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Antitrust Trends in 2019: Enforcement Watch List for the Year to Come

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As 2019 kicks off, the Cooley antitrust group highlights 10 recent developments and trends corporate counsel should be aware of – from the US Supreme Court and lower courts, the Department of Justice and Federal Trade Commission and enforcers around the world – that are likely to impact businesses this year and beyond.

1. *Ohio v AMEX*: New rules for multisided markets, including high-tech platforms

The Supreme Court in 2018 issued a landmark decision in *Ohio v. American Express*, addressing the appropriate analysis of alleged anticompetitive effects in multisided markets, where an intermediary serves more than one distinct set of customers. The court concluded that AMEX's contracts preventing merchants from directing customers to other credit or debit cards charging lower fees, its so-called "anti-steering" rules, do not violate the antitrust laws.

Many industries involve two-sided or multisided markets. Traditional two-sided advertising markets include newspapers, magazines, radio and television. Innovation and the rise of the digital economy have spurred explosive growth in next-gen multisided platforms, especially in technology markets that connect consumers to products and services, such as apps that bring buyers and sellers together to facilitate a transaction, social media platforms, online booking tools, ride sharing, energy management and financial services like credit cards.

Credit card issuers market their platforms to both merchants and cardholders and provide distinct services to each that facilitate a transaction between them. The Supreme Court determined that AMEX operates as a two-sided "transaction platform," providing services simultaneously to two different groups of customers (cardholders and merchants) who depend on the platform to intermediate a transaction.

The court rejected the plaintiffs' argument that there is a separate market for merchant services and that an increase in merchant fees on one side of the market demonstrated an anticompetitive effect. Plaintiffs' arguments, the court held, "wrongly focuse[d] on only one side of the two-sided credit-card platform," as "[e]vidence of a price increase on one side of [such] a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power."

The court reasoned that "two-sided transaction platforms" that "facilitate a single, simultaneous transaction" exhibit "pronounced indirect network effects and interconnected pricing and demand," and ultimately are "better understood as supplying only one product – transactions." Accordingly, "evaluating both sides of a two-sided transaction platform is … necessary to accurately assess competition."

This market definition allowed AMEX to persuade the court that the procompetitive investments that it makes on the cardholder side of the market must be considered in the competitive effects analysis. If the court had determined that there were two separate markets, AMEX's arguments about the benefits to cardholders may not have been considered.

While the decision is not a free pass to technology platforms and other types of multisided products, it will undoubtedly increase the burden on the antitrust agencies and private plaintiffs in alleging and proving anticompetitive effects when dealing with

interconnected multisided platforms. The decision is also likely to have broader application as antitrust litigants and merging parties apply the court's reasoning in analogous circumstances.

2. Pharma in the crosshairs

Conduct by pharmaceutical, biotech and medical device companies remains at the top of the antitrust enforcement agenda and a target of private litigation across a spectrum of issues.

The FTC and courts continue to interpret the contours of lawful and unlawful so-called "reverse payments," where patent owners pay alleged infringers in connection with the settlement of patent litigation.

Perhaps most significant, during 2018, an FTC administrative law judge dismissed one complaint despite finding a payment was "large and unjustified," concluding that any "theoretical" harm was outweighed by procompetitive effects. In particular, the judge found that it was unlikely the generic drug would have been introduced "at risk" before the agreed upon entry date and that the "real world procompetitive benefits" of the settlement – which provided a broad license enabling entry before patent expiration – were substantial. Increased judicial deference to the but-for world, including the likely outcome of patent cases, could significantly influence future reverse payment challenges. An appeal to the full commission is pending.

In federal court, the FTC also lost a reverse payment challenge, in *FTC v. Abbvie*, but proceeded to take its sham litigation claim to trial and won a $448 million disgorgement verdict, the largest monetary award ever in a litigated FTC antitrust case. The case underscores the significant antitrust risks where a firm may be alleged to have engaged in baseless, sham litigation to delay generic competition.

The FTC is appealing to the Third Circuit a lower court decision finding that the FTC cannot sue for an injunction under the FTC Act where it fails to allege an ongoing or imminent violation. In that case, involving alleged sham petitions before the FDA, the court found no imminent violation, where the alleged misconduct ceased almost five years before the FTC filed its complaint. If upheld, the ruling could force the FTC to rely more heavily on administrative litigation to obtain cease and desist orders, rather than injunctions in federal court, to prevent what it believes are unfair or deceptive acts or practices and unfair methods of competition.

