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Avoiding Antitrust Violations Under Obama

Law360, New York (August 02, 2010) -- Since the passage of the Sherman Act in 1890, the intensity of antitrust enforcement has often followed the ebbs and flows of the economy — the most prominent example being Franklin Roosevelt's suspension of enforcement as he promoted his New Deal policies.

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Given this history, some companies during this protracted recession have felt secure relaxing their own vigilance against potential antitrust misconduct, assuming that regulators will look the other way. But these companies have overlooked another history lesson — antitrust enforcement often increases under a Democratic administration.

Consistent with this history, President Obama began his administration by naming agency heads — Jon Leibowitz as chairman of the Federal Trade Commission and Christine Varney as assistant attorney general for the Antitrust Division — known to favor aggressive antitrust enforcement, particularly with regard to the high-tech, health care and pharmaceutical industries.

Under their stewardship, the FTC and the Division have begun to reshape the antitrust landscape for almost all companies doing business in this country.

With expectations running high, some commentators have suggested recently that the level of antitrust enforcement has not lived up to the rhetoric. But this view does not account for how policy is established by the agencies through their interpretation of the antitrust laws as set forth in guidelines for the courts and private litigants.

It also ignores the practical reality that developing new cases takes time, especially because the Antitrust Division during the prior administration did not file a single monopolization case under Section 2 of the Sherman Act.

Instead of being lulled into complacency, companies should use this calm before the storm to implement antitrust compliance programs or update existing ones. Here are three areas in particular that require increased vigilance: (1) mergers, (2) monopolization, and (3) unfair competition.

Mergers

Although it is premature to draw any definitive conclusions, a probable legacy of the Obama administration will be stepped-up merger enforcement. For companies considering a potential merger with, or acquisition of, a competitor, mere lip service to lower cost and other consumer benefits will not withstand government scrutiny. The procompetitive justifications for a combination must be real and quantifiable.

To provide better insight into the process, the FTC and Division have worked together over the past year to revise the 1992 Horizontal Merger Guidelines. If adopted, the revised guidelines will play a critical role in shaping analysis and outcomes by agencies and courts alike.

Earlier this year, the agencies released the draft guidelines for comment, which spurred an expansive (and ongoing) debate about their underlying economic theories and practical effects. The most significant revision is a de-emphasis of market definition in the merger review process and an increased focus on competitive effects. Such a shift in focus could assist companies seeking approval on mergers in concentrated markets.

Overall, however, the revised guidelines appear to provide the agencies with more flexibility to challenge transactions. For example, although they emphasize the use of economic models, the revisions leave unclear precisely what methodology is appropriate. Nonetheless, the revised guidelines are a clear signal that the Obama administration will leave an imprint on future merger enforcement.

The FTC and Division have also been busy in the trenches. During fiscal year 2009, the FTC challenged 19 consummated mergers and in a record seven cases authorized staff to file a complaint in federal district court or initiate administrative hearing proceedings. In the first half of fiscal year 2010, the FTC brought 11 more merger enforcement actions. Similarly, the Division litigated a high-profile merger enforcement action against Ticketmaster and Live Nation.

The consent judgment for the Ticketmaster/Live Nation merger is notable for the number of behavioral remedies obtained by the Division because the agency has typically favored structural merger remedies that require less extensive monitoring. Also, unlike the FTC, the Division has not customarily required that a specific buyer of a to-be-divested asset be named in a final judgment.

Hence, this consent judgment appears to indicate a convergence in the agencies' views, suggesting that the outcome of future cases and investigations will be less dependent on whether the Division or FTC is analyzing the particular conduct.

Monopolization

In 2008, the Division of the Bush administration published a report setting standards for evaluating potential monopoly behavior under Section 2 of the Sherman Act. This report made formal a set of polices meant to articulate clear guidelines for determining whether certain types of conduct by large companies would harm competitors.

In particular, the report assured firms with large market shares that the Division would only prosecute the most egregious anticompetitive practices — and then only if harm to consumers substantially outweighed the benefits of the practice at issue.

In 2009, however, Assistant Attorney General Varney wasted little time in showing that a new sheriff was in town by withdrawing the report. The accompanying press release called the action "a shift in philosophy and the clearest way to let everyone know that the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers."

In essence, therefore, the Division's enforcement policy has reverted to the one that generated the landmark antitrust lawsuits of the 1990s against Microsoft and others. At a minimum, the Division has given notice that companies with substantial market share can no longer rely on the safe harbors from Section 2 liability contained in the 2008 report.

Whether conduct exposes a firm to liability will depend upon intent, actual monopoly power (or the probability of obtaining it), and the impact in the marketplace of practices such as loyalty discounts and exclusive distribution arrangements. As with merger enforcement, any procompetitive benefits must be demonstrable.

Additionally, companies with large market share should consider whether its contracts or business dealings will significantly exclude, or limit, their rivals' ability to compete.

Unfair Competition

While the Sherman Act is the best-known vehicle for regulating anti-competitive behavior, the FTC's original mission, as set forth in the Federal Trade Commission Act of 1914 (the FTC Act), was to prohibit "unfair competition."

In 1938, Congress added a prohibition on "unfair or deceptive" trade practices. Today, Section 5 of the FTC Act is potentially a powerful weapon for enjoining unfair methods of competition, as well as deceptive acts and practices in commerce. Not only are the FTC's substantive powers under Section 5 at least co-extensive with the Sherman Act, its standard of "unfairness" has been held to encompass conduct beyond the reach of the Sherman Act.

In December 2009, the FTC flexed its muscle under Section 5 by filing an administrative complaint against Intel Corporation, alleging that the world's leading microprocessor maker unlawfully stifled competition for more than a decade. This ongoing monopolization lawsuit is widely seen as a test case by the FTC for advancing its policy goals through Section 5.

As the Chairman Leibowitz has made clear, the FTC's affection for Section 5 is a reaction to the real or perceived concerns about private party litigation under the Sherman Act that have resulted in judicially created barriers to antitrust enforcement that also apply to government enforcement. According to the FTC, these barriers should not limit Section 5 actions because these cases do not raise similar concerns about class-action litigation and the impact of treble damage awards.

As a result, future FTC cases are likely to be litigated under Section 5. This shift in enforcement strategy again underscores the fact that companies need to dust off their antitrust compliance policies.

In particular, the FTC's enforcement action against Intel demonstrates that compliance with the Sherman Act may not protect against an FTC lawsuit. For example, based on the Intel complaint, the FTC intends to use Section 5 to develop more restrictive regulation of loyalty discounts than currently found under antitrust law.

Conclusion

Since the early days of the Obama administration, the FTC and Division have been active on a number of fronts changing antitrust policy. Given the great and increasing antitrust exposure faced by companies and their executives, now is the time for either new antitrust compliance programs to be implemented or existing programs to be revised in light of recent developments in the law.

--By Gaspare J. Bono (pictured) and Stephen M. Chippendale, McKenna Long & Aldridge LLP

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