

ANTITRUST TRADE AND PRACTICE

Expert Analysis

Antitrust Yearly Wrap-Up: New Administration, Same Enforcement?

Though many predicted the antitrust administration under a Republican president would be characterized by less activity and enforcement, 2017 was a busy year for both the Department of Justice's Antitrust Division (DOJ) and the Federal Trade Commission (FTC).

Leadership Transition At U.S. Antitrust Agencies

The FTC and the DOJ experienced significant leadership changes in 2017. Republican Makan Delrahim was confirmed as Assistant Attorney General for the Antitrust Division of the DOJ in September after being nominated in March by President Trump. Mr. Delrahim previously served as Deputy Assistant Attorney General at the DOJ and spent time



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as a lobbyist for technology and health care companies. During his first public speech as AAG, Mr. Delrahim stated that he intends to be an “enforcer, not a regulator” and will emphasize international cooperation

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and consistency in international antitrust enforcement during his tenure. In October, President Trump nominated Joseph Simons as FTC Chairman. Mr. Simons served as the Director of the Bureau of Competition in the early 2000s during the George W. Bush Administration.

The selections of Mr. Delrahim and Mr. Simons appear to be consistent with a traditional Republican agenda. Republican antitrust administrations historically have been characterized by a focus on economic evidence (rather than innovative theories) of the likelihood of harm to competition, increased flexibility on remedies and limited vertical merger enforcement. However, it appears that antitrust enforcement under President Trump may continue to be rather aggressive.

DOJ Merger Enforcement

Merger enforcement in 2017 continued with the rigor of 2016. Several mergers that were challenged under the previous administration were ultimately abandoned during the new one, other transactions proceeded with divestitures and one consummated transaction was actually unwound.

In the health care industry, both the Aetna-Humana and Anthem-Cigna mergers, which were challenged in 2016, were abandoned in 2017. In January, Judge John D. Bates of the U.S. District Court for the District of Columbia granted the DOJ's injunction blocking Aetna's acquisition of Humana, finding that the transaction would harm senior citizens who rely on Medicare Advantage and low-income consumers who obtain insurance on public exchanges. After the court rejected the parties' proposed divestitures, they abandoned the deal in February without appealing. Also in February, Judge Amy Berman Jackson of the same court blocked Anthem's acquisition of Cigna, finding that the transaction, the largest in the history of the health care industry, would substantially lessen competition in the market for the sale of health insurance to national accounts and large employers. The parties lost their appeal in April and abandoned the deal in May, but continue to litigate termination fees and potential damages against each other.

Proposed transactions in other industries experienced similar scrutiny. John Deere abandoned its proposed acquisition of Monsanto's Precision Planting LLC in May, just a few weeks before the

DOJ's court challenge was set to begin. The DOJ had filed suit in 2016 alleging the transaction was a merger-to-monopoly in high-speed precision planting systems. Finally, in June, after a two-week trial, the District Court of Delaware blocked EnergySolutions' acquisition of Waste Control Specialists finding that the acquisition would significantly lessen competition in the low-level radioactive waste disposal market in 36 states, the District of Columbia and Puerto Rico. (The authors' firm represented defendants EnergySolutions and Rockwell Holdco. in the antitrust litigation.)

Other transactions moved forward last year, but in many cases,

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only with divestitures. In one of the highest valued transactions ever, Dow and DuPont successfully completed their merger of equals in August after lengthy investigations in over 20 jurisdictions. The DOJ argued that the proposed

merger would harm farmers and other consumers because it would reduce competition in the development, manufacture and sale of two specific types of crop protection chemicals and eliminate competition between the only two U.S. producers of acid copolymers and ionomers. The parties agreed to a settlement requiring DuPont to divest its market-leading herbicide and insecticide products and Dow to divest its U.S. acid copolymer and ionomer business. Although the European Commission required research and development divestitures, the DOJ did not find such divestitures necessary under U.S. market conditions. (The authors' firm represented DuPont in the antitrust litigation and settlement.)

The DOJ ordered divestitures in other transactions as well, including those in the agriculture and radio advertising industries. In April, the DOJ sued to block Danone's acquisition of WhiteWave Foods and simultaneously proposed a settlement that required Danone to divest its Stonyfield Farms business. In November, the DOJ required Entercom Communications to divest 13 radio stations before it could proceed with its acquisition of CBS Radio. The DOJ claimed the divestitures were necessary to preserve competition in

three geographic markets for businesses that buy advertisements on radio stations.

