

Five Important Antitrust Enforcement Trends in 2016 and Their Potential Impact on 2017

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As 2016 comes to a close, a number of important trends in antitrust have emerged that will likely have lasting effects on competition law enforcement in the coming years. A new administration will put its mark on federal antitrust policy, but the following five developments witnessed at the Department of Justice Antitrust Division and FTC over the last year deserve a second look because they will likely shape civil and criminal antitrust efforts in 2017 and beyond.

1. Merger challenges keep heading to court.

When the federal antitrust agencies head to court to challenge a merger, it is big news. Only a small percentage of the proposed mergers reviewed by the federal antitrust agencies are subject to in-depth investigations. And where a competition concern is raised, the merging parties are usually able to reach a settlement with the enforcers or the deal is dropped. However, a growing trend in recent years has been the willingness of the federal agencies to reject proposed fixes that are found inadequate and move to block the transactions. The effort has been described at the FTC as "litigating the fix." The year 2016 saw a number of examples.

Early in 2016, the FTC achieved an important court victory, when it successfully blocked the proposed merger between office supply superstore operators Staples

and Office Depot. In two high-profile hospital merger cases, the FTC suffered losses at the district court level. Yet, before the year's end, the FTC was able to secure favorable results from federal appellate courts in these challenges.

Penn State Hershey Medical Center and Pinnacle Health System called off plans to merge after the U.S. Court of Appeals in Philadelphia ordered a federal district court to enter a preliminary injunction that would prohibit the two hospital systems from taking any steps to consummate the proposed deal, pending the completion of the FTC's administrative trial on the merits of its underlying antitrust claims. Shortly thereafter, the U.S. Court of Appeals in Chicago held that a lower court erred in denying the FTC's request for a preliminary injunction blocking the proposed merger of Advocate Health Care Network and NorthShore University HealthSystem—two of the leading providers of general acute care inpatient hospital services in Chicago's northern suburbs. The appellate court reversed the district court's June 2016 decision and remanded for further proceedings. The merger was to remain enjoined pending the district court's reconsideration of the preliminary injunction motion.

The Justice Department also encountered deals for which the proposed fixes were found to be inadequate. As 2016 came to a close, the Justice Department was wrapping up challenges to two mergers that would reduce the country's "big five" health insurers to three.

Final closing arguments were set for December 30 in an action to block Anthem's proposed \$54 billion acquisition of Cigna. In the last few weeks of the year, the government also was making its case to stop Aetna's \$37 billion attempt to buy Humana. At the time the complaint was announced, Attorney General Loretta Lynch said that the Justice Department was willing to engage in settlement discussions. However, Principal Deputy Associate Attorney General William Baer said that the parties' proposed divestiture remedies were "inadequate, incomplete, and unlikely to solve the competitive problems."

It is important for practitioners to recognize that the willingness of staff to go to court to stop a deal that is perceived to be anticompetitive will most likely continue under the new administration. Yet, it remains to be seen whether the types of transactions challenged in 2016 will also be attacked in 2017.

On the campaign trail, candidate Donald J. Trump spoke of blocking AT&T Inc.'s

proposed acquisition of Time Warner Inc. However, there have been press reports that President-elect Trump's transition team had already backed away from these assertions. The future of merger enforcement at the FTC and Antitrust Division in the Trump Administration might be evident from how the new leadership will handle the AT&T-Time Warner deal and the pending merger challenges involving health insurers if they are not resolved before the transition. Actions taken on these deals could signal continuity or a change in priorities.

2. New price fixing investigations announced, as long-running probes continue.

In 2016, the Department of Justice Antitrust Division continued filing new actions in a number of its long-running probes, such as its investigations of the auto parts industry and real estate foreclosure auctions. However, the year also saw charges in some new probes. Two particularly important price fixing investigations announced in 2016 involved packaged seafood and generic drugs.

In December, the Justice Department announced its first charge in its packaged seafood industry probe against a former Bumble Bee Foods executive. Just two weeks later, another executive was charged and agreed to plead guilty for his alleged role in the price fixing conspiracy. More charges will likely follow in 2017, including corporate plea deals.

News of the Justice Department investigation has been circulating for some time. When a proposed merger in the industry was abandoned in 2015 in light of a Justice Department challenge, government concerns about the competition in the marketplace were disclosed. In the face of a challenge in late 2015, Thai Union Group P.C.L.—the owner of Tri-Union Seafoods LLC, doing business as Chicken of the Sea International—and Lion Capital LLP mutually agreed to terminate plans to acquire Bumble Bee Foods, LLC. In response, William Baer, then assistant attorney general in charge of the Antitrust Division, stated: “Our investigation convinced us—and the parties knew or should have known from the get go—that the market is not functioning competitively today, and further consolidation would only make things worse.”

