

Experts Split On Group To Curb Int'l Antitrust Abuse

By **Michael Macagnone**

Law360, Washington (June 29, 2017, 5:15 PM EDT) -- A number of antitrust practitioners told a House panel Thursday they needed a new high-level working group to help mitigate international abuses of competition law that harm U.S. companies, following on a Chamber of Commerce-commissioned report on antitrust enforcement.

In their testimony before the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, the experts recommended that President Donald Trump's administration set up a high-level interagency working group to help coordinate governmentwide responses to abuses of competition law abroad.

That came amid warnings from Democrats and two of the experts that such a response could cause a "tit for tat" of retaliatory responses from other countries against U.S. companies.

The co-chair of the Chamber's International Competition Policy Expert Group, Covington & Burling LLP partner Deborah Garza, said that a number of countries around the world have at times taken unfair adverse steps against U.S. firms, particularly using noncompetition based factors in their decisions.

"There is a concern that certain of our major trading partners in some cases deny American companies substantive due process and in other cases use competition law to promote national champions or force transfer of American technologies without proper compensation," Garza said.

But Deborah Fox, a professor at the New York University School of Law, cautioned against letting the working group be geared toward trade sanctions and other actions. Fox said that creating such a working group could undermine the work of the Federal Trade Commission and the Department of Justice, which have been "very clear and very persuasive to other countries when they see a problem with international antitrust enforcement."

"I do not believe trade remedies ought to be used as sanctions. I do not think they will work. I think they will result in a race to the bottom," Fox said.

Another expert, Randy Stutz, associate general counsel with the Antitrust Institute, said creating such a working group would "create a massive lobbying target and set up a political body to be in charge of competition efforts," undermining efforts to remove political considerations from antitrust decisions in other countries.

American companies, he said, also face problems dealing with foreign cartels, and such actions by U.S. authorities could further discourage domestic antitrust actions against those entities.

The Judiciary Committee's ranking member, Rep. John Conyers, D-Mich., said that such additional steps could encourage backlash against U.S. companies.

"We must be careful not to provoke retaliation against American businesses with any pressure to change their antitrust enforcement practices," Conyers said. "An excessively punitive approach may also prove to be counterproductive and harmful to American interests in the long run."

However, a number of Republicans on the antitrust subcommittee, including Chairman Tom Marino, R-Pa., pointed out that simply talking may not cut it with a number of countries. Marino pointed to actions taken by China that he said have hurt American firms to the advantage of Chinese state entities.

"Let's get down to where the rubber meets the road and give me just one example other than penalizing countries, whether it is through sanctions, whether it is through trade, of playing on a level playing field," Marino said.

Garza acknowledged that discussion may not cut it with some countries that have decided to use competition policy to satisfy other ends.

"When they are dealing with it at that level, we need to deal with it at that level. You can't bring a knife to a gunfight," Garza said.

The Chamber of Commerce report recommended that the working group be responsible for a governmentwide review of potential remedies against unfair antitrust enforcement abroad, and present those recommendations to Trump and Congress. The report also recommended taking additional steps at the World Trade Organization and Organization for Economic Cooperation and Development to encourage reforms by member countries.

--Editing by Jill Coffey.