



Ep. 10: Antitrust: Looking Back and Looking Forward

January 10, 2019

Jose Garriga:

Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

Supermergers have been commonplace over the last several years, with regular headlines about household names acquiring each other. In 2018 alone, AT&T and Time Warner was only one of a number of announced mergers that dominated headlines. In the wake of these announcements invariably comes government scrutiny to evaluate them from an antitrust perspective to see whether they are anticompetitive and to gauge the impact they may have on consumers.

We have with us today Akin Gump antitrust partners Gorav Jindal and Corey Roush. They'll discuss the year in antitrust, what impact Trump administration initiatives are having on merger activity, and where antitrust regulation may be going in 2019.

Welcome to the podcast.

Gorav, Corey, thank you for appearing on the show today. The last year featured a number of marquee M&A announcements involving name-brand players in the entertainment, grocery, computer, beverage, energy and health care industries. So, let's start off with a big-picture question about that, then.

The 20th century saw the enactment of a series of laws intended to prevent mergers that limited competition. But in this era of supermergers and tech giants, is there still an appetite for legislative remedies from the federal government?

Gorav Jindal:

This is Gorav. I mean, you're quite right that the key antitrust laws were enacted long ago. The Sherman Act was enacted in 1890, the Clayton Act shortly thereafter. 100-plus years has allowed for the development of a rich case law, and antitrust enforcement in particular has evolved as we've refined our views on economics and what truly constitutes market distortion, which is what the antitrust laws are designed to prevent. Over that time, naturally, there have been various interest groups that have called for changes, but, historically, from a legislative perspective, it's been on the margins.

Some examples of that are the Webb-Pomerene exceptions to the antitrust laws, which were designed to help immunize coordinated conduct to support wartime efforts, and the Celler-Kefauver Act, which is in the middle of the century, which was enacted to address loopholes in the Clayton Act and also to deal with mergers between firms that were not specifically competitors.

But today, there are three pieces of legislation that are currently being discussed with varying levels of enthusiasm. The first one, in particular, which, I think, is born from the Democrats' view as part of the New Deal—Sen. [Amy] Klobuchar [*D-MM*] has proposed legislation that would dramatically overhaul any trust enforcement of mergers.

Under her bill, there would be a competitive advocate assigned within the FTC [*Federal Trade Commission*]. They would presumptively make large vertical and conglomerate mergers above a certain size to be illegal even if there was no head-to-head competition between them. And, so, that's probably the most significant piece of legislation that is currently being contemplated that would be a massive overhaul to the antitrust laws. Two other pieces of legislation which have been poking around, kicked around from time to time are the anti-OPEC legislation, currently described as NOPEC, which would give the Attorney General the power to sue OPEC for coordinated production that affects crude oil and other petroleum-based product.

The third one is the SMARTER [*Standard Merger and Acquisition Reviews Through Equal Rules*] Act, which is legislation that is designed to harmonize the standards of enforcement for mergers between the Department of Justice and the Federal Trade Commission, both of whom share antitrust enforcement authorities at the federal level for transactions and other related conduct. The SMARTER Act has been one which would harmonize that preliminary injunction standard and make sure that enforcement does not depend on which agency your transaction gets cleared to.

Jose Garriga:

Thank you, Gorav. So, with that as a backdrop of what might be in offing, let's take a look back at 2018. As I mentioned, a busy year, a lot of headlines, but I will say, Corey, could you describe the M&A market this year from that antitrust perspective?

Corey Roush:

I would say somewhat surprising, as many of us, including me, said when a Republican was elected that we expected the enforcers who would be appointed into the lead positions at the main agencies—the Federal Trade Commission and the Antitrust Division of the Department of Justice—to be more inclined to allow the markets themselves to dictate business and would become less of an antitrust enforcement body, which is historically what we've seen when there's been a change in administration. Somewhat surprisingly, we've not really seen a lessening in enforcement. We've actually seen a very active DOJ, a very active FTC in monitoring mergers that are being put before them, in demanding remedies that come out of those mergers, and even in litigating against those mergers. You mentioned at the outset AT&T/Time Warner; that was a vertical merger that the Department of Justice decided it wanted to sue to block. That is not something that a lot of us looking at vertical mergers generally would have thought a Republican administration would likely have done. Many folks thought that neither Democrats nor Republicans would focus that highly on vertical issues, but the FTC has also been active in its merger enforcement. It's been litigating just this year at least two mergers: Tronox/Cristal, and one that we worked on, Wilhelmsen/Drew Marine. They've both been very active in enforcement against mergers, and we're seeing also a lot of required divestitures coming out of mergers, where they're basically trying to fix the nuanced competitive harm that they see coming out of mergers.

