Hughes Hubbard & Reed

Antitrust Outlook – Spring 2018

As the calendar tells us it is spring, despite all contrary indications of ice and snow in the northern U.S. this April, we offer our outlook on the important developments and emerging trends in antitrust enforcement in the United States.

The Trump administration has been slow in making appointments to the two antitrust enforcement agencies, and there remain open leadership positions at both the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) that we expect to be filled in the coming months. Merger and cartel enforcement actions have declined, and merger reviews have on average lengthened from 2016 to 2017, but the DOJ has not shown any reluctance to take aggressive positions and push matters to litigation.

MERGERS

DOJ merger investigations leading to antitrust conduct investigations
The DOJ will not hesitate to pursue separate civil or criminal investigations where it uncovers anticompetitive conduct in the course of merger clearance investigations. A recent example of this can be seen in the DOJ's probe into the canned seafood industry that uncovered evidence of price-fixing during the review of a proposed merger, now abandoned, between Bumble Bee and Thai Union d/b/a Chicken of the Sea (the latter's U.S. subsidiary subsequently blew the whistle as the leniency applicant). As a result of this investigation, Bumble Bee and two of its executives pleaded guilty to a criminal price-fixing conspiracy, as did an executive from StarKist. Likewise, the DOJ's civil settlement of a "no poach" agreement among rail companies was the fruit of facts reportedly uncovered in the course of a merger investigation.

Reinvigoration of vertical merger challenges through litigation
The DOJ's suit to block the merger of AT&T and Time Warner marks the first time the DOJ has asked a court to block a vertical merger since 1977. Contrary to some accounts, however, it is not the only objection to vertical mergers in four decades. Since 2000, the DOJ and FTC have challenged 22 vertical mergers, with some investigations resulting in behavioral consent decrees and others in abandoned transactions. The DOJ's suit is consistent with statements of the Trump administration and with the DOJ's announced reluctance to entertain behavioral remedies.

The outcome of this trial now unfolding in district court in Washington, D.C., will likely also shed light on other contemplated vertical mergers, including two pending in health care: CVS Health Corporation's proposed acquisition of health insurer Aetna, announced in December 2017, and health insurer Cigna Corp.'s proposed acquisition of pharmacy benefits manager Express Scripts, announced in March 2018.

Structural remedies over behavioral remedies

We are seeing an increased emphasis on divestitures to remedy perceived anticompetitive concerns. Assistant Attorney General Makan Delrahim has recently discussed the Antitrust Division's preference for structural remedies over behavioral remedies on several occasions, and this preference is clear in consent decrees requiring divestitures in mergers (e.g., Bayer/Monsanto). Furthermore, in an April 2018 speech, the director of civil enforcement for the Antitrust Division cautioned that even divestitures might not be a sufficient remedy for mergers between two companies that compete on innovation, implying that such transactions would instead be blocked. The FTC has thus far taken a different approach, resolving enforcement actions with behavioral remedies on two occasions in 2017 (a vertical merger led by Broadcom Limited and a horizontal merger led by Enbridge Inc.). Whether the FTC remains more open to behavioral remedies remains to be seen.

ANTITRUST CONDUCT (NON-CARTEL)

Stepped up enforcement against information sharing among competitors

There is an increased focus on information sharing among competitors as a potential antitrust violation. For example, in March 2017 the DOJ settled a civil antitrust claim against DirecTV alleging that the company acted as a ringleader of information exchanges with three of its competitors as the companies negotiated rights to telecast Los Angeles Dodgers baseball games. The case settled with the mildest of remedies, primarily commitments to avoid sharing competitively sensitive information with rivals, but we expect that other investigations may bring harsher penalties. In particular, hub-and-spoke cartel conduct (i.e., the sharing of competitively sensitive information with a third party with the understanding that this information will be passed on to competitors) is a focus of enforcers.

Focus on the pharmaceutical industry continues

The FTC remains focused on maintaining competition in the generic drug industry and has indicated that it may be investigating markets where the entry of generic pharmaceuticals is expected but has not yet occurred. One roadblock to the FTC's enforcement, however, is clear: a federal court has ruled that the FTC lacks jurisdiction to seek broad injunctive relief against future actions to delay generic entry, though the FTC has appealed this decision. The FTC has also been very focused on life sciences mergers, requiring divestitures to address its competitive concerns (e.g., Baxter/Claris and Abbott/Alere). A long list of state attorneys general and the DOJ also are in the midst of several ongoing antitrust investigations in the pharmaceutical industry, focusing on potential anticompetitive conduct relating to the sale and marketing of generic and branded pharmaceutical products.

