

Antitrust Agencies Ready For Tough Fights In 2012

By **Jacqueline Bell**

Law360, New York (January 01, 2012, 12:00 AM ET) -- Facing the complex pressures of an election year, regulatory agencies are sure to make 2012 a year full of fireworks, with aggressive cartel enforcement, creative thinking in merger reviews and a new push to shake up antitrust's role in intellectual property matters, attorneys say.

Both the U.S. Department of Justice and the Federal Trade Commission have multiple investigations in the pipeline with lots of potential, attorneys say. And while FTC commissioners serve seven-year terms, and are thus somewhat insulated from election year politics, DOJ antitrust leaders face the prospect of a shakeup come November, and are certainly eager to distinguish themselves and ensure the hard work of the past few years pays off, attorneys say.

"This an extremely important year for the agencies and the heads of both the DOJ and the FTC to make their mark," said Colin Kass, partner at Proskauer Rose LLP.

As a result, antitrust practitioners say they're already starting to feel a stronger push from regulators to drive open investigations and cases towards a conclusion — setting the stage for a dramatic year at the U.S. antitrust agencies. Here's what to watch for in the coming year.

Cartel Enforcement Gets Even Hotter

The U.S. Department of Justice can be expected to take an aggressive approach in rooting out anti-competitive cartel conduct in 2012 as investigations mature and develop into wide-ranging enforcement actions, attorneys say.

The agency has been involved in a broad investigation into the automotive parts industry, and in September secured a guilty plea and a \$200 million criminal fine from Furukawa for participating in a price-fixing and bid-rigging conspiracy involving the sale of automotive wire harnesses and related products.

Three executives — all Japanese nationals — also agreed to plead guilty and serve prison time in the U.S. ranging from 12 to 18 months. Those were the first charges to emerge from the DOJ's antitrust probe into the auto parts sector, but they certainly won't be the last, attorneys say.

"They don't let these things go," said Robert Bell, partner at Kaye Scholer LLP. "I think you're going to see a lot more prosecutions in the U.S. You're going to see a lot of companies involved in these, a lot of fines, and a lot of people going to jail."

And those enforcement nets are getting ever wider, attorneys say, noting that this is the type of investigation that is likely to breed even more probes.

"The approach to these investigations fairly consistently has been unpeeling onions of particular industries, reaching across the markets where cartel participants get involved, and jumping from one area to the next. The interesting question in some ways is what's the next shoe to drop," said David Meyer, partner at Morrison Foerster LLP.

Attorneys also expect the DOJ's work with other antitrust enforcers abroad to intensify over the next year, as the agency works to tackle cartels that are centered in Asia, but impact products shipped to the U.S.

More and more jurisdictions are criminalizing cartel behavior, and China's nascent antitrust agencies could also present some new opportunities. Both the DOJ and the FTC signed a "memorandum of understanding" with China's three antitrust agencies in July designed to boost communication and cooperation between antitrust enforcers in both countries.

"I think we're going to see more joint activity between the DOJ and some of these Asian jurisdictions. I would not be surprised if we see the first joint U.S.-Chinese raid. I strongly suspect that everyone's looking for the perfect opportunity to do one of those," said Kenneth P. Ewing partner at Steptoe & Johnson LLP.

Still, there are ongoing complications stemming from international cartel enforcement that the DOJ may have to face in 2012, attorneys say. Courts continue to grapple with just how far the U.S. antitrust laws can reach outside of U.S. borders, and the Justice Department has yet to take a firm stance on the question.

"We don't have a lot of clarity from the DOJ on how they view international commerce," said Craig Seebald, partner at Vinson & Elkins LLP.

But as investigations center on collusion among producers of raw materials that are, for example, sold to manufacturers in other countries, and incorporated into finished products that are eventually imported into the U.S., the agency may have to make some tough decisions on how far they want to go to reach that conduct.

"The DOJ is coming face to face with the limits of the reach of antitrust law," said Scott A. Stempel, partner at Morgan, Lewis & Bockius LLP. "The question is, will it try to be more aggressive and test the boundaries."

Merger Enforcement Fired Up By Recent Wins

The U.S. Department of Justice scored some big wins in the merger enforcement arena in 2011 that should embolden the agency in future challenges, experts say, particularly if the economy improves and more opportunities to weigh in on mergers present themselves.

The DOJ successfully faced down AT&T Inc.'s proposed \$39 billion bid to acquire rival T-Mobile USA Inc. from Deutsche Telekom AG, filing a lawsuit in August seeking to block the controversial merger that — when combined with similar opposition from the Federal Communications Commission — led AT&T to abandon the transaction in December.

The agency's willingness to challenge the transaction and apparent readiness to take the case all the way to trial should give some pause to companies contemplating combinations likely to attract regulator attention, experts say.

"Companies that are planning highly concentrating horizontal mergers will have to think twice, no matter how much political clout they think they can bring to the table," the American Antitrust Institute said in a statement when AT&T decided to drop the deal.

In November, the DOJ also successfully blocked H&R Block Inc. from buying the developer of rival TaxACT, in the department's first case to go to trial since its failed bid to stop Oracle Corp.'s takeover of PeopleSoft Inc. in 2004. The case also marked the first time the department has convinced a Washington federal judge to enjoin a transaction in decades, which should also boost the agency's confidence in future merger fights, experts say.

"The H&R Block case was a very favorable opinion for the DOJ on coordinated effects, on unilateral effects, on efficiencies. It ran the table on a bunch of potentially difficult legal issues where past courts have decided against the DOJ," Meyer said. "It really provided a favorable landscape for them to challenge future mergers in court."

The FTC had some early success in its antitrust challenge to Ohio health care provider ProMedica Health System Inc.'s recent acquisition of St. Luke's Hospital, convincing an administrative law judge to back the agency's position in December. ProMedica has said it plans to appeal.

