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Antitrust 2018: Trends and Developments to Watch

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1. Trump's appointments set the antitrust agenda for 2018

Almost a year into the Trump Administration, leadership at the Department of Justice Antitrust Division is now set. The Senate confirmed Makan Delrahim as Assistant Attorney General at the Department of Justice on September 27, 2017, and his deputies were assembled even before his confirmation. At the Federal Trade Commission, however, only two of five Commissioner's seats are currently filled. In October, Trump announced his intention to nominate Joseph Simons to chair the FTC and Rohit Chopra to serve as a Commissioner, both of whom must be approved by the Senate.

Both Delrahim and Simons bring years of antitrust experience and served in senior antitrust enforcement positions in the George W. Bush Administration – Delrahim as Deputy Assistant Attorney General at the DOJ and Simons as Director of the Bureau of Competition at the FTC. Both appointees emphasize the importance of taking an economic-focused approach to analyzing antitrust issues.

Delrahim also brings years of political experience, having served as Chief Counsel and Staff Director to the Senate Judiciary Committee. He also served as Deputy Assistant to the President in the White House at the beginning of the Trump Administration. Chopra, a Democrat supported by Senator Schumer, will bring consumer protection and financial services experience to the FTC, which is responsible for consumer protection as well as antitrust enforcement.

These appointments suggest that the antitrust agencies will follow a less-interventionist, Republican approach to antitrust enforcement, but recent enforcement, particularly against the AT&T/Time Warner merger, and public statements indicate the agencies may be somewhat more aggressive and will not take a laissez-faire, hands-off stance.

2. Scrutiny of vertical mergers

Perhaps the most high-profile merger presently pending is a vertical merger – AT&T's proposed $85.4 billion acquisition of Time Warner, owner of CNN, HBO and Warner Brothers. The DOJ has challenged the merger in court and trial is set for March 2018. This will be a major test as the first major antitrust trial for the Trump Administration.

Antitrust scrutiny most often focuses on the horizontal aspects of transactions involving a combination of competitors, which may result in anticompetitive effects, such as increased prices, reduced innovation or a decrease in quality. The proposed acquisition of Time Warner by AT&T *does not* involve horizontal competition but rather is a vertical merger, involving an upstream supplier and a downstream distributor.

The DOJ alleges that the combination of Time Warner's media content with AT&T's video distribution network will allow the combined firm to "use its control over Time Warner's valuable and highly popular networks to hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for the right to distribute those networks." The DOJ further alleges that the combined company would thwart the industry's transition "to new and exciting video distribution models that provide greater choice for consumers, resulting in fewer innovative offerings and higher bills for American families."

It is rare for antitrust authorities to challenge a vertical merger in court on such a theory of competitive harm. In

fact, the last time the DOJ tried a vertical merger case was in 1977, *which the DOJ lost*, and the last time the DOJ *successfully* tried and blocked a vertical merger case was in 1972. *See United States v. Hammermill Paper Co*. (W.D. Pa. 1977); *Ford Motor Co. v. United States* (1972).

Since then, to resolve antitrust concerns raised by enforcers, parties proposing vertical mergers have either abandoned them or agreed to settlement, typically involving a behavioral remedy, requiring non-discriminatory treatment of all customers. Indeed, the DOJ allowed Comcast's acquisition of NBC Universal to proceed, subject to such remedies in 2011. Delrahim, however, in his first speech as Assistant Attorney General, made clear he would disfavor behavioral remedies.

But AT&T and Time Warner have staunchly committed to stay the course and defend their proposed vertical merger in court. Accordingly, in 2018 we may witness the first DOJ vertical merger trial in over 40 years, the outcome of which may impact vertical merger law for decades to come.

3. DOJ antitrust enforcement under Delrahim will focus on structural remedies

Newly confirmed Assistant Attorney General Delrahim wasted no time in indicating his approach to antitrust enforcement will "return to the preferred focus on structural relief to remedy mergers that violate the law." Structural remedies typically require companies to divest certain product lines or business units, while behavioral remedies are those that require or restrict specific behavior of the merged companies.

