ANTITRUST

TRUMP'S FIRST YEAR: NOT AS 'MERGER-FRIENDLY' AS EXPECTED

Despite the anticipated "pro-business" approach of the Trump administration, the Department of Justice and the Federal Trade Commission have both continued to challenge mergers. Indeed, late in 2017, DOJ signaled that it might be taking a tougher stance on vertical mergers and might be unwilling to accept behavioral remedies to settle such matters.

"A year or so ago, there was a general assumption in the business community and antitrust bar that there was going to be something of a lapse in antitrust enforcement under the Trump administration," says Juan Arteaga, a partner in Crowell & Moring's Antitrust Group and a former deputy assistant attorney general in the Antitrust Division at DOJ. But that did not happen. In May 2017, the DOJ blocked Anthem's proposed $54 billion acquisition of Cigna when the D.C. Circuit affirmed the trial court's decision. The next month, DOJ blocked a $367 million merger between EnergySolutions and Waste Control Specialists (continuing another suit filed by the prior administration).

In September 2017, DOJ brought its first merger challenge under the Trump administration when it sued to partially unwind Parker-Hannifin's $4.3 billion acquisition of CLARCOR. DOJ took the unusual step of challenging a consummated deal that it had previously cleared without even seeking additional information during the statutory review period. In its challenge, DOJ stated that the companies had failed to disclose certain information during the investigation, showing that DOJ will not hesitate to keep scrutinizing a merger's competitive effects even after the deal has closed. This case was recently settled when the companies agreed to divest the business that was the subject of the suit.

The FTC, too, has continued to be active on the antitrust front. "We haven't seen any major shifts in antitrust enforcement at the FTC since the election. The commission has continued to challenge deals, filing four challenges in the past year alone," says Alexis Gilman, a partner in Crowell & Moring's Antitrust Group who was previously assistant director of the Mergers IV Division in the FTC's Bureau of Competition. For example, he says, in June 2017, the FTC moved to stop the merger of DraftKings and Fan Duel, the two largest online daily fantasy sports sites, saying the combined company would create an organization that controls more than 90 percent of the U.S. market for such fantasy offerings. That move prompted the companies to call off the deal.

That same month, the FTC authorized a federal court action to block the proposed acquisition of a physicians' group, saying that the move would significantly reduce competition for various physician services in one part of the state. "That was in keeping with the agency's long line of active enforcement in the health care space, which is likely to continue," says Gilman.

In the recent past, he notes, "roughly half of the FTC's antitrust enforcement actions have been health care-related. Health care is an industry where the FTC continues to be very active and act in a bipartisan way."

Recently, the FTC has filed two more merger challenges, including one to unwind a consummated merger. In 2017, DOJ and the FTC brought three separate actions seeking to unwind consummated mergers. Gilman says the FTC is also likely to keep pursuing non-merger antitrust actions, especially where pharmaceutical companies pay generic drug makers not to bring their lower-cost products to market.

Overall, adds Arteaga, "to the extent that GCs and business executives were expecting a big pullback in antitrust enforcement, they might need to recalculate their assumptions."

"Companies and their advisors have to take these developments into account when formulating their M&A strategies for the upcoming year." —*Juan Arteaga*

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DOJ: A FUNDAMENTAL CHANGE

Late in 2017, the new assistant attorney general for the DOJ Antitrust Division, Makan Delrahim, shook basic assumptions about federal antitrust policy when he strongly suggested that behavioral remedies will almost always be inadequate to address DOJ's concerns in merger investigations, including those involving vertical mergers. A short time later, DOJ challenged the AT&T-Time Warner vertical merger.

In discussing the ramifications of these recent DOJ developments, Arteaga says that "it's too early to say whether there has been a long-lasting change in DOJ policy toward vertical mergers and behavioral remedies, but companies and their advisors have to take these developments into account when formulating their M&A strategies for the upcoming year." Arteaga adds that "these developments and subsequent press releases issued by DOJ strongly suggest that companies relying primarily on behavioral remedies, instead of putting asset divestitures on the table, will likely run into significant difficulty when trying to negotiate a settlement with DOJ."

It may not take long to find out if the change is systemic. "DOJ is reviewing other significant vertical mergers," says Arteaga. "The way these deals are handled could tell us if the AT&T-Time Warner suit was a unique situation or the result of new policy toward vertical mergers."

Whether the FTC follows suit on vertical mergers remains to be seen. There are a number of vacancies on the commission. In the coming year, says Gilman, "we will likely have five new commissioners. That makes it hard to predict exactly what direction the commission could take."

We may see early signals soon. The significant vertical cases at the FTC are still pending, but should be in the latter stages of review. "How the FTC handles these deals will probably be an early indication of what approach it is going to take with vertical mergers," says Gilman.

"However," he adds, "the director of the FTC's Competition Bureau recently emphasized that the FTC has always had a strong preference for structural, rather than behavioral, remedies in merger investigations. And he noted that vertical-merger enforcement is not unusual, which could be a signal that the FTC may try to take an approach consistent with that of DOJ."

A NEW FOCUS ON IP AND ANTITRUST

The new head of the DOJ Antitrust Division is signaling change, including in how the department will look at IP and antitrust.

In November, Assistant Attorney General Makan Delrahim announced that DOJ will carefully scrutinize the concerted actions of members of standards-development organizations that restrict the legitimate exercise of patent rights. Going forward, Delrahim says, the division will focus on what he sees as the true competitive threat in the IP area: parties in standards bodies that use key IP but drag their feet on paying for licenses, or simply refuse to take a license. These "holdouts" and their activities, he says, will be receiving hard looks in the coming year.

"Delrahim basically said that the division has been too focused on protecting people and companies that use IP and hasn't offered enough protection to people and companies that create IP, which he believes ends up harming competition and consumers by minimizing the incentive to innovate," says Crowell & Moring's Juan Arteaga. He notes that while this represents a change from the division's recent focus, it is actually a return to previous DOJ policy around antitrust and IP law.

Meanwhile, at the FTC, the two sitting commissioners (Acting Chair Maureen Ohlhausen and Commissioner Terrell McSweeny) appear split, and because we will likely have five new commissioners by the end of the year, the future is less certain. "We don't have a clear view yet on what the FTC's position will be on this key issue," says Crowell & Moring's Alexis Gilman. "Thus, the views of the incoming commissioners as to the proper balance of IP and antitrust issues in general will play an important role in the course that the FTC takes in this area."

As a result of the DOJ shift and the uncertainty at the FTC, Arteaga says, "standards bodies and the companies that participate in them need to be more cautious in the way they handle technology patents. They should review their antitrust compliance programs and think carefully before changing their policies in ways that might end up disadvantaging IP owners."