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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Antitrust Yearly Wrap-Up: Active on All Fronts

By Karen Hoffman Lent And Kenneth Schwartz

Matching expectations, 2018 was an active year filled with contentious merger reviews, increased civil/criminal enforcement actions, and pivotal policy shifts. Here's what to remember about 2018 and what to expect in 2019.

Mergers

The AT&T/Time Warner saga continues. AT&T's $85 billion acquisition of Time Warner was one of the most publicly watched and debated antitrust matters in recent years. To recap, the Department of Justice (DOJ) sued to enjoin the merger even though the parties were not horizontal competitors; rather the transaction combined AT&T distribution capabilities with Time Warner's content portfolio. In essence, the DOJ's vertical theory of harm alleged that the merger may increase the combined entity's bargaining power such that it would deny or upcharge Time Warner content to AT&T's competitors that would then pass higher fees on to consumers. Of note, the DOJ had not sought to challenge a vertical merger in federal court in more than 40 years and routinely approved such transactions with behavioral remedies to resolve any potential concerns. Presiding federal Judge Richard Leon didn't buy the DOJ's argument and refused to enjoin the merger in June.

The case is now on appeal to the U.S. Court of Appeals for the D.C. Circuit. See *United States v. AT&T*, No. 18-5214 (D.C. Cir. filed Sept. 20, 2018). At oral arguments on December 6, the panel seemed skeptical of the DOJ's main bargaining power/blackout theory. They also expressed doubt that Judge Leon clearly erred in his judgment, the standard needed to overrule his decision. Antitrust attorneys will continue to watch this case in 2019. Appellate courts rarely review merger challenges so this case has the potential to develop vertical merger analysis, clarify what the district court must consider in its review, and speak to the merits of the blackout/content leverage theory. One other practical takeaway from this saga is it may finally incentivize the antitrust agencies to update their vertical merger guidelines, which were originally published in 1984 and do not meaningfully reflect the agencies' or courts' current approach to vertical merger analysis.

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Procedural hiccups for CVS/Aetna. Judge Leon frustrated the DOJ for the second time in 2018 when he put a momentary kibosh on the DOJ's resolution of the $69 billion merger between CVS Health (CVS) and Aetna. After an extensive review,

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the DOJ cleared the transaction subject to the divestiture of Aetna's Medicare Part D business, an area of direct competition between the merging parties. Merger settlements with the DOJ (but not the FTC) are subject to court review under the Tunney Act, 15 U.S.C §16 (2012). In practice, the Tunney Act is typically viewed as a purely administrative and procedural aspect of the process. However, in December, Judge Leon issued an order requiring CVS and Aetna to hold some aspects of their businesses separate while he reviews the settlement they reached with the DOJ in October.

At issue is a significant difference in interpretation of the Tunney Act, as Judge Leon appears interested in understanding aspects of the merger that the DOJ concluded did not raise antitrust concerns, whereas the DOJ believes such scrutiny is outside the bounds of judicial review. Judge Leon is displaying an increased level of judicial involvement not seen in decades of practice but which portends increased costs and delays for the merging parties. While this is a case to watch in 2019, it very well may simply reflect the judicial philosophy of one judge rather than a major shift in the settlement review process.

Structural remedies remain the preferred approach. In 2018, the antitrust agencies continued their established practice of seeking structural fixes rather than behavioral remedies to resolve antitrust concerns, especially in horizontal mergers. For example, in May, Bayer AG agreed to divest approximately $9 billion worth of its businesses and assets in order to proceed with its proposed $63 billion merger with Monsanto Company. Similarly, the Federal Trade Commission (FTC) required industrial gas suppliers Praxair and Linde AG to divest significant assets in multiple product markets across the United States as part of a settlement that resolves charges that their proposed $80 billion merger likely would be anticompetitive.

Both DOJ Assistant Attorney General Makan Delrahim and FTC Chairman Joe Simons have publicly reiterated their commitment to structural remedies as the government's preferred settlement path. Merging parties in highly concentrated industries should carefully consider the risks of government intervention pre-signing and understand whether they have a viable settlement solution, if one is required.