In October 2018, President Trump signed a new law that modifies the Medicare, Prescription Drug, Improvement and Modernization Act to require biologic drug makers to alert the FTC and DOJ of agreements, including patent litigation settlements, they reach with biosimilar applicants. Just as the requirement under the MMA to notify agreements involving pharmaceuticals led to an explosion of antitrust challenges, this new law may foreshadow increased scrutiny of patent settlements and other agreements involving biologics.

In a case tackling the antitrust implications of settlement agreements more broadly, the FTC challenged trademark litigation settlements entered by 1-800 Contacts with more than a dozen competing online contacts lens retailers, which restricted the use of each other's trademarks as key words in online searches. The commission affirmed an administrative law judge's conclusion that such settlements were not immune from antitrust scrutiny and that the agreements harmed consumers and competition for the online sale of contact lenses.

The DOJ, 45 state attorneys general and private plaintiffs continue to pursue claims that drug companies fixed generic drug prices, in what was recently characterized by one state official as "most likely the largest cartel in the history of the United States." The investigation and enforcement actions reportedly involve more than 300 drugs sold by at least 16 companies.

3. Faster, cheaper merger review?

In welcome news for companies engaged in M&A and other transactions reportable under the Hart-Scott-Rodino Act, the DOJ and FTC have announced reforms designed to reduce compliance time and costs for merger review.

While Second Requests are issued to investigate only 3-4% of transactions reported under the HSR Act, they typically trigger a long, grueling and expensive process.

In a recent speech, DOJ Assistant Attorney General for Antitrust Makan Delrahim reported that in 2017, a typical "significant" merger review took approximately 11 months to complete, 65% more time than similar reviews in 2013. AAG Delrahim announced that, "provided that the parties expeditiously cooperate and comply throughout the entire process," DOJ "will aim to resolve most investigations within six months of filing."

Proposed changes include making the Antitrust Division Front Office open for meetings early in the merger review process, reducing the number of document custodians and investigational hearings, using a model voluntary request letter to collect key information within a few days of filing and using a model timing agreement, giving the DOJ 60 days from compliance to decision. DOJ is also seeking to improve coordination with foreign jurisdictions conducting parallel investigations and revising the agency's remedies guidelines.

In exchange, DOJ is insisting that merging parties provide detailed information to the government early in the investigation and a rolling production of documents and information in advance of certifying compliance with Second Requests. AAG Delrahim stressed that merging parties should not "hide the eight ball," but instead work with the DOJ in good faith to resolve open issues expeditiously.

The FTC is also taking action to streamline its merger review process and provide transparency. In August, the FTC published its own model timing agreement, which addresses the timing and logistics of document productions and investigational hearings and includes provisions to ensure that the agency knows when parties expect to comply with Second Requests.

These reforms may take time to fully implement, and timing to complete the HSR process will continue to turn on the complexity of the case. The initiatives at least reflect a recognition by the DOJ and FTC that the current process is often unduly burdensome for those transactions that receive a Second Request.

4. Rewriting the vertical merger playbook

Heading into 2019, the potential for future challenges to vertical mergers – combining firms that supply products to each other, in contrast to horizontal mergers, which combine competitors – remains shrouded in uncertainty.

The case to watch is the DOJ's challenge to AT&T's $85 billion acquisition of Time Warner, owner of CNN, HBO and Warner Brothers. In June 2018, after a six-week trial, the US District Court for the District of Columbia found that the DOJ failed to show the acquisition is likely to substantially lessen competition, the DOJ's first loss in a merger challenge since 2004. The case has now been briefed and argued before the DC Circuit Court of Appeals.

After the AT&T loss in district court, the DOJ closed investigations of vertical aspects of two other large mergers, CVS-Aetna and Cigna-Express Scripts. On the other hand, DOJ obtained structural relief to resolve vertical concerns raised by Bayer's merger with Monsanto, which would have combined Bayer's seed treatment business with Monsanto's leading seed business. AAG Delrahim has said the Antitrust Division will no longer accept what he called the "Band-Aid of behavioral remedies," such as requiring firewalls and nondiscrimination provisions to address vertical concerns, instead insisting upon structural remedies, such as divestiture.

The FTC meanwhile accepted behavioral conditions to address concerns raised by the Northrop Grumman-Orbital ATK merger, raising the specter of different standards at the two agencies.

Clarity may be forthcoming during 2019 from the DC Circuit as well as from the expected FTC report following the agency's Hearings on Competition and Consumer Protection in the 21st Century (see development 8 below), which included a deep dive into vertical merger analysis.

5. Exposure to antitrust liability looms even after deals close

Recent public and private antitrust enforcement vividly demonstrate that antitrust liability can continue to impact mergers even well after transactions close. Firms should consider such possibility in evaluating risks before signing up to deals.