Antitrust enforcement under the Trump administration has also involved some less common actions. In September, the DOJ sued to unwind Parker Hannifin's consummated acquisition of CLARCOR, despite the deal earning agency clearance during the HSR period. The DOJ argued that the transaction substantially lessened competition in markets for aviation fuel filtration products in the United States and required Parker Hannifin to divest the Facet filtration business it acquired from CLARCOR in order to restore the lost competition. This case is a reminder that HSR clearance does not prohibit regulatory challenge, even when the deal has been consummated. In October, the DOJ modified General Electric's (GE) consent decree for its merger with Baker Hughes after GE missed the deadline to complete required divestitures. These modifications imposed incentive payments on GE to encourage prompt completion of the remaining 10 percent of its divestitures. The company will begin making daily incentive payments in January 2018.

But the action that received the most attention this year was the DOJ's suit to block AT&T's acquisition of Time Warner based on vertical integration concerns. The DOJ has not sued to block a vertical merger in over 40 years. In fact, in 2011 the DOJ *approved* a similar acquisition with consent decree stipulations—Comcast's acquisition of NBCUniversal. AT&T and Time Warner argued that they do not compete directly with each other, and relied on the merger guidelines published by the DOJ to further argue that the suit is wholly unwarranted. They have also alleged that President Trump has influenced Mr. Delrahim's decision to sue due to his strong dislike for CNN, owned by Time Warner. The DOJ argued in its complaint that the merger would harm consumers because it would cause higher television bills and reduce the number of emerging innovative options for television. Mr. Delrahim has also said that consent decrees, like the one in Comcast-NBCUniversal, are not effective and believes structural remedies, like asset divestitures, better protect competition. The trial is set to begin on March 19, 2018.

FTC Litigation

Not to be left out of the enforcement trend, the FTC continued its

focus on regulatory action, particularly against the pharmaceutical industry, despite being staffed with only two commissioners in 2017. Questcor Pharmaceuticals, now Mallinckrodt Ard Inc, paid \$100 million to settle FTC charges alleging the company violated antitrust laws when it acquired the rights to develop Synacthen Depot, a competing drug that threatened Questcor's U.S. monopoly over an infantile spasm drug. In addition to paying the fine, Questcor was ordered to license the drug to another company. In February, the FTC filed a complaint against Shire ViroPharma alleging the company repeatedly filed unsupported petitions with the U.S. Food and Drug Administration to delay the FDA's approval of generic competitors against its branded drug, Vancocin. The litigation is notable because it is the first time the FTC has taken action against a drug manufacturer based solely on petitions to the FDA. ViroPharma filed a motion to dismiss in June, yet the matter is still pending with the court as of this writing. The FTC also filed a federal court action in the Northern District of California against Watson Laboratories and Allergan challenging as an unlawful "pay-for-delay" agreement a May 2012 settlement of patent litigation

related to the branded drug Lidoderm. However, the FTC's case has been stayed pending resolution of Watson and Allergan's October 2016 lawsuit in the Eastern District of Pennsylvania seeking a declaratory judgment that the FTC lacks statutory authority to challenge the Lidoderm settlement in federal court or, at minimum, lacks statutory authority to pursue a disgorgement remedy against Watson and Allergan. (The authors' firm represented Watson Laboratories in securing severance of antitrust claims brought by the FTC relating to the pharmaceutical products Lidoderm and Opana ER.)

Criminal Enforcement

No matter the year or administration, price-fixing remains illegal under U.S. antitrust law. In May, Bumble Bee and one of its top executives pleaded guilty to price fixing in shelf-stable tuna fish, with the company agreeing to pay \$25 million in fines. In August, two e-commerce companies, Zaappaz and Custom Wristbands, as well as key executives for each company, pleaded guilty to conspiring to fix prices for customized promotional products sold online to customers in the United States. The companies will pay a total of \$2.3 million in fines. The DOJ also uncovered

several large price-fixing conspiracies this year. Eight companies and ten individuals were indicted for conspiracy to fix prices for electrolytic capacitors sold in the United States and abroad. Five ocean shipping companies pleaded guilty to involvement in a conspiracy to fix prices, allocate customers and rig bids. The companies have paid over \$255 million in fines. Four individuals also pleaded guilty; seven more have been indicted but remain fugitives.

Global Antitrust Development

Global antitrust development and international policy cooperation continued in 2017. Chile, Thailand and the Philippines all introduced pre-closing, and in some instances, post-closing, merger filing obligations. Argentina and other jurisdictions have new merger control legislation pending. Several jurisdictions, including Germany, lowered their filing thresholds presumably to target the digital and pharmaceutical industries. CADE in Brazil, COFECE in Mexico and the EU Commission have continued aggressive enforcement policies in 2017, and continue to work cooperatively with each other and U.S. antitrust enforcement authorities. In May, over 500 delegates from more than

80 jurisdictions attended the sixteenth annual conference of the International Competition Network (ICN). At this conference, the ICN adopted Recommended Practices on cartel fines, merger notification and merger review and also provided a framework for analyzing exclusionary unilateral conduct. These Recommended Practices are the ICN's most influential work product and are used by agencies around the world as benchmarks.

Conclusion

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