Delrahim, in his keynote address at the ABA's Antitrust Fall Forum in November 2017, criticized the DOJ's decision to enter into behavioral consent decrees to resolve vertical mergers, including in the Comcast/NBCU, Google/ITA and Live Nation/Ticketmaster mergers, noting that these types of remedies "supplant competition with regulation," and "antitrust is law enforcement, not regulation."

Delrahim again highlighted the "challenges of behavioral consent decrees in antitrust cases," in December 2017, commenting on the Second Circuit's decision to affirm the lower court's ruling in *United States v. Broadcast Music, Inc*. In criticizing the continued enforcement of the 1966 decree in the case, Delrahim stated, "[s]uch [behavioral] decrees, over time, effectively become perpetual regulations that the [DOJ] and the courts are often not well-suited to enforce."

4. Focus on pharma

The FTC continues to aggressively target pharmaceutical companies proposing mergers and acquisitions, as well as conduct by pharmaceutical companies as their drug patents expire. Private litigants also continue to bring antitrust cases against pharmaceutical companies.

Life sciences mergers are an FTC target. The agency, for example, recently required divestitures of two generic pharmaceutical products to resolve antitrust concerns raised by Baxter's $625 million acquisition of Claris' injectable drugs business, including concern over what it called "imminent, future competition." The agency also required divestiture of two point-of-care medical testing device product lines to resolve concerns raised by Abbott's $8.3 billion acquisition of Alere.

The FTC also continues enforcement against so-called reverse payment settlements of patent litigation in the pharmaceutical industry, including a case last year involving Opana, an opioid used to relieve moderate to severe pain. The FTC challenged a "no-AG" agreement, under which the pioneer firm agreed not to introduce an authorized generic drug for two and a half years, despite having the legal right and financial incentive to do so. After initially filing in federal court, the FTC is pursuing administrative litigation. This approach aligns with Acting Chairman Maureen Ohlhausen's admonitions to develop post-*Actavis* precedents administratively, a trend that is likely to accelerate under Republican stewardship of the FTC.

In the meantime, the federal courts continue to shape the contours of antitrust liability for reverse payment settlements. In a pair of late 2017 decisions, the Third Circuit in *In re Lipitor* revived two reverse payment suits, finding the lower court had imposed too stringent a pleading standard, while in *In re Wellbutrin*, the court found that plaintiffs lacked antitrust standing because they failed to show that generic entrants would be able to

overcome the pioneer drug company's patent in litigation to enter the market. Litigants on both sides of reverse payment battles will undoubtedly rely on these precedents in future cases.

5. The Supreme Court may rule on the “rule of reason”

The Supreme Court recently granted certiorari to review the Second Circuit's decision in *Ohio v. American Express*, giving the high court an opportunity to offer insight on the application of the rule of reason, a standard courts apply to determine whether the alleged conduct is an *unreasonable* restraint in violation of the antitrust laws.

In 2010, the DOJ and 17 states filed suit against AmEx, arguing that the company's anti-steering provisions in its contracts with merchants, which prohibit the merchants from encouraging customers to use other credit cards by offering discounts, restrain trade unreasonably, violating the Sherman Act. The district court found the provisions unlawful.

On appeal, the Second Circuit reversed, finding the district court had erred in evaluating the effects of AmEx's conduct on the two-sided market in which it operated by considering effects only in the merchant market and "excluding the market for cardholders" in its relevant market definition. The Second Circuit explained, this "ignores the two markets' interdependence." This led, the Second Circuit said, to a misapplication of the rule of reason standard because the district court failed to assess the procompetitive effects of AmEx's anti-steering provisions on the cardholder side of the market. Simply, the district court had not considered whether a price increase to merchants would be used to fund benefits for cardholders. The Second Circuit reasoned, because the anti-steering provisions "affect competition for cardholders as well as merchants, the plaintiffs' initial burden [at trial] was to show that the [provisions] made *all* AmEx consumers on both sides of the platform – i.e., both merchants and cardholders – worse off overall."