Jose Garriga:

Thank you. That's looking at it from the executive side. Looking at it from the legislative side, we had a major tax reform bill enacted. What impact, if any, did a tax reform have on deal activity and merger investigation trends generally?

Corey Roush:

I don't think either Gorav or I focuses a ton on what is the tax reform impact on deal activity. Both of us really, though, have seen arguments on both sides that the level of deal activity, which has been high in 2018, could be attributed to tax reform, or it might be in spite of it. We don't really have a strong opinion. What we do know is that merger

activity has been fairly high. In terms of merger investigation trends, we don't think the tax reform has had any real impact on that. We are seeing high-profile mergers, some that have vertical issues, some that have horizontal issues, some that are just big and still get a review but do get cleared fairly quickly.

Jose Garriga: You mentioned that the Trump administration was not being perhaps as lenient as one might have expected from a Republican administration, but, generally speaking, beyond that perspective, would you say that the policies and initiatives that have been put forward by the administration have affected antitrust policy and regulation rather than enforcement?

Corey Roush: I think they've certainly affected policy, but when you say regulation, I don't think they've affected regulation. Let me explain. There have been a number of things that have been done, and this is particularly on the DOJ side, which ultimately reports up to Trump, where the FTC is its own independent body. There have been a number of things that have been done that have been changes in policy that are actually reflective of the way enforcement has been for many years. For instance, they have basically removed the vertical guidelines. As was said many times in AT&T/Time Warner, and has been said in many other scenarios, the old vertical guidelines that the FTC and DOJ had were outdated and did not reflect the way that the agencies actually enforced.

By withdrawing those, they really didn't change how they were enforcing or regulating, but it was a change in technical policy, but it was one that reflected what was already occurring and what was occurring in the Obama administration. By the same token, there were some outdated remedies guidelines. They are no longer being followed. But that wasn't really a change as a result of this administration saying "We're going to do things differently"; it was more a change to reflect the way the agencies have operated.

For many years, they have said, "We don't want behavioral remedies to fix mergers." Because there are, in agencies' views, inherent problems with enforcing behavioral remedies. Instead, they like structural remedies, remedies that include things like divesting assets, because then those assets with someone else can go forward and be competitive, and there's not as much monitoring required. That has been the practice for years, but we still had some guidelines that suggested behavioral remedies were a little more prevalent, and they are. These are not changes in the ways agencies are enforcing, but more an effort on the part of the agencies to make sure that their policies comport with the way they're enforcing.

Jose Garriga: Thank you Corey. Let's talk about that a little bit, then, in terms of something that could change in enforcement and possibly policy, and that's the fact of the new Democratic House majority that came about as a result of the elections last month. Gorav, what do you think? Do you think that this new Democratic majority in the House could have an impact on antitrust enforcement?

Gorav Jindal: Well, I don't think it's going to have much of an effect, actually. I know that there's been a lot of talk about the Democratic win in the midterm, but the truth is, at least as it relates to the three pieces of legislation I talked about, which are the ones currently pending, the most significant ones that are pending, Klobuchar's bill, which would really overhaul antitrust merger enforcement, still would require Republican support to pass in the Senate. While the Democrats control the House, they still don't control the Senate. Given the significant overhaul that her bill and that bill in particular would cause, it's probably unlikely to gain any additional traction, and probably doesn't substantially move forward in light of the midterms. The platform itself is probably going to get more airtime as part of a new deal, but I don't think that's probably going to have much of a chance to pass.

The other two pieces of legislation—the SMARTER Act and NOPEC—are really not bipartisan. Those two pieces of legislation have kicked around in various forms for a number of years and across administrations. While there's always been the threat of legislating an antitrust solution against actions of OPEC—and there have been various interests in the wake of antitrust enforcement that would appear to be different under the FTC than it would had it been enforced by the Department of Justice—neither the SMARTER Act nor the NOPEC legislation really have any obvious connections to the midterm elections as being more or less likely. When both sides had an opportunity to pass it, they declined to do so. I'm not sure if we can really learn a lot from past experience that way. It's not particularly a great answer or the sexiest answer, but I think the answer is that the new change in the midterms probably doesn't have a major effect on legislation.

Corey Roush: One thing I would add is we're talking to our colleagues in our congressional investigations group, and they think we're certainly likely to see a lot more congressional investigation activity. While politics on the Hill really doesn't and isn't supposed to influence our antitrust enforcement bodies in their review of mergers, parties who are going through mergers, I'm hearing, are probably more likely than before going to see some Hill activity in also looking into the merger, even though it's questionable as to what authority the Hill has on a big merger.

