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Overview

Stephen P Murphy

Locke Lord LLP

The United States Federal Trade Commission (the FTC) enforces federal antitrust laws through its Bureau of Competition. The two most significant sources of the the FTC’s antitrust authority are the FTC Act and the Clayton Act. (The FTC also has statutory powers to enforce consumer protection laws, an area outside the scope of this overview.) The FTC Act prohibits unfair methods of competition, which includes, but is not limited to, any conduct that violates the Sherman Antitrust Act. The Clayton Act prohibits corporate acquisitions that may tend substantially to lessen competition.

The FTC may bring civil enforcement actions for violations of either the FTC Act or the Clayton Act. It shares civil enforcement authority with the United States Department of Justice Antitrust Division (DoJ). Because the agencies have no formal division of responsibilities, they utilise an inter-agency clearance programme to ensure they do not duplicate investigative efforts. With respect to criminal antitrust enforcement, the FTC has statutory authority to refer potentially criminal antitrust matters to the DoJ. Under the International Antitrust Enforcement Assistance Act (IAEAA), the FTC may invoke its investigative tools to obtain materials from domestic sources for the use of foreign antitrust authorities, and may seek investigative assistance from those authorities pursuant to mutual or bilateral assistance agreements established under the IAEAA.

Civil enforcement

The FTC has civil investigative and enforcement authority with respect to violations or potential violations of US antitrust laws. Its investigative powers include the power to issue subpoenas and civil investigative demands (CIDs). Like a subpoena, a CID may be used to obtain existing documents or oral testimony; unlike a subpoena, a CID may also be used to require the recipient to file written reports or answers to questions. The FTC Act expressly authorises the issuance of CIDs to entities not found within the territorial jurisdiction of any US court. In addition to these investigative tools, the FTC relies on the voluntary submission of evidence and information from complainants, customers, suppliers and competitors of the target under investigation.

These voluntary submissions are often made at the request of FTC staff, but are also initiated by aggrieved private parties seeking an FTC investigation. In many cases, the target itself voluntarily provides information.

In the merger context, the FTC (in conjunction with the DoJ) relies upon notifications and documents that merging parties are required to provide pursuant to the Hart-Scott-Rodino Act (HSR Act). For 2015, such HSR reports are required to be filed with the FTC (and DoJ) when the size of the transaction exceeds US\$76.3 million, and the size of the parties exceeds US\$152.5 million in assets and US\$15.3million in assets, respectively. In these cases, the inter-agency clearance process is particularly important. Should the FTC or the DoJ determine that further examination is warranted, they may issue a ‘second request’ for documents related to the transaction and potentially effected commerce (often requiring very voluminous responses) to the merging parties.

Following an investigation, the FTC may initiate an enforcement action if it has ‘reason to believe’ that the law is being or has been violated. Typically, the FTC will seek to negotiate a consent decree, which is an agreed judgment that does not involve any admission of liability and that a court may enforce in the same manner as an injunction. In the absence of a consent decree, the FTC may commence an FTC agency adjudicatory proceeding before an administrative law judge to remedy a violation. In the event of such a filing, section 13 (b) of the FTC Act authorises the Commission to go into federal district court to seek a preliminary injunction to block the transaction pending the outcome of the administrative proceeding. In addition, the FTC has the authority to seek preliminary and permanent injunctive relief in federal courts for violations of any provision of the law that it enforces. In the competition context, the FTC has used this authority primarily for the purpose of obtaining preliminary injunctive relief to block or hold separate corporate mergers or acquisitions pending completion of an FTC administrative proceeding.

Examples of FTC antitrust investigations include:

- investigations to address consummated corporate mergers that did not require HSR Act filings;

- investigations of associations' codes of ethics;
- investigations of not-for-profit hospital conduct that may result in anti-competitive pricing; and
- pay-for-delay settlements of branded and generic drug infringement suits.

Remedies in civil enforcement actions by the FTC typically include an injunction against the continuation or renewal of the challenged activity, unwinding of a merger, or imposition of civil penalties where prescribed by statute.

