

## Merger Reviews To Watch In 2018

By **Melissa Lipman**

*Law360, New York (January 1, 2018, 3:04 PM EST)* -- Despite predictions that the government would take a less-aggressive stance on merger enforcement under the Trump administration, both antitrust agencies are heading into 2018 with blockbuster challenges lined up in the federal courts.

Indeed, less than two months after Makan Delrahim won confirmation to head the U.S. Department of Justice's Antitrust Division, the watchdog launched its first bid to block a vertical merger in decades over AT&T Inc.'s \$84.5 billion deal for Time Warner. And observers are now waiting to see not only how the DOJ's complaint will fare, but also whether it's a harbinger of more vertical merger challenges to come.

Meanwhile, even with just two commissioners on hand who must agree on every challenge, the Federal Trade Commission has forged ahead with several suits, including a year-end complaint over Tronox Ltd.'s \$2.2 billion acquisition of rival Cristal.

Here's a look at those cases and the other merger reviews and challenges to watch in the year ahead.

### **AT&T-Time Warner**

Few would have predicted AT&T's bid to add Time Warner's roster of cable channels to its holdings would face an antitrust suit. Challenges to vertical tie-ups exceedingly rare, and the DOJ had allowed a similar transaction — Comcast Corp.'s acquisition of NBCUniversal — to move forward several years ago once the companies agreed to license their content to online rivals and to abide by the now-defunct Open Internet rules.

But with rumors swirling that the DOJ was readying a suit if AT&T wouldn't agree to divest some business units as part of the deal, Delrahim made it clear in a November speech that he wouldn't accept the kind of conduct remedies that secured approval for the 2011 Comcast deal.

A few days later, the government filed a complaint arguing that the vertical integration of AT&T's DirecTV distribution network with must-have Time Warner content like HBO and CNN would lead to hundreds of millions of dollars worth of price increases and squelch innovative competition in digital video distribution.

How those arguments play with the court will have a significant impact on future deal-making, with

lawyers already questioning whether the AT&T complaint marks the first step toward a more aggressive approach to vertical combinations.

“It is probably the most interesting antitrust challenge of the past two decades,” said Cadwalader Wickersham & Taft LLP partner Amy Ray. “There is not that much law on vertical mergers, so it will be of great value to the agencies and frankly to prospective merging parties to have more guidance.”

Of course, the DOJ will also have to contend with an extra wrinkle: Questions about whether the case is driven by politics given President Donald Trump’s campaign vow to stop the deal and oft-expressed antipathy for Time Warner’s CNN.

“It will be tough to disentangle the effect of politics on this case, but I think in shedding light on the concerns that could be caused by vertical mergers, it could be an extremely important case,” said Rutgers University law professor Michael Carrier. “Certainly AT&T will raise awareness of these developments as they already have.

“But I think as an antitrust case, the complaint and later the evidence will rise and fall on its own two feet,” Carrier added.

### **Tronox-Cristal**

Where the DOJ’s vertical challenge broke from recent history, the FTC’s December suit to keep Tronox from going ahead with its \$2.2 billion acquisition of chemical mining and processing company Cristal followed a similar mold to the agency’s recent cases.

The watchdog outlined a relatively narrow market — a particular formulation of a white pigment called titanium dioxide — and warned that within that scope the combination would allow two of the top three producers in North America to join forces and harm competition.

“It’s something that’s been pretty common in the FTC’s litigated cases to focus on relatively narrow markets. We saw that in Sysco-US Foods, in the Staples-Office Depot case,” said Crowell & Moring LLP’s Alexis Gilman, referring to the agency’s successful recent merger challenges in the national food distribution and office supply retail sectors.

More unusual, however, was the FTC’s focus on claims that further consolidation within the market would make it easier for the remaining players to coordinate their production and capacity without having to illegally conspire.

“The complaint leads with coordinated effects theories, and the unilateral effects theory is somewhat secondary,” Gilman said. “Most cases these days focus on unilateral effects. Some people think there can be in some cases a tension [in] alleging both, so I think that’s fairly interesting.”

### **Bayer-Monsanto**

Bayer AG’s \$66 billion buyout of Monsanto Co. has continued to face antitrust scrutiny throughout 2017 even after the DOJ and European Commission both allowed a rival agrochemical megamerger between Dow Chemical Co. and DuPont to move forward earlier in the year.

The EU, which has until early March to make its decision on the deal, already caught the attention of

much of the antitrust bar with its requirement that Dow and DuPont sell some research and development assets for new crop-protection chemicals. The requirement, which went beyond what the DOJ ultimately mandated in its review, stemmed from concerns that the tie-up would otherwise squelch innovation. The commission issued its formal complaint outlining its antitrust concerns with the deal, known as a statement of objections, in late December but has yet to publicly release the details of the case, according to media reports.

