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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Antitrust Yearly Wrap-Up: 'Unbuckle' for 2017?

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The year 2016 has proved to be yet another active one in antitrust and competition law. Government regulators continued their rigorous enforcement approach, particularly on the merger front, while important principles and doctrines of private enforcement continued to evolve and multiple foreign jurisdictions continued to expand both their administrative and private antitrust regimes. Of course, the November election of Donald J. Trump to the presidency has generated not unexpected speculation about the future direction of antitrust in the U.S., particularly with regard to merger enforcement. All told, 2017 portends to be an even more interesting year than 2016, but potentially because of *less* antitrust activity and enforcement.

Merger Enforcement

The Federal Trade Commission (FTC) and Department of Justice's Antitrust Division (DOJ) had some high profile successes in merger enforcement this past year. In May, Staples and Office Depot abandoned their proposed merger in the face of an FTC challenge and the granting of a preliminary injunction by the U.S. District Court for the District of Columbia.[1] The FTC argued, successfully, that Staples and Office Depot were the only meaningful competitors capable of servicing the market for office supplies purchased by very large customers (i.e., Fortune 100 companies)—so called business-to-business or "B2B" transactions. Such a "2-to-1" merger triggers a "structural presumption" of anticompetitive effects, which the defendants were unable to rebut despite their argument that Amazon Business was a strong, emerging competitor that would provide a viable option in this product space.

For its part, the DOJ is involved in two ongoing merger litigations that seek to prevent consolidation in the health insurance industry, namely the acquisition of Cigna by Anthem, and of Humana by Aetna.[2] In essence, the DOJ complaints allege that the mergers would reduce the number of large, national health insurers from five to three, would limit price competition, reduce benefits, and materially decrease incentives to provide innovative wellness programs in a variety of geographic markets. Both trials are ongoing as of this writing.

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The FTC's enforcement efforts against two hospital mergers finished on a high note in 2016, as the Third and Seventh Circuits overruled separate district court decisions from earlier this year that had stymied the FTC's attempt to block the mergers.[3] The FTC's geographic market definition was critical to both the district and circuit courts' decisions. The FTC had claimed that the hospital services in question are "inherently local," and insisted that the effects on insurers as proxies for consumers must be taken into account in hospital merger cases. The circuit courts agreed on both accounts, which may bring some needed predictability in this active area.

Private Litigation

The year 2016 saw a variety of noteworthy private litigations as well, interpreting previous Supreme Court decisions and generating new and interesting case law.

In 2013, the U.S. Supreme Court handed down their landmark reverse payments in patent dispute settlements decision, *FTC v. Actavis*,[4] which mandated that the full rule of reason be applied to reverse-payment cases. Recently, the circuit courts have issued several interpretations of this decision. First, in early 2016, the First Circuit ruled that the lack of a cash payment from a branded drugmaker to a generics company does not prevent an agreement from being targeted as anticompetitive.[5] Subsequently, in September, the Third Circuit vacated a decision certifying a class of purchasers alleging pay-for-delay deals, and for the first time laid out the factors that courts must consider when determining the numerosity of a proposed class in this context.[6] Lastly, in November, the First Circuit left in place a jury verdict finding no antitrust injury (but an antitrust violation) from the challenged conduct. This case is notable as the first jury verdict on pharmaceutical company settlements since *Actavis*.[7]

One unique decision in 2016 dealt with the subject of international comity. The Second Circuit vacated a district court judgment against two Chinese companies that had been accused of fixing the price of vitamin C.[8] The decision came on the heels of an appeal from MOFCOM, the Chinese Ministry of Commerce (and one of China's antitrust regulators), which argued that the district court's decision should be vacated because the companies were required to comply with a price-fixing regime imposed by Chinese law, and therefore should not be faulted for their actions by the American courts. The three-judge panel agreed.

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Finally, in 2016 the Second Circuit also issued a discreet but important class action decision with far reaching implications for plantiffs' counsels, overturning a $7.25 billion settlement between Visa, MasterCard and private retailers relating to swipe fees.[9] The court found that merchants who would accept the cards after the settlement date were not adequately represented in the settlement discussions. This was a concern, the court explained, because retailers who had accepted the cards in the past had the same counsel as the retailers who would take them in the future, creating potential unfairness to at least some of the later-accepting merchants. A group of the retailers asked the Supreme Court for review, arguing that refusal to let the same counsel represent injunctive and damages classes that do not perfectly align would offer little benefit in practice; that request is pending.