In seeking cert, the states argued the Second Circuit improperly collapsed two distinct spheres of competition into one, in conflict with Supreme Court precedent, which holds that when different sides of a two-sided platform involve distinct competition and products that are not substitutes, they should be considered separate markets for the purposes of an antitrust analysis.

A Supreme Court decision in the case may shed light on how courts should apply the rule of reason, particularly in cases involving two-sided markets. This will have widespread effects in many industries, such as software (computer users and application developers), healthcare (insurance companies and patients), travel (ticket booking agencies/websites and passengers), ride-sharing (drivers and riders) and media (advertisers and consumers).

6. No-poach agreements will be prosecuted as criminal activity

While no criminal charges have yet been brought against employers for entering no-poach or wage-fixing agreements, that is about to change.

In October 2016, the DOJ and FTC jointly issued a policy statement entitled "Antitrust Guidelines for Human Resources Professionals," advising that agreements among companies not to poach each other's employees or agreements among employers on employees' wages violate antitrust law.

That policy statement followed high-profile civil enforcement actions brought by the agencies against high-tech and healthcare employers. The guidelines emphasize that, going forward, employers can and would be prosecuted criminally for naked agreements on employee compensation or to not solicit or hire each other's employees.

The Trump Administration has voiced support of this Obama-era policy. On January 19, 2018, in remarks prepared for a conference hosted by the Antitrust Research Foundation, Delrahim indicated that if employers have engaged in no-poach or wage-fixing agreements since the issuance of the policy, their actions will be treated as criminal. He noted the Antitrust Division has "been very active" in reviewing potential violations, and that, "In the coming couple of months, you will see some announcements, and to be honest with you, I've been

shocked about how many of these there are, but they're real."

Based on Delrahim's comments, criminal prosecutions are on the horizon.

7. Cartel activity to remain top priority

Democrats and Republicans alike agree antitrust enforcers should vigorously pursue cartels, including agreements to fix prices, allocate markets and rig bids. The DOJ's recent enforcement and public statements indicate that we can expect such enforcement to continue, in the US and abroad.

The DOJ's criminal enforcement efforts in 2017 were wide-ranging. It brought action against domestic, geographically limited conduct, prosecuting real estate investors in Alabama, California, Florida and Georgia for bid rigging schemes at public foreclosure auctions and against individuals and companies for customer allocation, price fixing and bid rigging involving water treatment chemicals in the southeastern United States.

The DOJ also targeted high-tech industries operating internationally. It indicted alleged co-conspirators in an ongoing investigation of price fixing in the electrolytic capacitors industry. In addition, the DOJ obtained guilty pleas from ecommerce companies and their top executives for a conspiracy – conducted via texts, social media platforms and encrypted messaging applications – to fix prices for customized promotional products sold online.

The DOJ's recent criminal antitrust enforcement actions portend what is to come in this administration in 2018 and beyond. Delrahim emphasized in a speech shortly after his confirmation that "[w]hen companies fix prices, rig bids or allocate customers, they attack the very premise of the free market system – the competitive process. Cartel activity not only harms consumers by raising prices and reducing output, but it undercuts their faith in the free market system. To prevent and deter the corrupting influence of collusion, we use a transparent, unambiguous per se rule for the most harmful agreements among competitors."

The DOJ and FTC said one of their "top priorities is the criminal investigation and prosecution of international price-fixing cartels" in issuing revised Antitrust Guidelines for International Enforcement and Cooperation during 2017.

8. Intellectual property licensing guidelines modernized to emphasize rights of IP owners

The DOJ and FTC also issued revised Antitrust Guidelines for the Licensing of Intellectual Property in 2017. This update, the first since the IP Guidelines were issued in 1995, provides greater freedom for patent, copyright and trademark owners and reflects court decisions and statutory changes to intellectual property laws over the last 20 years.

