5 antitrust trends to watch in 2019

Antitrust Alert

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2018 was a memorable year for antitrust law. The US Supreme Court's analysis of two-sided markets, the drama over high-profile merger challenges and heightened interest in no-poach agreements, among many other things, kept the antitrust bar on its toes. All signs point to 2019 being equally memorable.

As we move into 2019, this article explores a few key antitrust issues that are likely to shape the year to come.

1. SEARCH ENGINE KEYWORDS

The Federal Trade Commission's recent decision in the 1-800 Contacts Inc. case, which held that agreements not to bid on certain search keywords were anti-competitive, could have significant implications for online retailers, as well as manufacturers that make direct online sales.

When consumers type a query into a search engine, many of the results they see are often "sponsored links," meaning advertisements purchased by businesses looking to drive traffic to their sites. Businesses can purchase keywords that will return a link to their webpage when typed into a search engine. They can also purchase negative keywords that will prevent their site from being displayed in the results of certain searches. But what happens if companies make agreements not to bid on certain keywords? According to the FTC, such agreements may violate the Section 5 of the FTC Act.

1-800 Contacts, the nation's largest online retailer of contact lenses, entered into a series of trademark settlement agreements around certain search keywords, which led to a federal court case. The FTC argued that the agreements were anti-competitive and violated Section 5 of the FTC Act.

The FTC's decision in the 1-800 Contacts case is significant because it establishes a precedent for antitrust enforcement in the context of online advertising. It also highlights the importance of understanding the dynamics of search engine algorithms and how they can affect competition.

While the specifics of the 1-800 Contacts case are unique, the broader implications for online retailers and manufacturers are clear. As search engines continue to evolve, so too does the landscape of online advertising and competition. Antitrust lawyers will need to stay vigilant in monitoring developments in this area to ensure their clients are not inadvertently running afoul of antitrust laws.
agreements with competing retailers in which the companies agreed not to bid on certain search engine keywords, including the other's trademarks. They also agreed to employ certain negative keywords. In November of 2018, the FTC commissioners found that this practice was unlawful. It limited consumer choice in the market for contact lenses and suppressed competition in the market for search engine keywords, the commissioners concluded.

1-800 Contacts has indicated that it intends to appeal the decision to a US Court of Appeals, and the outcome of that appeal will have significant implications for e-commerce companies. If the commission's decision stands, it is likely to invigorate enforcement in this area, and may spur private litigation as well. As companies prepare for 2019, they should review their online retail policies and practices, and carefully evaluate any agreements with competing resellers regarding search engine keywords.

2. NEW RISKS FOR PRICING ALGORITHMS

Pricing algorithms have been an area of focus in antitrust law recently because of the potential for coordination. In 2019, that focus will only increase and possibly expand into another area of antitrust law, price discrimination.

Computer pricing algorithms are designed to collect large amounts of market data and price products based on that data, as well as on other inputs that the seller specifies. This technology allows businesses to react quickly to changes in the marketplace and implement nuanced pricing strategies. As the US Department of Justice and plaintiffs have noticed, however, the technology can also facilitate price-fixing.

In the most well-known example of this, the DOJ prosecuted David Topkins, who used pricing algorithms to coordinate prices for wall posters sold online. Topkins and his co-conspirators did this in part by instructing the pricing algorithm they used to avoid price competition. Another prominent example was the class action filed against a ride-sharing company alleging that the algorithm used by the company to price rides and pay drivers facilitated a hub-and-spoke conspiracy.

This case, and others, have helped shine a spotlight on the price-fixing risk posed by algorithms, but that is not the only antitrust issue that may be implicated. Pricing algorithms also have the potential to expose sellers to allegations of price discrimination. As with price-fixing, the issue is how the seller designs and uses the algorithm.

The Robinson-Patman Act is the primary federal law governing price discrimination. It generally prohibits discrimination in price in contemporaneous sales of like goods if there is a harm to competition. However, it provides certain exceptions, such as meeting competition. Algorithms give sellers an ability to dynamically adjust prices, and to make prices highly targeted. Depending on how the algorithm is designed, there is a risk that this may translate into discriminatory pricing.