Global Antitrust Developments

On the international front, China remained a hot topic in 2016. In June, the U.S. House of Representatives Judiciary Committee held a hearing on "International Antitrust Enforcement: China and Beyond," focusing on China's Anti-Monopoly Law (AML). While the AML was passed in 2007 to "facilitate the transition from reliance on central planning and state ownership toward a market-based economic regime," it has recently been criticized by many in the international community as a vehicle for the Chinese government to advance its political and economic agenda. There remains a concern that the AML is being used to benefit Chinese companies and industry through enforcement effects that tend to target foreign businesses, including U.S. companies. Perhaps this is not that surprising, however, as the AML specifically mentions a commitment to promoting a "socialist market economy." While the hearing did not generate any immediate action, the concerns raised by the FTC, U.S. Patent and Trademark Office and other stakeholders are likely to influence U.S.-China interactions in the competition arena.

Back in 2013, the European Union recommended to all Member States that they develop a collective redress mechanism, setting out a series of non-binding principles to that end. And while not all jurisdictions have acted in this area, the U.K. has been particularly proactive. For example, in 2015, the Consumer Rights Act came into force, creating a collective action regime for competition law claims to be brought in the specialist Competition Appeal Tribunal (CAT).[10] Under this Act, claimants may bring collective actions in relation to cartels or other competition law infringements, on either an opt-in or opt-out basis (subject to certification by the CAT). Certification under this process seeks to avoid frivolous and unmeritorious claims, and will consider a number in factors, including strength of claim and availability of alternative dispute resolution, as well as the claim's suitability for collective redress and the justness of the class representative. While these collective redress procedures in the U.K. are still relatively new, an increase in claims can be expected. Other jurisdictions continue to expand or develop their collective redress regimes, which certainly is something to look after in 2017.

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Antitrust Under Trump

As one might expect, the Trump administration will likely have a significant impact on antitrust enforcement for at least the next four years. Those reading tea leaves focus on Joshua Wright, who heads the FTC Transition team. Wright is a former Republican FTC Commissioner known for espousing an "evidence-based approach" to antitrust enforcement, stating, for example, that the agencies should allocate their resources to generate the highest rate of return for consumers—i.e., look for "low hanging fruit" such as public restraints of trade.[11] Wright's evidence-based approach focuses on certain methodological commitments: (1) integrating economic analysis into all stages of enforcement decision-making; (2) integrating empirical evidence into the decision-making process; and (3) committing to basic insights of decision theory with the aim of minimizing the adverse costs and impacts of speculative enforcement decisions.[12] One may fairly assume that President Trump's DOJ and FTC appointments will in some significant measure reflect Wright's substantive views on antitrust and the related decision-making process. In particular this includes integrating efficiency considerations and evidence into all types of antitrust analysis, particularly mergers.

Finally, Justice Antonin Scalia's surprising death in February 2016 has left a much-discussed open seat on the highest court in the land. As promised, the Republican-controlled Senate has refused to take up President Barack Obama's nomination of Merrick Garland, insisting that the newly elected president should fill the seat with his own nominee. Therefore, Donald Trump will be in the position to appoint a new Justice immediately (and given the ages of several Justices, possibly more). During the presidential campaign, Trump released a list of 21 names that appear on his "short list" for the Supreme Court. These names were, predictably, conservative jurists mostly drawn from the Federal Circuit courts and state supreme courts. While these candidates have a variety of antitrust experience, it is likely that President Trump will appoint a new Justice with relatively conservative views on antitrust law. But antitrust viewpoints may not be a critical factor in Trump's selection as opposed to a potential justice's views on more traditional socio-political subjects.

Conclusion

The past year was a tumultuous one around the world, and to some degree antitrust developments necessarily lag behind these events and may take years to manifest changes. Hence, in the coming year, observers curious about antitrust developments should take note of who the Trump administration appoints to the leadership positions within the DOJ and FTC and the antitrust experience of the new junior Justice of the Supreme Court. However it plays out, there certainly will be some departure from the last eight years of proactive enforcement.

1. *FTC v. Staples*, No. CV 15-2115 (D.D.C. May 17, 2016).
2. *United States. v. Anthem*, No. 16-cv-1493 (D.D.C. filed July 21, 2016); *United States v. Aetna*, No. 16-cv-1494 (D.D.C. filed July 21, 2016).
3. *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016); *F.T.C. v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016).
4. *FTC v. Actavis*, 133 S. Ct. 2223 (2013).
5. *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538 (1st Cir. 2016).
6. *In re Modafinil Antitrust Litig.*, 837 F.3d 238 (3d Cir. 2016).
7. *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 39 (1st Cir. 2016).
8. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016).
9. I*n re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016).
10. As this is a U.K. statute, it should not be effected by the Brexit vote.
11. Joshua D. Wright, Commissioner, FTC, What's Your Agenda, Remarks at the ABA Spring Meetings (April 11, 2013).
12. Joshua D. Wright, Commissioner, FTC, Evidence-Based Antitrust Enforcement in the Technology Sector, Remarks at the Competition Law Center, Beijing, China (Feb. 23, 2013).