In *Steve & Sons, Inc. v. JELD-WEN*, a jury determined that JELD-WEN violated Section 7 of the Clayton Act – which makes unlawful mergers and acquisitions the effect of which "may be substantially to lessen competition" – when it acquired one of its door-part competitors. The courtroom challenge came nearly four years after JELD-WEN's acquisition and after the DOJ reviewed and declined to challenge the merger. In addition to a $176 million treble-damages award, the court in October 2018 ordered divestiture of one of the acquired door-manufacturing facilities, more than six years after closing.

While JELD-WEN involved private litigation, the DOJ's challenge to Parker Hannifin's $4.3 billion acquisition of CLARCOR highlights that the expiration of the HSR waiting period does not equate to government approval or immunize transactions from subsequent review.

There, more than six months after the parties received HSR clearance and closed the deal, the DOJ brought suit alleging the transaction combined the only US sources of aviation fuel filtration products, a small portion of the deal. The DOJ's complaint cited internal emails by the buyer "identifying the 'notable area of overlap,'" questioning "whether buyer should be 'forthcoming'" about the antitrust issues and stating that the buyer was prepared for the possibility it might have to divest CLARCOR's aviation filtration business. Parker Hannifin agreed to settle the matter by divesting the aviation fuel filtration products it had acquired.

Transactions that fall below the HSR thresholds are also regularly challenged, both before and after closing. The FTC is currently challenging a consummated merger in administrative litigation involving the merger of top sellers of prosthetic knees equipped with microprocessors. The transaction was not HSR-reportable, and the agency opened an investigation after the transaction closed following receipt of a complaint from a large customer.

6. Shifting sands in DOJ and FTC positions on antitrust enforcement on FRAND commitments and patent holdup

New leadership at the DOJ and FTC have proselytized changes in how the agencies will address standard-setting organizations and other issues at the intersection of antitrust and intellectual property law. AAG Delrahim has signaled significant changes in how the DOJ views patent "holdup" versus patent "holdout" and fair, reasonable and nondiscriminatory commitments.

SSOs comprised of industry participants that collectively set standards to ensure interoperability and compatibility of products have often required patent holders to disclose relevant patents and agree to license those essential to implementing their standards on FRAND terms. The role of antitrust in ensuring that FRAND commitments are honored has been litigated in a number of cases over the last 20 years.

In a shift from prior administrations, AAG Delrahim has questioned whether refusals to license on FRAND terms should be a violation of antitrust law, arguing that the failure to abide by FRAND commitments should not give rise to an antitrust claim.

A related issue is the competitive implications of patent holdup versus patent holdout. Previous administrations have focused on competitive concerns from so-called patent holdup, where firms demand royalties for patent licenses *after* incorporation in the standard, based on the added market power derived from incorporation into the standard, rather than the value of the underlying

intellectual property.

AAG Delrahim has indicated that he views "the collective holdout problem," where before setting a standard, the implementing firms either object to a patent owner's licensing terms or refuse to take a license at all, as a "more serious impediment to innovation."

Delrahim argues that "innovators make an investment before they know whether that investment will ever pay off" and have no recourse if implementing firms hold out, whereas implementing firms have a buffer against holdup because some investments occur "after royalty rates for new technologies could have been determined." Thus, "under-investment by the innovator should be of greater concern than under-investment by the implementer."

The FTC has proceeded more cautiously. Chairman Joseph Simons has stated the FTC will continue to examine both patent holdup and patent holdout because both raise potential antitrust issues. SSOs, patent owners and implementers alike should all stay attuned to these developments.

7. Increasing scrutiny of information exchange among competitors and use of algorithms

The antitrust agencies have indicated the exchanges of competitively sensitive information among competitors may run afoul the antitrust laws, issuing guidance that information exchanges "may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect." They have advised that, absent adequate safeguards, competitors should not exchange current and future price information, strategic plans, cost information, information about future product offerings, expansion plans and customer-specific information.

In late 2018, the DOJ settled with seven broadcast companies to resolve allegations the companies exchanged "pacing" and other information in select markets in alleged violation of Section 1 of the Sherman Act, which makes illegal agreements that unreasonably restrain trade.

The complaint describes pacing information as information that compares a station's revenues booked for a certain time period to the revenues booked in the same point in the previous year. The complaint asserts that the exchange permitted broadcasters to anticipate whether competitors were likely to raise, maintain or lower spot advertising prices, though it does not allege the conduct increased prices or caused other actual anticompetitive effects.