Recent developments

In fiscal year 2014, the FTC initiated 42 substantial antitrust merger and non-merger investigations, 24 of which resulted in favourable results for the Commission. Of the 18 substantial investigations closed without action, 12 were non-merger matters and six related to mergers.

In the merger area, the FTC's Bureau of Competition brought 18 merger enforcement actions in the 2014 fiscal year, down from 23 in 2013. Of the 24 enforcement actions, 19 resulted in consent orders. Of the remaining mergers, three were withdrawn or restructured as a result of antitrust issues raised by the Commission, one was abandoned by the parties in response to an FTC complaint and one was abandoned after the FTC issued a consent order after filing a complaint in federal court. In the non-merger area, the FTC initiated six investigations, all of which were resolved with consent decrees.

Health care continued to be an important enforcement priority for the FTC in 2014. Many of the merger enforcement actions involved a health-care industry transaction and, notably, both of the enjoined transactions involved proposed mergers of hospitals, clinics or laboratories.

On 24 January 2014, the FTC won a significant victory in the Idaho federal district court obtaining a permanent injunction against the acquisition by St. Luke's Health System, Ltd of Saltzer Medical Group. Two factors are of principal significance in the case. First, this transaction was not subject to reporting under the HSR Act. Second, the acquisition had already been consummated and the injunction had to 'unscramble the eggs'. In its decision, the district court focused on the competitive harm, including increases in price that would result from the leading hospital chain acquiring the largest primary care physicians' practice in the Nampa, Idaho area. Key pieces of evidence for the FTC were e-mail correspondence between senior St. Luke's executives that had to be produced in discovery

extolling their ability to raise prices as a result of the transaction. An additional noteworthy point about this case is that the parties argued at some length that the transaction would further the goals of the federal Affordable Care Act. The FTC made clear during the case that it would evaluate health-care mergers using traditional antitrust standards for evaluating competitor collaborations.

On 22 April 2014, the FTC won another significant victory in the Sixth Circuit Court of Appeals which affirmed an FTC decision and order requiring the divestiture by ProMedica of another hospital in the Lucas County, Ohio market. Of significance in this decision is that the Sixth Circuit relied heavily on the structural analysis found in the Joint Department of Justice Antitrust Division-Federal Trade Commission Merger Guidelines (2010). As with *St Luke's*, the *ProMedica* case involved significantly damaging internal correspondence, one of which read that the target hospital could 'run in the black if activity stays high'.

In 2014, the FTC investigated a number of merger transactions in the pharmaceutical area and resolved eight of the investigations with consent orders. In particular, the FTC was concerned with potential competition from drugs not yet on the market. To deal with these concerns, the FTC required the divestiture of assets and rights relating to the potentially overlapping products. In the Akorn, Inc acquisition of VersaPharm, Inc, the FTC required the divestiture of an Abbreviated New Drug Application to the Food and Drug Administration (FDA) for a tuberculosis drug. In the Medtronic, Inc acquisition of Covidien plc, the FTC required the divestiture of a drug that had not yet received FDA approval but still posed significant competitive issues. In a September 2014 federal district court complaint, the FTC continued its efforts to block delays in generic drug introduction in the pharmaceutical arena. The complaint challenged the filing of patent infringement complaints by AbbVie, Inc and its partner Besins Healthcare, Inc to allegedly stop the introduction of a generic testosterone replacement drug. These complaints were allegedly settled as a form of reverse payment settlement agreement.

A marked development in FTC enforcement in 2014 was the 'hard' look the Commission was taking at association codes of ethics that prohibited members from competing with each other or precluding new membership. In December 2014, the FTC announced consent decrees with the Professional Lighting and Sign Management Companies of America and the Professional Skaters Association. The Lighting Association had by-laws that prohibited

inter-jurisdictional competition and solicitation of competitor customers. The Skating Association's code of ethics had similar issues. The FTC consent decrees required abolishment of the offensive provisions, publication of the consent decrees and establishment of compliance programmes. Consent decrees were also obtained in 2014 from the National Association of Teachers of Singing, Inc and the National Association of Property Managers, Inc to prohibit similar types of conduct.