In 2019 and beyond, sellers using algorithms, private plaintiffs and perhaps even the FTC are likely to begin grappling with this issue. Pricing algorithms are not inherently discriminatory, just as they are not inherently collusive. However, they should be designed and implemented with a keen eye toward Robinson-Patman Act compliance.

3. DATA SCRAPING

Like pricing algorithms, big data has been a hot topic in antitrust circles in recent years. Enforcers in the EU, and to a lesser extent in the US, have begun to pay close attention to the competition implications of companies aggregating and using huge troves of data. However, one particular method of accumulating big data – data scraping – seems likely to be of particular interest in 2019.

Scraping refers to the use of automated computer programs to extract data from websites, such as social media pages, in order to use that data elsewhere. This practice generally involves accessing a website hosted by another company and may also involve accessing third-party profiles or pages within the website.

The practice implicates difficult questions of data ownership, market power and exclusionary conduct. Companies should be on the lookout in 2019 for cases involving the antitrust implications of data scraping.

4. VERTICAL MERGER CHALLENGERS

One of the defining antitrust issues of 2018 was the DOJ's rekindled interest in challenging vertical mergers. In recent years, vertical merger challenges have been rare. Since 2000, the FTC and DOJ have challenged only
about one per year. And litigation over vertical mergers has been nearly unheard of in recent decades. Commentators, however, have disagreed on the significance of recent DOJ actions, and what they portend for future vertical mergers. 2019 may offer important clues.

If there is a genuine policy interest in reshaping the approach to vertical mergers, the agencies may indicate an intent to revise the outdated vertical merger guidelines, known as the “non-horizontal merger guidelines.” The history of the horizontal merger guidelines shows that they can be an effective tool that is highly persuasive on the courts. And there is ample academic scholarship on vertical mergers for the agencies to draft new guidelines. Accordingly, it will be important to watch in 2019 for signs that the agencies are interested in such an update.

A more immediate clue may be the pace at which the Antitrust Division, and for that matter the FTC, challenge vertical mergers. If a broad shift in policy is under way, the agencies may increase the frequency with which they challenge vertical mergers and the frequency with which they litigate those challenges.

In the same vein, it will be important to observe the conditions imposed by the agencies when approving vertical mergers. 2019 will likely be an important indicator of things to come.

5. DEMANDS FOR AGGRESSIVE ENFORCEMENT

Last year witnessed a growing chorus, in government, academia and the press, calling for more aggressive application of the antitrust laws to dominant companies; particularly technology companies. Executives were summoned to testify, a market-leading company faced a record penalty, major news outlets urged “trust busting” and scholars gathered at a top university to discuss concentration among top technology firms.

All signs are that this trend will continue in 2019. Further, if the global economy falters, the calls for action will likely grow all the louder.

This is not to say that a new approach to enforcement is inevitable, or necessarily warranted. To be sure, US antitrust law is not designed to be a social cure-all or a creature of populist sentiment. It is designed to protect competition. Courts’ modern understanding of what that means is a product of more than a century of iterative progress. Still, the calls for more vigorous enforcement look unlikely to die down anytime soon.

Two aspects of this trend are worth watching in 2019 in particular. First, it will be important to watch whether large technology firms face increased scrutiny of proposed transactions, particularly acquisitions of relatively small potential competitors. If the calls for change begin to affect antitrust policy, this may be one of the earliest signs. Second, observers should closely watch the intersection of consumer protection and antitrust law. US enforcers have generally maintained a clearer distinction between the two areas of law than their counterparts in other jurisdictions. The US agencies may be inclined to blur those lines, however, in the name of responding to changing markets.

Taking stock of your readiness

These five trends, and others, are likely to make 2019 an important year for antitrust law. As we welcome the new year, companies should take stock of their readiness to confront these trends. Now is the time to consider whether your antitrust compliance program is ready for 2019 and beyond.

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