Information exchange promises to continue as a hot topic for antitrust enforcers, especially as tools and technologies to exchange information rapidly evolve and expand. As discussed below, the FTC's Hearings on Competition and Consumer Protection in the 21st Century addressed the competitive impact of algorithmic software, artificial intelligence and predictive analytics. Debates continue whether software code and technology serve as tools for more efficient competitive decision-making or autonomous collusion.

The DOJ has been clear that "where competitors agree to restrict competition between them, whether by agreeing to display identical gasoline prices at gas stations on opposite street corners, or by fixing prices using advanced technology like online trading platforms or algorithms, they violate the Sherman Act." But, "the fact that price movements in response to changing competitive conditions and customer demand happen more quickly because of new technology does not change the generally pro-competitive nature of these price changes." Thus, the DOJ's focus in price-fixing cases, whether or not facilitated by algorithm-based pricing software or other technology, remains "concerted action."

8. FTC exploring new approaches to competition and consumer protection enforcement on matters involving high-tech markets

The FTC is devoting enormous resources to a series of hearings on Competition and Consumer Protection in the 21st Century.

The agency has held 16 days of hearings, with discussion among company executives, economists and lawyers, and three more are scheduled before the hearings wrap up in February, with final comments due in March – though that deadline may be delayed by the government shutdown.

The hearings have covered such topics as privacy, big data and competition, competition and consumer protection issues associated with the use of algorithms, artificial intelligence and predictive analytics, the role of intellectual property in promoting innovation, and the identification and analysis of collusive, exclusionary and predatory conduct by digital and technology-based platform businesses.

The hearings, modeled after a 1995 FTC study under Chairman Robert Pitofsky on global competition and innovation, are aimed at considering whether "changes in the economy, evolving business practices, new technologies or international developments might require adjustments to competition and consumer protection law, enforcement priorities and policy."

While only time will tell the extent to which the hearings may move the needle, there is substantial pressure for US authorities to be more aggressive in challenging tech leaders, following the lead of competition authorities in Europe and Asia. The hearings have even questioned the "consumer welfare" standard on which much of modern antitrust enforcement is based. The FTC Chairman's introduction to the hearings promised that the FTC would keep "a very open mind" on these important issues, including whether "significant adjustments to antitrust doctrine, enforcement decisions and law would be beneficial to our country."

9. Increased global merger scrutiny of transactions involving companies with little or no revenue

In the US, the HSR Act has long required notification of transactions valued over a significant amount, currently $337.6 million, regardless of the merging firms' assets and revenue.

Outside of the US, most merger control regimes are based on the turnover or revenues of the merging parties. In recent years, however, competition authorities around the world are adopting new rules to require notification of large acquisitions of firms with no or insignificant revenues at the time of acquisition.

This issue arises most frequently in deals involving tech and pharmaceutical startups, where firms may not yet have significant revenues but whose potential is evident in the transaction value. Antitrust authorities are keen to review acquisitions of not yet marketed drugs, for example, which may have a significant impact on the market.

Recently, new transaction value-based thresholds have come into force in both Germany and Austria. Notification may now be required in Germany where the value of the transaction exceeds €400 million (approximately $460 million) and the target is significantly active in Germany. Similarly, deals may now need to be notified in Austria where the value of consideration for a transaction exceeds €200 million (approximately $230 million) and the target is active to a "significant extent" in Austria.

The European Commission, meanwhile, has undertaken a consultation on whether its current turnover-based thresholds are sufficient to catch relevant mergers and if a deal value based threshold should also be required. An evaluation paper is expected from the commission in the near future.

10. Brexit to impact competition law

As the UK government continues to address how to leave the EU, questions regarding the future operation of the UK competition law regime have come to the fore.

In November 2018, nearly 30 months after the British electorate voted to leave the EU, the European Commission published a 585-

page draft Withdrawal Agreement, which provides for a transition period during which EU law will continue to apply to the UK as if it were still a Member State. Therefore, EU competition law will continue to apply to the UK until at least the end of 2021. As widely reported, however, the Withdrawal Agreement needs to be approved by the UK and the European Parliaments, and the UK Parliamentary vote scheduled during December 2018, has been postponed.

In the absence of ratification, and assuming that the UK does not withdraw or suspend its notice of its intention to leave the EU, Brexit will take effect on March 29, albeit without any agreement with the EU.

To prepare for such an eventuality, the UK government has published regulations that set out detailed changes that would be made to UK competition law in the event of a "no-deal" Brexit. Under the regulations, the Competition and Markets Authority would continue to apply domestic competition law within a framework set by EU competition law, including EU case law and block exemptions. While there may be some disruption, particularly for live merger cases, the CMA will have an increased budget to address these challenges and is hiring personnel to handle the workload.

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