Publications

Top 5 Antitrust Issues Facing Companies in the U.S. Today

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Whether dealing with online competitors, market disruption or regulatory uncertainty, companies operating in the U.S. face a host of new and ongoing challenges. Companies need to understand the intersection of antitrust law and the current competitive realities, as well as the law’s new take on some old issues. Below is our pick of the top 5 antitrust issues facing companies in the U.S. today. We will explore each one in more depth over the next few weeks.

1. **New Enforcement Officials.** Although there is a general consensus in the antitrust community on the proper role for antitrust enforcement, individual government officials can and do make a difference in policy. Because the campaign raised the possibility of unconventional antitrust enforcement choices, the new administration’s selections were highly anticipated. The unusual delay in naming a permanent FTC chairman, three new FTC commissioners, and the head of the DOJ Antitrust Division has only increased the uncertainty, especially for companies with large mergers under review. The few “acting” appointments made to date have signaled a continuation of that general consensus, perhaps with a more muted approach to enforcement – but will those trends continue? And will state enforcers become even more active to fill any perceived drop in enforcement?

2. **Competitor Collaboration.** Antitrust enforcement efforts have always been concerned about certain types of collaboration among competitors – but have at times acknowledged that benchmarking, joint ventures, and information exchanges can promote competition if done properly. Defining that line and communicating it to companies has always been a counseling challenge. Recent FTC and DOJ guidance on information exchanges regarding wages provided practical tips but also ratcheted up the risk by raising the possibility of criminal penalties. Trade associations and joint lobbying have always kept antitrust counsel busy, but now counselors might need to advise on industry-wide meetings called by top politicians. Emerging technologies often present both opportunities for pro-competitive collaboration as well as anti-competitive collusion so watch this area closely.

3. **Pricing.** Price signals to buyers and sellers are crucial to a competitive economy. But new methods of retailing present new twists on some age-old antitrust issues. For instance, some online sellers stepped into hot water by discussing the pricing algorithms that adjust their prices quickly and automatically. Also, resale prices charged by distributors have worried manufacturers for over a century – online sales and club stores are only the latest methods. But now manufacturers and retailers alike are discovering how long-time tactics like MSRP’s and MAP programs work in the age of price scrapers and virtual shopping carts. And speaking of age-old issues – Robinson-Patman discrimination claims resurfaced in the last several months, reminding sellers that RP compliance remains a necessity.

4. **Merger Review.** As the number of mergers and their size and complexity have increased in recent years, some economic commentators have blamed increasing concentration for sluggish economic growth. Enforcers in the prior administration challenged many proposed mergers, usually successfully. Will similar merger trends continue and, if so, what will the new administration’s reaction be? Media reports claim that some merging parties are now turning to lobbying administration officials outside the enforcement agencies. There are even whispers of potential changes to the HSR merger review process. Companies planning to merge – or whose competitors or suppliers are merging – must determine if and how any changes in process will affect their businesses.

5. **Intellectual Property.** Decades ago, antitrust enforcement officials developed the “9 No-No’s” regarding patents and licenses. The days of antitrust hostility toward the use of intellectual property rights may have seemed to be behind us, but renewed tension between antitrust and intellectual property policy seems to be growing today. Patent holders, especially those with a patent essential to an industry standard, are facing more challenges from enforcement officials and private parties. In the pharmaceutical industry, companies are still sorting out the details of antitrust law’s reaction to so-called pay-for-delay agreements. And even a trademark owner is now facing FTC allegations that a series of settlements of infringement matters was anti-competitive.

Schiff Hardin’s Antitrust and Trade Regulation team is following all of these issues. Look for more analysis to come – and contact us to discuss how they will affect your company in 2017.

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