate will vote on the confirmation of Makan Delrahim, the nominee to head the Antitrust Division. Delrahim received strong bipartisan support from the Judiciary Committee.[1]

Emphasis on Empirical Harm and Respect for Merger Efficiencies

Froeb's record suggests that he will take a cautious, empirically grounded approach to antitrust enforcement. While at the FTC he favored case-by-case analysis over reliance on presumptions, stating that "[m]arket shares and concentration may be poor predictors of merger effects."[2] Similarly, in a declaration he filed for a client at the Federal Communications Commission ("FCC"), Froeb strongly criticized the FCC's rule prohibiting mergers between two "top-four" stations in local television markets.[3] In his academic writing, Froeb has emphasized that merger review must take into account the particular characteristics of the industry at issue, and that structural presumptions may be inappropriate in certain

[1] For additional information on Delrahim's nomination and what it means for antitrust enforcement in the Trump Administration, please see our previous article, linked **here**.

[2] *See* Luke Froeb, Dir., Bureau of Econ., U.S. Fed. Trade Comm'n, Remarks at the Summit at Como: A Discussion of Competition Policy, Law and Economics: From Theory to Praxis: Quantitative Methods in Merger Control 6 (Oct. 30, 2004), *available* ***here***.

[3] *See* Luke Froeb, Padmanabhan Srinagesh & Michael Williams, Joint Declaration to the U.S. Federal Communications Commission In Support of Comments of Hearst-Argyle Television, Inc. 7-8, 14-15 (2006) ("The more general lesson is that an inflexible structural rule for merger-based policy is likely wrong under some set of circumstances almost certain to be encountered in practice. A case-by-case approach would not be subject to this limitation."), *available* ***here***.

cases.[4] There are also indications that Froeb may be more receptive to efficiency evidence when reviewing mergers and he has advised against pursuing "remedies that are likely to interfere with substantial merger-related efficiencies."[5]

As an academic, Froeb has published extensively on the use of mergers simulation models to evaluate the competitive effects of transactions.[6] Such models received some heightened attention recently when the FCC relied heavily on a merger simulation in its order approving the merger of AT&T and DirecTV (Froeb was not himself involved in that matter).[7] Froeb has criticized the use of merger simulations when they are used inappropriately as a "black box" to predict results "regardless of whether [they] fit[] the evidence."[8] Consistent with his emphasis on case-by-case analysis, he has noted that merger simulations are better suited for some industries than others and must be evaluated in conjunction with other evidence, particularly empirical evidence like "natural experiments."[9]

Froeb appears skeptical of enforcement against vertical mergers and conduct. He has written that it is "difficult to find evidence that vertical controls reduce welfare."[10] In testimony before Congress on the *Ticketmaster/LiveNation* merger, he stated that although vertical mergers should be considered on a case-by-case basis, they are "generally pro-competitive."[11] He has taken a similarly favorable position toward mergers that could that increase innovation.[12]

Froeb's cautious approach to enforcement does not imply that he will turn a blind eye to new theories of harm or new evidence of economic harm. He has emphasized the importance of ensuring that "competition policy does not lag behind in understanding the commercial practices it regulates,"[13] of reassessing the use of economic analyses based on new teachings, and of continuing to develop new and reliable empirical analyses.[14]

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[4] See Arturs Kalnins, Luke Froeb & Steven Tschantz, *Can Mergers Increase Output? Evidence from the Lodging Industry*, 48 RAND J. OF ECON. 178, 200 (2017) ("We conclude that mergers in revenue-management industries should not be analyzed using models of competition that ignore the peculiar industry features that cause firms to practice revenue management."), *available* ***here***.

[5] Luke Froeb, Dir., Bureau of Econ., U.S. Fed. Trade Comm'n & John H. Seesel, Assoc. Gen. Counsel for Energy, U.S. Fed. Trade Comm'n, Remarks before The Fuel and Energy Committee, Section of Antitrust Law, American Bar Association: The Cost of Filling Up: Did the FTC Approve Too Many Energy Mergers? 10 (Mar. 31, 2005), *available* ***here***.

[6] *See generally*, *e.g.,* Michael Doane, Luke Froeb, Gregory Werden, and David Zimmer, Predicting the Price Effects from Retail Mergers (Vanderbilt Owen Graduate Sch. of Mgmt., Working Paper No. 2034464, 2013), *available* ***here***.

[7] *See, e.g.*, Fed. Comm. Comm'n, Memorandum Opinion and Order, MB Docket No. 14-90, ¶ 105 (July 24, 2015) ("Our economic analysis of the Applicants' merger simulation finds that the net effect of the transaction on consumers is positive."), *available* ***here***.

[8] *See* Luke Froeb, ABA Brownbag: Continuity in Economics at the FTC, at 6 (Aug. 5, 2003), *available* ***here***.

[9] *Id.* at 7, 11.

[10] Luke Froeb, U.S. Fed. Trade Comm'n & Vanderbilt Univ., Remarks at the European Association for Research in Industrial Economics: Economics and Antitrust: Enforcement R&D 23 (Sept. 2, 2005), *available* ***here***.

[11] *Ticketmaster/LiveNation Proposed Merger: Hearing Before the H. Subcommittee on Courts and Competition Policy*, 111th Cong. 8 (Feb. 26, 2009) (statement of Luke Froeb), *available* ***here***.

[12] *See id.*

[13] *Id.* at 9-10.

[14] *See* Froeb, ABA Brownbag: Continuity in Economics at the FTC, at 11.

Conclusion

We expect that with Froeb in place, businesses interacting with the Antitrust Division will experience a rigorous economic approach to merger and conduct review and a cautious approach to enforcement. While Froeb can be expected to hold Antitrust Division staff to a high standard in proving harm from conduct or transactions, parties should plan to offer a strong empirical case for the benefits of their transactions or conduct and be prepared to defend the assumptions on which their analyses rely. We encourage you to contact any of the lawyers listed below, or your regular Davis Polk contact, if you would like to further discuss what Mr. Froeb's appointment could mean for your business.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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