And attorneys said they were watching to see whether the commission would double down on that kind of argument in a number of deals, including the current one, given Bayer's promotion of "digital farming" — the use of technology to monitor and manage crops.

"The question is how much will the innovation theory be in the statement of objections," said Akin Gump Strauss Hauer & Feld LLP partner Davina Garrod. "The commission may put in its statement of objections that this merger will harm the evolution of the digital farming market. At the moment, the whole idea of digital agriculture is a little bit nebulous, so it will be interesting to see if they put it in the statement of objections and how they define it."

### **CVS-Aetna**

After the DOJ scuttled Aetna Inc.'s plans to merge with rival Humana Inc. in early 2017, the insurer forged ahead with a different deal proposal in early December. CVS Health Corp. announced in early December that it would pay \$69 billion for Aetna.

The deal is a largely vertical transaction, combining CVS' massive network of retail pharmacies and its pharmacy benefit manager operations with Aetna's insurance business.

"It comes at a time when the agencies are stocked with staff who have experience both in challenging health insurer and pharmacy deals," Ray said. "But it would seem that it would be less problematic than the health insurer deals that were challenged in the last year."

While the deal theoretically could land before either agency — the DOJ generally gets dibs on health insurer transactions while the FTC claims retail and PBM deals — the clearance process seems to be leaning in the DOJ's favor. And experts questioned whether, having staked out its ground on one major vertical deal, the DOJ might be more open to taking a tougher stand on another as well.

"My question is, given that CVS already ... operates as the PBM for Aetna, to what extent are there going to be even greater efficiencies that are due to the merger as opposed to the business relationship they already have with one another?" Ray said.

### **Disney-21st Century Fox**

Disney continued the spate of year-end dealmaking with a \$52.4 billion deal to acquire a sizeable chunk of 21st Century Fox as the company looks to build a rival service to Netflix, including production studios, some networks and its stake in Hulu.

The transaction, which would put the edgier content of the FX and Fox networks under the same house as Pixar and Marvel, will surely garner a close antitrust look. But it's the combination of the two companies' sports channels — Disney's ESPN with Fox's local sports networks — that might garner the most attention. The transaction does, however, also raise vertical issues as Disney adds content for its

planned digital distribution venture.

“It certainly raises some issues that will require a close look in some of the film production areas, and possibly some of the sports properties,” said Fenwick & West LLP antitrust chair Mark Ostrau. “The sports area is a little more interesting because there are a lot of exclusive deals with the teams and the leagues that might limit how that works.”

And despite the DOJ’s recent pushback against using conduct remedies, Ostrau said such fixes could likely easily deal with any problems that did arise with the sports properties.

“Very targeted, easily monitored remedies are still likely to continue,” Ostrau said.

### **Broadcom-Qualcomm**

After Qualcomm Inc. rejected Broadcom Ltd.’s initial \$130 billion offer as too low amid the regulatory risks it worried a merger would face, it remains far from clear that Broadcom would succeed in a hostile takeover campaign or in winning Qualcomm’s backing for a tie-up in 2018.

But if the deal does go forward, it could raise a host of interesting antitrust issues given the fact that regulators have recently looked at sizeable transactions involving both companies.

Indeed, Qualcomm’s \$38 billion buyout of NXP Semiconductors NV has lingered into the new year as the European Commission’s investigation has been delayed by problems getting information it said it needed to evaluate the deal.

“The parties won’t be able to pull the wool over [the agencies’] eyes so easily,” said Clifford Chance LLP’s Thomas Vinje. “It helps them to identify difficult issues, and that could slow things down.”

Much would likely also depend on how broadly enforcers are willing to view the market for semiconductor chips. At a high level, the transaction would make the company a sizeable player, but one in a relatively dispersed marketplace, Vinje said. But such a broad look is unlikely given the narrower market segments the European Commission has used in its more recent reviews, such as chips for the automotive or wireless industries, Vinje said.

Any deal would also have to contend with the fact that Qualcomm currently faces antitrust investigations and litigation over its patent licensing practices in a number of key jurisdictions, including the U.S. and Europe.

“It’s coming at a time where the FTC has a conduct enforcement action against Qualcomm pending in federal district court,” Ray said. “It will be interesting to see how Broadcom would structure its arguments of what merger-specific effects there would be, especially with respect to any change in Qualcomm’s IP licensing.”

Indeed, Broadcom might be able to leverage Qualcomm’s current difficulties with the way it has sought to calculate royalties for its chip patents to help the transaction, Vinje said.

“Broadcom ... has taken a more liberal view of that licensing practice and so when Broadcom says customers are behind it ... perhaps Broadcom has promised ... the smartphone producers that it would change those licensing practices,” Vinje said. “That then could assuage the customers and ... prevent

them from objecting to the deal.”

--Additional reporting by Matthew Perlman. Editing by Mark Lebetkin.

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