An Expert's View

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Andrew focuses his practice on counseling clients in a wide range of antitrust matters, with a specific emphasis on mergers and acquisitions, joint ventures, and investigations by the US Department of Justice (DOJ) and the US Federal Trade Commission (FTC). He also has substantial experience in private antitrust litigation, including antitrust class action litigation.

Andrew discusses recent trends in antitrust merger enforcement:

How would you assess the first year of merger enforcement under President Trump's administration, and have you seen any noticeable changes in how the federal antitrust agencies have approached merger review?

Normally, the common thinking in the antitrust bar is that, although there are differences at the margins, antitrust enforcement tends to be fairly constant, whether a Republican or a Democrat is in the White House. Going into 2017, the antitrust bar was uncertain of what to expect in enforcement under the Trump administration.

In fact, the DOJ has been slightly more focused on enforcement than many of us anticipated a year ago. For example, the DOJ challenged in court a vertical merger (AT&T Inc.'s proposed acquisition of Time Warner Inc.) for the first time in several years. The DOJ also has indicated that it will strongly disfavor conduct remedies, which it has relied upon in the past, for example, to try to fix potential areas of concern in vertical mergers while also allowing merging parties to realize procompetitive or competitively neutral efficiencies.

At the FTC, the new regime has been announced but not yet been installed, and only two Commissioners (one from each party) are currently serving. This had led to a unique dynamic because a majority vote is needed for an enforcement action, but the FTC appears to be largely going about its business as usual. Moreover, recent statements by the incoming Chairman designee suggest merger review will remain a priority.

In terms of the investigating staff, I have not detected a material difference in the approach to merger review. I would not be surprised, however, if the new DOJ and FTC leadership seek to optimize the merger review process in the coming months, to reduce the time required for in-depth merger reviews and the number of documents collected.

At the decision-maker level, practitioners are monitoring whether, and to what extent, politics may play a bigger role in merger review, which traditionally has experienced minimal political influence. That question arose specifically in the context of the DOJ's challenge of the AT&T/Time Warner acquisition, given President Trump's expressed views about Time Warner-owned CNN. The administration denied the political nexus, but practitioners are still watching this issue closely when a transaction implicates an industry, company, or nationalistic consideration about which President Trump has spoken.

Practitioners also will continue to focus on substantive considerations and whether there are discernable trends in how matters are investigated, analyzed economically, analyzed from an efficiency standpoint, and litigated. In addition, the antitrust bar will be monitoring industries that receive a lot of antitrust scrutiny. Hospital provider transactions, for example, appear to be an area of continued focus.

There were several enforcement actions against consummated transactions in 2017. How are you advising clients on this front?

I do not see much change in the advice to clients on this front. For a while now, the agencies have taken action against consummated transactions that they feel have led to competitive harm.

The DOJ's post-consummation challenge of the Parker-Hannifin Corp./CLARCOR Inc. acquisition raised the most questions in this area. The particularly interesting aspect of this case was that the parties had submitted a Hart-Scott-Rodino (HSR) Act filing and the initial HSR Act waiting period had expired. The agency thereafter became concerned about the transaction, investigated it, and sued to block the consummated transaction based on a small overlap.

Most enforcement actions against consummated mergers arise from situations where the parties did not have to submit HSR Act filings, usually because of the fairly small size of the transaction, one party, or both parties. In such cases, the parties can sign and then immediately close, as opposed to needing to abide by the HSR Act's mandatory waiting period before closing. The agencies often hear of concerns in the marketplace after a transaction closes, which leads them to open an investigation.

In practice, although there are a few other examples of similar enforcement actions over the last several years, the Parker-Hannifin/CLARCOR challenge largely appears to be an outlier. That said, it demonstrates the importance of carefully drafting antitrust-related closing conditions in merger and acquisition agreements, taking into account the client's position and interests in the transaction.