Increased scrutiny of licenses for standard-essential patents

Technology companies are closely watching litigation and debate among the antitrust agencies, both in the U.S. and internationally, regarding the circumstances in which a holder of standard-essential patents might face antitrust liability for demanding particular patent licensing terms. In the U.S., a federal district court has

allowed the FTC's lawsuit against Qualcomm, filed in January 2017, to proceed on a theory that a refusal to license patents to competitors in the context of an agreement to license technology on fair, reasonable, and non-discriminatory (FRAND) terms, could constitute an anticompetitive refusal to deal. (A parallel private action brought by Apple against Qualcomm raises similar issues.) This is an area of particular interest to AAG Delrahim, who has offered several comments on the topic indicating his disagreement with the FTC's theory of anticompetitive harm in the Qualcomm case.

CARTELS

Criminal prosecutions and fines in 2017 were significantly reduced in comparison to 2016, as the DOJ reached the tail end of its auto parts and LIBOR and foreign currency exchange (FX) investigations last year. Investigations into the capacitors, ocean shipping, and public real estate foreclosure auction industries have not produced enforcement results on par with those seen in prior years, but the DOJ has focused its enforcement efforts on prosecuting atypical cartels and "no poach" agreements. Other ongoing investigations and litigations show that the DOJ intends to pursue an aggressive cartel enforcement agenda while defendants are more inclined to contest criminal charges.

Forthcoming criminal prosecution of "no poach" agreements

In October 2016, the DOJ and FTC issued joint guidance for human resource professionals that warned that naked wage-fixing and no-poaching agreements among employers are per se illegal, and that, going forward, the DOJ intends to prosecute such agreements criminally. Since then, AAG Delrahim has foreshadowed imminent criminal prosecutions. In April 2018, the DOJ announced the settlement of "no poach" charges against Knorr and Webtec, suppliers to the railroad industry. The conduct was prosecuted civilly, rather than criminally, only because it predated the joint guidance. We consider this an area that deserves particular compliance focus due to the heightened enforcement risk, the possibility of imprisonment for executives who enter into "no poach" agreements, and the DOJ's caution that a significant number of companies and industries are involved in these agreements. The DOJ is keenly focused on the competition for talent: the Antitrust Division is also investigating information-sharing practices among colleges regarding applicants for early decision admissions.

DOJ suffers litigation defeats

Tokai Kogyu Co., Ltd. and its U.S. subsidiary were indicted for conspiring to rig bids and fix prices in connection with parts sold to Honda and other automotive companies. Unlike the other companies charged in the automotive parts investigation, Tokai and its subsidiary declined to plead guilty and instead went to trial. The jury returned a verdict of not guilty for both.

Whether the DOJ rehabilitates its trial record remains to be seen. In two unrelated matters, emboldened defendants are taking the DOJ to court. In October 2018, the DOJ will prosecute Nippon Chemi-Con, indicted for its role in the capacitor price-fixing cartel, and will also prosecute three U.K.-based former traders, indicted for their role in FX manipulation.

The DOJ's criminal case against an heir location service provider was dismissed by a district court on statute of limitation grounds. The court also rejected DOJ's argument that the case should be subject to the per se rule, instead finding that the alleged agreement was sufficiently unusual to apply the rule of reason. The DOJ

has appealed this decision to the Tenth Circuit, contending that under long-standing precedent, customer allocation is subject to the per se rule, and contentions of economic efficiency do not apply. If the district court's opinion stands, we may see more defendants argue for rule of reason treatment in cartel matters.

DOJ runs alongside states in cartel investigations with modest results

The DOJ's three-year investigation of price-fixing among dozens of generic pharmaceutical manufacturers has thus far resulted in guilty pleas from just two executives from a single drug manufacturer. This federal criminal investigation was triggered by a 2014 civil investigation by the Connecticut Attorney General that has spun into multidistrict litigation by the attorneys general of nearly every state in the nation against numerous generic drug manufacturers. In January 2018, the DOJ announced that it may join the civil suit filed by the states on behalf of U.S. government purchasers, an uncharacteristic action considering its own ongoing probe, in which restitution could be court-ordered with criminal convictions. This matter demonstrates that the state attorneys general will move forward aggressively with independent investigations, even where there is an existing federal investigation. The parallel investigations by both federal and state enforcers, with private civil plaintiffs waiting in the wings, present a minefield for pharmaceutical manufacturers tasked with responding to inquiries.

At the ABA Antitrust Section spring meeting in Washington, D.C., on April 11, 2018, the DOJ again expressed its intention to seek damages when the government is the victim of cartel conduct as a purchaser of goods or services. In such cases, the DOJ would seek recovery under section 4(a) of the Clayton Act, which allows treble damages; successful leniency applicants would only be liable for single damages.

Compliance in focus

While the DOJ has maintained its position that a cartel participant will not be given credit for having a compliance program in place, except for sentence mitigation, it recently has appeared more willing to engage in a discussion on the topic, signaling a potential shift in policy. For example, on April 9, 2018, the DOJ held a public roundtable discussion to explore the issue of corporate antitrust compliance and its implications for criminal antitrust enforcement policy. We expect to see future developments in this area.

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