Jose Garriga: Thank you. A reminder, listeners, that we're here today with Akin Gump antitrust partners Gorav Jindal and Corey Roush, discussing antitrust trends and outlooks. You mentioned the FTC before, both of you have, and let's talk about the FTC a little bit and its role. How has it evolved at this intersection that occupies big data, privacy, consumer protection and competition? Gorav, can you take the lead on that?

Gorav Jindal: Sure. I think there's been a lot of discussion about big data and these privacy issues, and, I think, for good reason. I think it's important to start with the idea of what big data can do. Big data has the capacity to really inform and improve products and services. They can enable better decision-making, can lead to better products, sharper products, better services, better-tailored advertising. Big data, as a general matter, is a very important and healthy way to improve our various industries. The competitive significance of data has always been treated much like any other asset has been treated under the antitrust laws, whether it's the product itself, or it's an input to a product or a service. There have been a couple cases, in particular, that illustrate the treatment by the FTC in the use of data. The first one is Reed Elsevier/ChoicePoint, which was a 2008 transaction in which the FTC was investigating the market for electronic service records for law enforcement; it's basically public records.

The merger involved the two largest providers of the service, LexisNexis and [ChoicePoint]. Basically, what the FTC found was these two entities were the biggest and were the closest competitors and ultimately required, as a condition of clearing the transaction, the divestiture of [ChoicePoint]'s database to Thomson Reuters.

In a similar circumstance, but it's a little bit more striking, is the FTC's investigation of Dun & Bradstreet Quality Education Data. That was a consummated transaction; it was already closed when the FTC looked at it.

In that instance, they were talking about the data itself being the product. It was data that was marketing data for kindergarten through 12th grade that was bought by consumers for purposes of figuring out how to sell products to schools. The data itself was the product. In that instance, even though the transaction had already closed, which typically requires a higher hurdle than for the FTC or really any antitrust authority to jump in and try to unwind a transaction that has already occurred, the FTC required the QED brand,

the Quality Education Data brand, to be divested to another entity, and they required a remedy.

I think, overall, what these two transactions illustrate is that there are situations where big data, despite its capacity to provide all sorts of healthy benefits and improvements in decision-making and all the other ancillary benefits, also has the capacity to increase barriers to entry and make it more difficult for other competitors to compete.

I think the other piece of your question you talked about was for privacy and consumer protection. One example in that space that would be instructive is the Google/Adclick transaction, which the FTC reviewed and then ultimately cleared. As we all know, Google is one of the largest search and advertising firms globally. Adclick, at the time, was the largest third-party ad servicing provider. While they didn't compete exactly at the same level, their combination was designed to bring about information that was consumer-based and help to deliver a better product.

What the FTC concluded was that the transaction, much like other vertical transactions, was not going to present a threat to competition and subordinated privacy-type issues and considerations for what it believed was the right competition-related outcome. That's an example, it's a little bit older, but it is an example of a situation where consumer protection-type issues rears their head in a competition-related space, and they resolve it using ordinary principles of antitrust as it applies to the situation. But I think as you see the use of big data to grow, and the collection of data from all sorts of different situations to grow, I think they will, even though they're applying ordinary principles of antitrust, probably continue to view it as a principal differentiator in the marketplace and perhaps something that creates and increases barriers to entry from differentiated service providers.

Corey Roush:

I agree with everything Gorav said. You know, when we talk about the FTC being at the intersection of these things, and I think each of the things he brought up were FTC cases, it's important for listeners to understand that the FTC is broken up into three bureaus: The Bureau of Consumer Protection, Bureau of Competition and Bureau of Economics. And Bureau of Economics works with both the other bureaus in their duties. Over the course of the last several years, the FTC has started to bring together its ... I mean, the two bureaus, the Bureau of Consumer Protection and Competition are still separate, but I think they're working together more and more, and, indeed, with the new commissioners that have come in and the Trump administration, they have launched a series of "hearings," they're calling them, on competition and consumer protection in the 21st century. I think actually just today they had the ninth session.

So, the FTC has really positioned itself to be at the intersection of these issues, although you do have folks at the DOJ Antitrust Division who are still very much focused on how you would define a market using data in the way Gorav was talking about and are still focused on these issues. But because of that unique makeup of the FTC, it really is at the intersection of all these things.

Jose Garriga:

Thank you Corey. That's a good point. So, we've looked at the past year. We've looked at some of these big-picture questions. I know one thing on which you all have spoken publicly is how to engage with antitrust regulators. So, maybe to offer listeners some closing takeaways, what recommendations do you have that you could offer listeners for effective engagement with antitrust regulators?