The power of FTC administrative complaints was seen once again in 2014 with the transactions in *Visant Corp, Jostens, Inc/American Achievement Corp* (competitors in the market for high school and college rings) and *Verisk Analytics, Inc/Eagle View Technology* (rooftop aerial measurement product competitors) being abandoned after the FTC filed administrative complaints.

In 2014, the FTC continued to investigate failures to file premerger notifications required by the HSR Act. In a case against Berkshire Hathaway, the FTC obtained a US\$896,000 civil fine where the party had failed to make a filing when it converted convertible notes into voting securities. This was the company's second such failure in a six-month period, and, in addition, it failed to institute a promised antitrust compliance programme.

A relatively new area of interest for the FTC is in patent assertion entities, sometimes referred to as 'patent trolls'. In an administrative complaint filed in November 2014, the FTC charged MPHJ Technology Investments, LLC with having sent out more than 9,000 letters to small businesses making false statements about the need to pay for document copying licences.

In September 2014, the FTC finally issued its update to the 'Fred Meyer Guides' on the much-maligned Robinson-Patman Act. While it has been a number of years since the FTC brought an R-P claim (private R-P claims are still regularly brought) and despite some thought of eliminating the Guides altogether, the new Guides provide significant guidance for sellers and buyers in the types of allowances, discounts and price discriminations that are lawful under the R-P Act.

While FTC Commissioner Joshua Wright has been attempting to restrict the scope of enforcement by the FTC of its powers under section 5 of the FTC Act, the Commission did act in July 2014 to accept a consent decree from two internet sellers of Universal Product Code barcodes. The FTC had alleged that the parties had issued an 'invitation to collude' (ie, communications from one party to an actual or potential competitor to coordinate on prices or output).

In the area of data security, in August 2014 the FTC filed an administrative complaint under section 5 against a medical transcription service for its failure to employ adequate network security to prevent the online posting of patient medical records.

Finally, in April 2014, the US Senate confirmed the nomination of Terrell McSweeney to the FTC. Ms McSweeney comes to the FTC from the Antitrust Division where she was the chief counsel for competition policy and intergovernmental relations. For the 14 months preceding the vote, the Commission had been deadlocked with two Republicans and two Democrats. This vote creates a Democratic majority in the Commission and suggests the potential for heightened antitrust enforcement by the FTC in the future.



Stephen P Murphy
Locke Lord LLP

Stephen P Murphy is a partner in the Washington, DC, office and an active member of the antitrust/competition practice group of Edwards Wildman Palmer LLP. Steve has represented clients in a wide range of antitrust matters, including price-fixing, market allocations, group boycotts, tying arrangements, contested mergers, abuse of standard setting processes and retail price restraints. He has also counselled clients on information exchanges, merger transactions and HSR requirements, competitor group negotiations, distributor issues, and non-compete and MFN clauses. Over his years of antitrust practice, Steve has established strong working relationships with FTC and DoJ staff, and these relationships have facilitated his representation of clients.



701 8th Street, NW
Suite 700
Washington, DC 20001
United States
Tel: +1 202 220 6900
Fax: +1 202 220 6945

Stephen P Murphy
steve.murphy@lockelord.com

www.lockelord.com

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Our breadth of antitrust experience includes litigation involving civil and criminal antitrust violations, as well as merger enforcement and the transactional implications of antitrust law. We have acted as a negotiator working with federal and state antitrust enforcement agencies to resolve merger disputes, a counsellor on the antitrust implications of business contracts and an internal investigator of antitrust compliance.

Locke Lord antitrust lawyers have the extensive knowledge of business, economics and law needed to litigate cases involving claims of alleged price fixing, customer allocation agreements, group boycotts, dealer termination, price discrimination, predatory pricing, illegal standard setting, tying issues, bundled discounts, monopolization and attempted monopolisation. We have unique, extensive antitrust experience in industries including energy, financial services, insurance, pharmaceuticals and health care. That background pays immediate dividends, as we can more efficiently investigate new cases and develop litigation strategies. In both antitrust litigation and in advising on mergers and acquisitions, we have significant experience negotiating with federal and state regulators, defending clients during civil investigations by these entities, and negotiating compliance packages and consent decrees.