Moving Front and Center

Antitrust

Over the past year, antitrust has emerged from relative obscurity to enter the political and governmental mainstream. Everyone, from the White House, Congress, and regulatory agencies, to state governments and presidential candidates, has been part of the dialogue. After years of megamergers and increasing consolidation across industries, along with little to no government enforcement of anti-monopolization laws, "antitrust is back, it's evolving, and it's at the center of a lot of public discourse," says Beatrice Nguyen, a partner at Crowell & Moring. "The various discussions that are taking place—and recent actions on the part of federal and state regulators—are creating an evolving landscape in antitrust, and they may point to upcoming fundamental changes in how the antitrust laws are enforced."

The changes in antitrust are taking several forms. For example, regulators are under increasing pressure from members of Congress and influential think tanks to consider the once-unusual step of reassessing and unwinding already-consummated mergers. And while the Department of Justice has been quite willing to pursue horizontal mergers, its 2017 challenge to the AT&T-Time Warner merger was the first time in four decades that the government challenged a vertical merger, in which companies from different stages of a common supply chain come together.

One of the more prominent shifts taking place is an increase in "targeted" antitrust scrutiny on entire industries—as opposed to specific companies—starting with Big Tech. In June 2019, the Department of Justice and the Federal Trade Commission divided up among themselves certain investigations into Google, Apple, Facebook, and Amazon. "I don't think we've seen a situation—at least in the past several decades—where regulators essentially divide up an industry to proactively start investigating it," says Nguyen. That same month, the House Judiciary Committee announced a bipartisan investigation into potentially anticompetitive behavior by prominent tech companies in Silicon Valley. And regulators and politicians alike have been talking about potentially anticompetitive actions of online marketplace operators and whether those operators should be able to both run and participate in their own marketplaces.

Other industries are in the spotlight, as well. With the pharmaceutical industry, politicians on both sides of the aisle have questioned a possible connection between rising drug prices and anticompetitive behavior among drug companies. A bipartisan House bill introduced in November 2019, for example, targets the practice of making minor modifications to a drug to extend its patent and keep generics out of the market. And a number of observers—including one FTC commissioner—have also called for greater scrutiny of health care-industry mergers.

Similarly, in 2018, Sen. Cory Booker introduced legislation that would place an 18-month moratorium on mergers between large agribusinesses, food and beverage manufacturers, and grocery retailers. Likewise, Sen. Bernie Sanders has released

State AGs: Taking Bold Action

While federal regulators explore potential new approaches to antitrust, state attorneys general are not standing still. "We've seen the states become willing to take bold action," says Crowell & Moring's Beatrice Nguyen.

Traditionally, states have often worked with the DOJ on antitrust investigations and litigation, but now they are increasingly likely to launch their own lawsuits. The year 2019 offered "some really prominent examples" of that trend, Nguyen says. In May, Connecticut and 43 other states filed suit against 20 pharmaceutical companies and 15 individuals for allegedly conspiring to fix prices for generic drugs. In June, a number of states sued to block the T-Mobile-Sprint merger, which was eventually approved by the DOJ. And in September, 48 states announced that they would investigate Big Tech companies for possible antitrust violations. In addition to these lawsuits, Nguyen says, "states are taking action individually. For example, California launched a high-profile antitrust lawsuit against a large hospital system in March 2018 that settled in October 2019. This was a case that the DOJ or the FTC might not have pursued."

For companies, it used to be that getting federal antitrust approval for a deal more or less meant the company was in the clear. But now "you can't really assume that anymore," says Nguyen. "The states may be waiting in the wings with a complaint even after the federal government gives its approval."

"Companies in concentrated markets need to be more mindful of potential antitrust implications when conducting business." **Beatrice Nguyen**

a detailed policy proposal that calls for, among other things, a moratorium on corporate consolidation in the agricultural industry, as well as the unwinding of prior mergers in that industry.

With the growing focus on entire industries, says Nguyen, "companies in concentrated markets need to be more mindful of potential antitrust implications when conducting business or considering acquisitions or mergers. Otherwise, they could find themselves in the crosshairs of regulators, embroiled in private litigation, or both."

Talking About Tomorrow

Regulators and politicians are also reconsidering how they should define "competition" in conducting antitrust analyses. While these discussions have not yet materialized into new laws, regulations, or enforcement action, they have gained traction and provide insight into how antitrust decision making is likely to evolve in the next few years.

Most notably, since the late 1970s, evaluations of mergers have analyzed whether the deal is good for consumers and consumer prices. But, says Nguyen, "we're starting to see more nontraditional considerations being included in antitrust discussions."

For example, as data plays a larger role in business, regulators appear to be more interested in factoring it into their analyses. "They are starting to consider questions such as, If a merger is going to result in one company getting an enormous amount of data, does that raise competition issues?" says Nguyen. Data privacy, too, is an increasing concern: If one company acquires another company and its data, what does that mean for consumers' personal information when they did not consent to giving their data to the acquiring company? As DOJ Antitrust Division Assistant Attorney General Makan Delrahim explained in November 2019, "Without competition, a dominant firm can more easily reduce quality, such as by decreasing privacy protection, without losing a significant number of users." He went on to add that "non-price dimensions of competition deserve our attention and renewed focus in the digital marketplace."

A variety of non-price dimensions is being discussed in various quarters. For example, says Nguyen, "there is a growing concern about labor-market concentration and the potential for companies and industries to have monopoly power over labor, resulting in lower wages." And enforcers' focus on labor is not limited to the merger context: No-poach agreements, in which companies agree not to hire each other's employees, are being scrutinized by regulators. Since the introduction of the DOJ and FTC guidelines for HR professionals in 2016, these agreements are also being investigated as criminal offenses in certain circumstances. The regulators' enhanced focus on labor has also led to an increasing number of labor-focused antitrust class actions.

This broadening discussion is showing up in Congress, too. In 2019, Sen. Richard Blumenthal, along with several other senators, wrote a letter to the DOJ and the Federal Communications Commission opposing the proposed merger between T-Mobile and Sprint because it would not only raise prices but also "harm workers, stifle competition, exacerbate the digital divide, and undermine innovation." And Sen. Amy Klobuchar has introduced several pieces of antitrust legislation, including the Consolidation Prevention and Competition Promotion Act, which would clarify that existing law prohibits mergers that result in lower product quality, decreased choice, and reduced innovation—more non-price criteria.

"In the past, many of these factors were not the driving forces behind regulators' merger investigations and analyses," says Nguyen. But if such ideas become part of the regulatory regime, she adds, "companies will need to pay attention to these considerations not only as part of their transactional review but also in the way they go about doing business."

In this environment, companies wanting to avoid antitrust troubles will need to take a more wide-ranging view of their actions and broaden their focus beyond the question of whether certain conduct will lower consumer prices. "Arguments and analyses are going to have to evolve and address these nontraditional factors," says Nguyen. Even if the laws don't change, she says, "it may be wise from a public-perception perspective to build a narrative that reflects issues beyond consumer prices." At the same time, companies should prepare the organization by ensuring, for example, that HR employees have antitrust training so that they avoid working too closely with other companies on hiring or wages.

As the mix of factors that go into antitrust decision making grows and regulatory scrutiny continues, the result is likely to be increased litigation with the government—and private litigation will not be far behind. And, Nguyen says, "we're not only talking about increased litigation, we're talking about the possibility of litigating new antitrust legal standards. Companies will need to pay attention to what is clearly an evolving antitrust environment."