

Competition Legislation And Regulation To Watch In 2015

By **Melissa Lipman**

Law360, New York (January 02, 2015, 5:26 PM ET) -- A bill to align the preliminary injunction standards for mergers at the U.S. Department of Justice and the Federal Trade Commission is the antitrust legislation most likely to advance in 2015. But attorneys should also be watching the battle between Uber and local regulators and the FTC's "patent troll" study.

Here's a look at the antitrust legislative and regulatory landscape for 2015.

Standard Merger and Acquisition Reviews Through Equal Rules Act

This bill would require the FTC to meet the same standard the DOJ currently does to win a preliminary injunction blocking a transaction and would remove the FTC's administrative process for merger challenges after an injunction is denied.

Currently, for the DOJ to win a preliminary injunction against a deal, it must show that allowing a deal to go forward would cause irreparable harm. The FTC, on the other hand, has a separate test laid out by the FTC Act allowing the agency to argue that blocking the deal would be in the public interest.

And while attorneys say the bill's passage may remain a long shot even with Republican majorities in both houses of Congress, the measure is the most likely candidate to advance this year.

"It got passed out of committee in the House, but had not been taken up in the Senate. But with the new Republican leadership, I think the likelihood of it getting passed out of the Senate is much higher," said Shawn Johnson, a Crowell & Moring LLP partner. "Even in that situation it's quite unknown whether it would end up being passed and whether there's support in the White House."

If the measure did make it through Congress and win presidential approval, it could end up affecting cases on the margins, attorneys say, despite the FTC's long-standing argument that its preliminary injunction standard is effectively the same as the DOJ's.

"While I do think the FTC has an important separate function as an administrative agency, and I'm personally opposed to any proposals out there to get rid of it, I do think it's important that different industries don't face a different standard of review on mergers," Cahill Gordon & Reindel LLP partner Elai Katz said.

For example, in some cases the difference in the standards could affect whether parties decide to pursue a merger because the industry they're in would land them before the FTC, or whether to take a deal into litigation against the agency, according to Johnson.

"This primarily impacts a very small number of cases, but essentially those are many of the hardest cases out there," Johnson said.

FTC Patent Assertion Entity Study

Patent assertion entities, less charitably referred to as "patent trolls," have been a controversial topic for years, with Washington lawmakers weighing legislation designed to tamp down on trolls and state attorneys general and the FTC pursuing consumer protection and competition claims against some patent enforcers.

But 2015 should see the completion of the FTC's first in-depth study of what PAEs do and what effect, if any, that has on competition.

The so-called 6(b) study will have two parts: one focused on reviewing general PAE activity and another comparing PAE enforcement efforts to those of manufacturers and other nonpracticing entities in the wireless chipset industry.

The commission has said it is particularly interested in investigating how patent assertion entities organize their corporate legal structure, what types of patents they hold, and how they acquire patents and generate revenue.

The probe will also focus on how the companies engage in licensing demands and litigation, what patent assertion costs the companies face, and how much money they earn from their activities.

"It's something we want to pay attention to, and it's important," said Mark Botti, Squire Patton Boggs LLP's antitrust co-chair. "I'd be very interested to see whether the FTC reaches a conclusion that patent assertion entities deliver any significant social value in an economic sense from their activities."

The answer to that question, Botti said, should offer insight into whether and how the FTC might pursue enforcement in that arena going forward.

"In other words, are they engaged in activities that antitrust should value in balancing against harm, or are they some kind of opportunistic creature of the patent system?" Botti said.

Uber's Battle With Local Regulators

Ride-sharing service Uber Technologies Inc. has proven popular with the public and backers alike, with its valuation hitting nearly \$40 billion after its most recent venture financing round in December. But that rise has not been without controversy and claims of unfair competition from rival services.

The app has incurred the wrath of taxi drivers and regulators the world over, with many cities and states either banning the service outright or threatening to do so.

In the last two months of 2014, Uber lost a battle to continue operating in Nevada while a state regulator pursues claims that the service is operating without the proper taxi authorization, and

Portland, Oregon, has been fining Uber and its drivers for operating, in the city's view, without complying with local taxi regulations.

That fight over whether Uber provides much-needed new competition in the transportation field or whether it's just violating local taxi and safety rules will be worth watching in 2015, according to Kellie Lerner, a Robins Kaplan Miller & Ciresi LLP partner.

"It's really interesting from an emerging market antitrust perspective because, as an antitrust attorney, I'm torn myself about what I think is the right result there," Lerner said.

The issues range from whether Uber offers little more than a guise for independent car services to fix prices, to whether Uber drivers are gaining an unfair advantage over their rivals.

"They're competing without having to go through all of the licensure and regulatory hoops that the taxi drivers have to go through, so [the question comes down to whether] it is a level playing field," Lerner said.

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