Both agencies also are examining blockbuster deals, with the FTC reviewing Express Scripts Inc.'s controversial \$29.1 billion bid to acquire rival Medco Health Solutions Inc., and the DOJ's scrutinizing Google Inc.'s \$12.5 billion deal to buy Motorola Mobility Holdings Inc.

There are also signs that the agencies are going to be increasingly focused on whether a proposed transaction could increase the potential for coordinated behavior among remaining rivals in a particular industry — a concept emphasized in the agencies' 2010 revisions to its merger guidelines which may well play out in new merger challenges in 2012, attorneys say.

"I do think the agencies are going to draw tighter lines around concentrated industries. At least that's what they're signaling," said Michael Cohen, partner at Paul Hastings Janofsky & Walker LLP. "That's a really big deal. And it's got all of us in the antitrust world certainly advising our clients differently with respect to the risks of a deal getting a look."

Wheeling and Dealing To Get Creative

While recent wins may have whetted the agencies' appetite for court challenges, the DOJ in particular has shown an increasing taste for creative merger remedies over the past year, particularly in its clearance — with conditions — of controversial tie-ups between Ticketmaster Entertainment Inc. and Live Nation Inc., Comcast Corp. and NBC Universal Media LLC, and Google Inc. and ITA Software Inc.

In consent decrees issued by the DOJ allowing those deals to proceed, the agency indicated an interest in going beyond typical divestiture or licensing remedies, imposing fixes to competitive concerns that control a merged company's conduct even long after the transaction closes.

"We've seen a greater willingness, at least at the DOJ, to accept creative remedies to address the types of competitive issues vertical mergers can raise," said Daniel Hemli, partner at Bracewell & Giuliani LLP.

In June, the DOJ also updated its guide for merger remedies for the first time in seven years, crystallizing its interest in pursuing conduct-based fixes in what the agency said was an effort to make sure the manual reflects its recent enforcement activities.

"My sense is that Justice has been more open to quasi-behavioral remedies in the past year or two than it has been in a couple of decades. That's a real shift. I would be surprised if that does not continue," Ewing said.

Some antitrust attorneys wonder, however, how difficult it will be for the agencies to monitor and enforce the consent decrees it has hammered out in these merger cases, and whether it may quickly rethink that strategy if the agreements prove to be more challenging to execute than expected.

"I think that some of these decrees are problematic. And as the department starts to have to enforce them, it'll be interesting to see what its experience is," Bell said.

Agencies to Push The Pendulum On IP Matters

Antitrust and intellectual property law have a natural tension — after all, a patent essentially gives its holder a type of legal monopoly over a particular invention. But the agencies are increasingly interested in exploring new ways patents could actually be used in an anti-competitive fashion, and are starting to rethink what role they should play when antitrust and IP issues collide, attorneys say.

In the next year, the agencies are poised to decide some tough antitrust questions related to patents, experts say, as they take a closer look at companies acquiring patent portfolios, examine the use of intellectual property to block imports, or review the process of turning patented inventions into industry standards.

"I think the patent side has won out for a long time, and I think the antitrust agencies are trying to see whether there's room for them to get back in," Kass said.

The DOJ's Antitrust Division is already examining Google's \$12.5 billion bid to buy Motorola, a deal designed at least in part to help Google expand its patent portfolio and use Motorola's intellectual property to shield its popular Android mobile operating system from the patent wars.

Federal regulators are also still reviewing the \$4.5 billion sale of bankrupt Nortel Networks Inc.'s massive and coveted patent portfolio to a group of tech giants including Microsoft Corp., Apple Inc., Research In Motion Ltd., EMC Corp., Sony Corp. and Ericsson Inc.

Nortel's more than 6,000 patents and patent applications cover wireless, wireless 4G, data networking, optical, Internet search, semiconductor and social networking technology, and critics of the transaction — approved by a bankruptcy court in July — say the portfolio could be used to curb competition in the mobile computing arena.

"I think it's going to be a larger and larger issue in transactions," said Alicia Batts, partner at Proskauer Rose LLP. "And even in investigations, I think they'll be looking at how people enforce their patents."

The FTC is also showing no sign that it plans to abandon its long-running fight against potentially anti-competitive pay-for-delay settlements of patent disputes between pharmaceutical companies.

At a November Senate hearing, FTC Chairman Jon Leibowitz said the commission would continue working to restrict the reverse-payment settlements, calling them “sweetheart deals” that delay consumers' ability to access lower-priced generics.

Healthcare Industry Ready to Test New Antitrust Rules

In October, the agencies issued final antitrust guidance for so-called accountable care organizations encouraged by the 2010 health care reforms, aiming to settle the industry’s ongoing antitrust concerns raised by the Patient Protection and Affordable Care Act.

The final policy statement creates an antitrust safety zone for some ACOs and lays out criteria and examples to try to help providers avoid running into trouble with competition enforcement.

One of the centerpieces of healthcare reform, ACOs are designed to provide voluntary incentives for health care providers to form collaborative arrangements to help treat individual patients across care settings, from doctors' offices to hospitals and long-term-care facilities.

While much of the healthcare industry has been leery of jumping into these arrangements, citing ongoing uncertainty about the antitrust implications, the new rules, coupled with a rising interest in health care combinations, will likely spark some transactional activity, and some opportunity for the agencies to provide additional clarity, experts say.

"The proof is going to be in the pudding, and we're going to know in the next year or two," said David Garcia, partner at Sheppard Mullin Richter & Hampton LLP. "The real underlying question is: how much does the policy statement inform what is about to happen at the regulatory level? No one really knows."

--Editing by Jocelyn Allison and Sarah Golin.