Key changes to the IP Guidelines include: (1) incorporating Supreme Court decisions confirming that simply holding a patent does not support a presumption of market power (*Illinois Tool Works*) and recognizing that resale price maintenance may have procompetitive benefits and should analyzed under the rule of reason (*Leegin*); (2) clarifying the position that there is generally no liability for unilaterally refusing to license; and (3) clarifying the antitrust "safety zone" applicable to licensing agreements.

These changes, according to then-FTC Chair Edith Ramirez, underscore the agencies' "commitment to an economically grounded approach to antitrust analysis of IP licensing."

Even with the change in leadership under Trump, it is unlikely this update will be overturned or found controversial, as the revisions were largely rooted in a desire to modernize the IP Guidelines to account for changes in case law, statutory law and enforcement policy. Indeed, Acting Chairman Ohlhausen "applaud[ed]" several attributes of the revised IP Guidelines.

The IP Guidelines should remain intact and provide useful guidance for practitioners and businesses in structuring IP transactions.

9. FTC likely to focus on misuse of administrative processes

Recent enforcement actions suggest the FTC is likely to focus on alleged abuse of legal and administrative processes, particularly where it believes pharmaceutical companies are attempting to delay generic entry.

In *FTC v. AbbVie*, the FTC has alleged AbbVie abused monopoly power in AndroGel, a topical gel approved for testosterone replacement therapy, by filing sham patent litigation against potential generic entrants in order to delay their entry. Last fall, the Eastern District of Pennsylvania granted the FTC partial summary judgment, finding AbbVie had filed "objectively baseless" patent infringement lawsuits against rival generic drug makers. While the FTC still will have to prove at trial that AbbVie had monopoly power at the time of filing those suits, the victory is likely to embolden the FTC to investigate and potentially challenge similar conduct.

The FTC is also challenging filings made with the FDA alleged to delay generic competition. An FTC suit against Shire ViroPharma alleges the company filed 24 meritless citizens' petitions, 18 public comments and three lawsuits against the FDA to delay generic entry and maintain its monopoly. The FTC alleges that the "serial, repetitive and unsupported" filings cost consumers "hundreds of millions" and has asked the court to grant restitution or disgorgement to discourage similar behavior in the future.

10. Scrutiny of algorithmic pricing by US and EU antitrust authorities

Antitrust agencies are keeping a watchful eye on companies using algorithmic pricing software that allows them to change prices based on, among other things, competitors' prices.

Algorithmic pricing allows companies to quickly react to changes in hundreds or sometimes thousands of different variables. As the use of such algorithms has increased, so have questions about whether they may be misused to allow companies to collude with competitors to fix prices.

In recent speeches, FTC officials have recognized that, while algorithmic pricing may raise some competitive concerns where companies use them to collude, they can also enhance competition by facilitating rapid competitive response to price changes, which may ultimately lower prices for consumers.

The FTC has also emphasized that an independent decision to use algorithmic pricing is not, in itself, anticompetitive, as the Sherman Act only finds illegal agreements to restrain trade. Ohlhausen recently stated, "Setting prices together is illegal, while observing the market and making independent decisions is not."

US antitrust authorities did bring an enforcement action involving the use of algorithmic pricing in 2016. In that case, an ecommerce retailer pleaded guilty to conspiring with another retailer to align pricing algorithms to increase the online price of posters. The UK Competition and Markets Authority brought its own case against the UK-based participant in this arrangement, leading to the imposition of fines and the first individual director disqualification under the competition regime.

The European Commission has noted the potential for price monitoring software to facilitate vertical resale price maintenance and competitor collusion in a May 2017 report on its ecommerce sector inquiry. And the Commission is continuing to consider the impact of the use of pricing software in amplifying the effect of a resale price maintenance agreement in one case.

Heightened interest in algorithmic pricing is also evidenced in the announcement by the CMA that it has created a "digital, data and technology team" that will examine, among other things, "how companies use online data and the growth of algorithms in business decision-making, including price discrimination."

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