Another newly announced investigation in 2016 involved generic drug price fixing. Two former pharmaceutical industry executives were charged with participating in a conspiracy to fix prices, rig bids, and allocate customers for two forms of generic

drugs. The Antitrust Division announced charges against Jeffrey Glazer, the former chief executive officer of generic pharmaceutical company Heritage Pharmaceuticals, Inc., and Jason Malek, the former president of the same company. The government alleged that the two participated in conspiracies involving an antibiotic, doxycycline hyclate, and glyburide, a medicine used to treat diabetes. The challenged conduct took place between April 2013 and December 2015. Charges in this long-running investigation have been anticipated for years. In 2014, Senator Bernie Sanders, joined by fellow lawmakers, sent a letter to Glazer, seeking information on the dramatic price increases for doxycycline hyclate. The letter represented that the average price of the drug increased by as much as 8,281 percent between October 2013 and April 2014. A number of private antitrust suits have been filed in response to the government's investigation. Additional charges are likely in 2017.

These new investigations were announced as the Justice Department continued its long-running probes in other areas. For instance, charges continued to be filed in the global auto parts cartel investigation, in which fines now total nearly \$2.9 billion. The first filings in this probe date back to 2011.

The government also continued to pursue real estate investors who engaged in anticompetitive conduct at foreclosure auctions around the country. The foreclosure case filings started in 2010. Most of the convictions result from conduct that took place in California, and some indicted individuals await trial there. There also have been a number of convictions in Alabama, Georgia, and North Carolina.

The auto parts and foreclosure auction probes could be winding down. Grand jury indictments against in *Maruyasu Industries Co., Ltd.* and *Tokai Kogyo Co., Ltd.* for their alleged participation in a conspiracy to fix the prices of automotive body sealing products and trials in the foreclosure investigation are indications that fewer plea deals with cooperating witnesses are on the horizon.

3. Agencies release guidance for practitioners, business.

The Justice Department and FTC continued their efforts to offer guidance to business and antitrust practitioners in 2016. Among the most notable developments were two efforts to update joint guidelines that were more than a decade old.

In August, the FTC and Antitrust Division sought feedback on proposed updates to

the Antitrust Guidelines for the Licensing of Intellectual Property or “IP Licensing Guidelines.” The guidelines set forth the two agencies’ antitrust enforcement policy concerning the licensing of IP protected by copyright, patent, and trade secret law. The updated guidelines are intended to account for the recently enacted Defend Trade Secrets Act; the longer copyright terms that went into effect after the guidelines were issued; and case law developments like the Supreme Court’s decision in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, in which the High Court agreed that a patent does not necessarily confer market power on the patentee.

The agencies also sought input on proposed updates to their joint Guidelines for International Operations. The newly proposed guidance would be called the “Antitrust Guidelines for International Enforcement and Cooperation.” It would replace the 1995 Antitrust Enforcement Guidelines for International Operations and provide guidance to businesses engaged in international activities on questions that concern the agencies’ international enforcement policy as well as the agencies’ related investigative tools and cooperation with foreign authorities.

The guidance adds a discussion of international cooperation, addressing the agencies’ investigative tools, confidentiality safeguards, the legal basis for cooperation, types of information exchanged, and waivers of confidentiality, remedies and special considerations in criminal investigations. As with the past guidance, the proposal outlines the relevant antitrust laws and discusses jurisdictional and comity issues. The agencies provided an updated discussion of the application of U.S. antitrust law to conduct involving foreign commerce, the Foreign Trade Antitrust Improvements Act, foreign sovereign immunity, foreign sovereign compulsion, the act of state doctrine and petitioning of sovereigns, in light of developments in both the law and the agencies’ practice. In addition, the updates include new illustrative examples focused on the types of issues most commonly encountered.

In addition, the FTC and Justice Department offered new guidelines for human resources professionals to educate them about how the antitrust laws apply to their job responsibilities and inform them of recent enforcement actions. In providing the guidance, the agencies made clear that going forward employers who conspire to hold down wages or restrict hiring of each other’s workers would be investigated criminally and, if appropriate, prosecuted criminally.