Civil Actions

Say no to "no-poach" agreements. The agreement not to hire a competitor's employees used to be standard in employment contracts, but in recent years, the DOJ, FTC, and state attorneys general are formally saying "no more." In October 2016, the FTC and DOJ issued the Antitrust Guidance for Human Resource Professionals, which codified their approach that no-poach and wage-fixing agreements are per se illegal if they are naked restraints (that is, agreements not tied to a legitimate transaction or collaboration) and, significantly, announced that the DOJ will prosecute naked agreements criminally. This past year, the DOJ obtained its first consent decree in a no-poach action since formalizing this policy against Knorr-Bremse AG and Westinghouse Air Brake Technologies. The DOJ in public statements continues to threaten criminal enforcement against parties who entered no-poach agreements after the October 2016 announcement, and in May announced that there are no-poach criminal investigations pending against health care industry participants. Though these investigations didn't yield related indictments or plea agreements in 2018, we can anticipate that the DOJ will bring both civil and criminal no-poach enforcement actions in 2019.

No-poach enforcement has also been active on the state level. In July, attorneys general from 10 states and the District of Columbia launched investigations into the use of no-poach agreements in franchising contracts within the fast-food industry. Washington State Attorney General Bob Ferguson attained consent decrees from numerous fast-food restaurants in which the parties promise to remove the no-poach provisions from their contracts. Private class action lawsuits predictably followed on the heels of these governmental investigations, and several already survived motions to dismiss. Going into 2019, market participants are on notice—with the federal agencies threatening criminal enforcement and the state AGs scrutinizing employment practices, employers should look twice at these types of provisions in all

forms of agreements to ensure they are procompetitive.

Qualcomm meets the FTC in court. It's been two years in the making, but the trial between the FTC and Qualcomm began on January 4 and is expected to garner much attention throughout 2019. In January 2017, the FTC sued to enjoin Qualcomm for allegedly refusing to license its standard essential patents (SEPs) to rival chipmakers, thus maintaining its monopoly over baseband processors used in cellphones. The FTC also alleged that Qualcomm used its dominance in the semiconductor market to extract higher royalties and anticompetitive licensing terms from cellphone makers. Federal Judge Lucy Koh issued a partial summary judgment in November holding that Qualcomm was required to license SEPs under industry group commitments to provide them on "fair and reasonable" grounds. See *FTC v. Qualcomm*, No. 17-cv-00220 (N.D. Cal. Nov. 6, 2018). This decision strengthens the FTC's position but in no way decides the case, as the FTC still needs to prove that the alleged conduct allowed Qualcomm to maintain monopoly power.

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Third-party standing. As discussed in our December 2018 article, in November, the U.S. Supreme Court heard oral arguments in *Apple v. Pepper*, a consumer class action lawsuit that raises third-party standing issues. The court must decide whether iPhone users who buy apps from Apple's App Store may sue Apple for alleged antitrust violations, or whether only third-party app developers may bring such claims. This case has the potential to overturn *Illinois v. Brick*'s holding that only direct purchasers have standing to sue for alleged antitrust violations. This case remains one to watch in 2019.

Criminal Enforcement

In 2018, the DOJ engaged in a variety of criminal enforcement actions aimed at cracking down on domestic and international cartels. Here are the highlights:

Real estate bids. Throughout 2018, several real estate investors pleaded guilty to conspiring to rig bids at online foreclosure auctions in Palm Beach County, Florida. According to court documents, the investors allegedly agreed not to bid against each other, artificially lowering the price paid at auction for foreclosed homes. The DOJ brought similar charges against investors in Mississippi and California, and entered into plea agreements with many of them throughout the year.