Corey Roush:

Sure, and this is Corey. I'll kick it off, and then we'll get some of Gorav's ideas. So, recently I heard Joe Simons, who's the current Chairman of the FTC, give some comments on what he viewed as the recipe for failure in getting a deal through, and I

was surprised because the things he mentioned seemed very clear to me to be a recipe for failure. So, stunned that there might be folks who are going in and doing these things.

But what he said was, "A recipe for failure was being unprepared, not cooperating, not answering questions, and being unclear." So, we know as a baseline you need to be prepared, cooperate, answer the questions you're asked and be as clear as you can be, but that's the baseline. So, here are the thoughts that I think will get you over the top in effective engagement with the regulators.

First, know your audience. So, we've been talking about the FTC and the Antitrust Division of DOJ. We haven't mentioned, but we should, the state AGs, because we have some active enforcers in various state attorney generals' offices. Each one of those agencies is different. At the state level, FTC is different than the DOJ at the federal level. You know, as I mentioned earlier, DOJ actually has a reporting line that ultimately goes up to the President; the FTC does not. So, the DOJ is a little bit more of a political entity. Important to understand that and to understand how, if at all, those politics are playing into the dynamics. Both the FTC and DOJ have different shops—different merger shops that have different specialties—and, candidly, they have different personalities. It's important to know what those personalities are. It is important to know what is effective with Mergers I at the FTC versus Mergers IV.

It may seem, it may go without saying, but you need to tailor your advocacy to that audience. So, if one group is more data-driven, you need to go in with more data. If one is more driven by past cases, you might want to focus on past cases.

Don't oversell to the agency or to your client. If you've oversold to the agency, and you're caught in that, you've lost credibility that will harm the deal you're on or the matter you're on—and you in the future—because both agencies have long memories. If you oversell or overpromise to your client, then when you're coming back with things that you know you can get the merger through if they're willing to do this or that, but you've told them they would never have to do this or that, then you might lose an opportunity to get a deal through because you oversold or overpromised.

The other thing, again, you would think it would go without saying, but I think it should be said, is to make sure you treat whoever you're dealing with at the agencies with respect even when you strongly disagree with their views. Ultimately, the best way is to calmly get a deal through or convince them that they don't need to do a particular investigation, and if you aren't treating them with respect, then they have no incentive to even move an inch towards you, much less to move all the way.

As I mentioned, there are long memories there. You know, you may have leadership turnover, but the people who work at the FTC at the staff level and even in many of the leadership positions, the people who work at the DOJ Antitrust Division and staff and many of the leadership positions have been there for years and sometimes decades. So, treating them with disrespect today might not just harm the deal or investigation you're on today, but might harm the investigation and deal you're on tomorrow, next year and in 10 years.

Jose Garriga:

That's a great point. I think that's probably something that's equally applicable to many other parts of the federal and state governments. Gorav, what do you think?

Gorav Jindal:

So, the only thing I would add to that, because I think those are all right, you do definitely need to be cognizant of your audience, and you need to weave that in appropriately into your strategy. I think to borrow upon that thought that was described as the overall idea of being prepared, I think it's important to me to recognize that being prepared means not only being prepared in front of the agency, but also being prepared before you sign

the deal. What I would say here is that, if you do a little bit of your homework ahead of time to understand exactly what the antitrust issues that may exist are by investing as a business into understanding what those competitive issues are, you can not only get a better handle on what your overall risk is, but you can get a better handle on how to make a trade in the risk allocation and definitive paper, so that you're negotiating having the best possible risk in mind.

Now, you may want to take that risk if it's traded appropriately, and you can give it away if you feel like it's something that you can give away, but the point is, is that if you do the work up front, you can get a better handle on what that risk might be, and you'll inform your negotiation so much more. I think that's particularly true today when a lot of the deal outcomes, particularly in challenges, they turn on a small number of documents. So, I think understanding and having a good, strong rationale that is reinforced in the documents and is also consistently identified in those documents—and, really, you have taken at least a look for some of these kinds of documents to see whether they exist—is a very helpful thing.

So, I think, overall, one subset of being prepared is to make sure that you're not just being prepared for purposes of interacting with the government. That's certainly true, but you do need to do that preparation, and it will be in your best interests to do some of that work before you even sign the deal.

Jose Garriga:

Thank you both. You've been listening to Akin Gump antitrust partners Gorav Jindal and Corey Roush. Terrific description and analysis of the players and issues on the antitrust landscape.

And thank you, listeners, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on among others, iTunes, Google Play and Spotify.

To learn about Akin Gump and the firm's work in, and thinking on, antitrust matters, look for “antitrust” on the Experience or Insights & News sections on akingump.com.

Until next time.

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