The guidance that the agencies provide will likely impact counseling decisions in the future. However, it is possible that new leadership under the Trump Administration could decide to rescind advice that is not in alignment with its priorities. The Obama Administration withdrew the Antitrust Division's September 2008 report, entitled "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act," which examined how specific types of single-firm conduct violate Section 2 of the Sherman Act. The move was said to signal a shift in philosophy on Section 2 enforcement. However, it did not open the floodgates for monopolization suits, and few Section 2 cases were filed in the years that followed.

4. Tunney Act compliance begins for HSR civil penalty settlements.

A little-noticed change in procedure at the Justice Department in 2016 will likely impact the speed with which Hart-Scott-Rodino (HSR) Act premerger notification violation suits are ultimately resolved.

In February, the federal district court in Washington, D.C. ruled that the Department of Justice must comply with Tunney Act procedures when seeking court approval of a civil penalty settlement resolving allegations of an HSR violation. In that case, the court denied the government's motion for entry of a proposed final judgment that required billionaire businessman Len Blavatnik to pay a \$656,000 civil penalty to resolve HSR Act violation allegations because the Tunney Act procedures had not been followed. The government unsuccessfully argued that the settlement with Blavatnik was not subject to Tunney Act procedures because an HSR Act settlement solely for a civil penalty was not a "proposed consent judgment" within the meaning of the Act.

Since that time, the Justice Department has begun filing competitive impact statements in these types of actions. In April, a competitive impact statement was filed with the federal district court in Washington, D.C. in the Blavatnik case, pursuant to the Antitrust Procedures and Penalties Act, to enable the court and the public to evaluate the proposed final judgment that would terminate the civil antitrust proceeding.

In an action against holding company Leucadia National Corporation, the government alleged that Leucadia's unreported acquisition of more than 16 million shares of KCG Holdings, Inc. voting securities in July 2013 violated the HSR Act.

Leucadia agreed to pay a \$240,000 civil penalty to settle the charges under a settlement announced in September 2015. At that time, the government moved for immediate entry of the settlement. A competitive impact statement also was filed in that case to comply with the Tunney Act.

The Tunney Act procedures slow down the approval process for settlements in these types of cases. In the past, settlements in HSR civil penalty cases had been approved by the courts within days. Parties to these types of settlements can now expect to see long waits for court approval, as the government complies with the Tunney Act requirements.

5. Congress pushes for regulatory reform.

There has been a push among Republican lawmakers for government “reform.” This effort has been directed at the FTC, among other agencies. With a Republican majority in both the House of Representatives and Senate, and President Donald J. Trump in the White House, measures that could not get sufficient support in both houses and faced a likely veto from President Barack Obama will almost certainly be reintroduced in the 115th Congress.

A legislative reform package aimed at the FTC in 2016, which ultimately failed to pass Congress, was focused primarily at the FTC’s consumer protection mission. However, it would likely impact the competition mission as well.

In July, the House Energy and Commerce Committee approved the proposed FTC Process and Transparency Reform Act (H.R. 5510). It included measures to limit the agency’s enforcement against unlawful acts or practices to instances of substantial injury to consumers; require the agency to make an annual report on the status of investigations; mandate economic analysis for the agency’s legislative and regulatory recommendations; prescribe that agency investigations terminate at the expiration of six months; and require the filing of an annual plan with Senate and House Committees. Incorporated in this package was the proposed TIME Act (H.R. 5093), which would have placed an eight-year time limit on most administrative consent orders. Another measure, the proposed STALL Act (H.R. 5097), contained provisions intended to relieve businesses of uncertainty as to whether an FTC investigation was still open, by requiring the FTC to send the company being investigated a verifiable written communication every six months.

An effort to change merger enforcement procedures at the FTC also gained ground

in 2016. The proposed “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015” or “SMARTER Act” ([H.R. 2745](#)) passed the House in March 2016. The measure, which stalled in the Senate and was opposed by the Obama Administration, sought to eliminate differences in the procedures used by the FTC and the Department of Justice Antitrust Division in challenging unconsummated acquisitions and mergers. In 2017, calls for government reform will likely include similar measures.

Conclusion.

Trends in merger and criminal enforcement, as well as agency practice and procedure, that were identified for 2016 will likely impact the year ahead. Important decisions will soon be made on concentration in the health insurance and the health care industries as a result of the agencies’ willingness to challenge mergers. The outcomes in these cases will impact the decisions of merging parties in the coming years and shape the tactics of the agencies for the foreseeable future. The criminal enforcement efforts of 2016 also will shape the coming year, as new probes replace long-running cartel investigations. Efforts to provide guidance in 2016 will continue to take shape in 2017, as a new administration decides how to update policies and guidelines. Lastly, procedural changes at the agencies dictated by court order may very well be joined by new processes decreed by congress.