Tracking the foreign exchange. As part of the department's ongoing investigation into antitrust and fraud crimes in the foreign exchange market, the DOJ entered a plea agreement with BNP Paribas USA (BNPP USA, a subsidiary of BNP Paribas S.A.) for allegedly fixing prices in Central and Eastern European, Middle Eastern, and African currencies. See *United States v. BNP Paribas USA*, No. 1:18-cr-00061 (S.D.N.Y. Feb. 2, 2018). Since 2015, five other banks—Citicorp, JPMorgan Chase & Co., Barclays PLC, the Royal Bank of Scotland plc, and USB AG—pleaded guilty to similar charges and collectively paid about $2.7 billion in criminal fines.

Bumble Bee seafood. On May 16, 2018, a federal grand jury indicted Christopher Lischewski, former CEO of Bumble Bee Foods, for allegedly participating in a conspiracy to fix the price of packaged seafood from November 2010 to December 2013. See *United States v. Lischewski*, No. 3:18-cr-00203 (N.D. Cal. filed May 16, 2018). Bumble Bee and its senior vice president of sales have already pleaded guilty to similar charges, but it remains to be seen whether Lischewski will do the same.

Of koozies and temporary tattoos. In November, as part of the DOJ's long-running investigation into information exchanges among online retailers, Gennex Media was charged with allegedly conspiring to fix the prices of customizable items such as wristbands, lanyards, drink koozies, and temporary tattoos. See *United States v. Gennex Media*, No. 4:18-cr-00654 (S.D. Tex. filed Nov. 1, 2018). Texas-based online retailer Zaappaaz

and e-commerce company Custom Wristbands pleaded guilty to similar charges in 2017.

Developing Doctrine

Embracing two-sided markets. *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) was one of the biggest antitrust cases of the year decided in the U.S. Supreme Court. There, the court held that American Express did not violate antitrust laws when it contractually banned merchants from telling customers not to use American Express cards at check out. To prove the restriction was anticompetitive, the plaintiffs tried to show that it allowed American Express to charge merchants high fees for each transaction, harming competition in the market for cardholder services for merchants. But the court held that the plaintiffs were not considering the correct market. The court instead recognized that the credit card market has two sides, where a credit card issuer like American Express creates a platform connecting merchants and cardholders. To prevail, the merchants needed to show harm to the entire market—that is, to both merchants and cardholders—which they didn't do.

This case is significant for several reasons. First, the court recognized a new kind of market that requires plaintiffs to satisfy a tougher burden of proving anticompetitive effects on the market's two sides. Second, defendants may now have more leeway to argue that anticompetitive conduct on one side of a market may be offset by procompetitive effects on the other side. Third, it is unclear how broadly this opinion will apply, as the Court did not clearly define how to identify a two-sided market, providing only scraps of guidance in the opinion. Some already believe this two-sided market theory applies throughout the tech industry, so it will be interesting to watch how lower courts apply and develop the theory in 2019.

No injury, no class standing. Courts have continued to closely examine antitrust injury in the context of class actions. In *In re Asacol Antirust Litig.*, No. 18-1065, 2018 WL 4958856 (1st Cir. Oct. 15, 2018), a reverse payments case, the First Circuit overturned class certification because about 10 percent of the class members were brand-loyal customers who would have bought the brand drug over the generic regardless of defendant Allergan's conduct. Since this 10 percent didn't suffer an injury-in-fact, the court found that class certification was inappropriate.

This case is part of an ongoing split among the circuits. Here, the First Circuit aligned with the majority view (held by the Second, Fifth, Eighth, and D.C. Circuits) that a class cannot be certified if even one member is uninjured and thus has no standing. Meanwhile, the Seventh and Ninth Circuits maintain that a post-judgment claims administrative process alleviates the standing concern and so permits class certification if only "some" members are uninjured. This issue is ripe for the Supreme Court's resolution and has major implications for the future of class action lawsuits.

2019 Projections

It is likely that 2019 will continue to be a year of action, with the DOJ and FTC giving more bite to the policy decisions they declared in 2016 and 2017. As such, we can anticipate aggressive merger review and challenges, civil enforcement actions targeting employment practices, and criminal enforcement actions against domestic and international "cartels." We can also anticipate more state antitrust enforcement actions and heightened state regulatory review, particularly in high-profile mergers that directly impact state residents.

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