Antitrust and Competition Law

Following the news that Qualcomm is being investigated by the Chinese government relating to their anti-monopoly laws, and India's call for greater cooperation among competition authorities from across the world, the growing number of cross-border M&A deals and possible anti-competitive practices across boundaries means that antitrust and competition law is drawing the attention of many company executives. To take a closer look at anti-trust and competition law, *Lawyer Monthly* speaks to Jim Lowe, a partner in the antitrust and competition practice at WilmerHale, based in Washington DC.

Please introduce yourself, your role and your firm.

My practice is focused on assisting clients facing government investigations including merger control proceedings. WilmerHale is an international firm whose specialties include government regulation and investigation, including antitrust and trade regulation, intellectual property and litigation.

How can companies succeed in developing initiatives that are beneficial to them without infringing anti-trust laws?

Regular compliance training that alerts senior business people to potential antitrust issues can go a long way to reducing risk and also to preventing unnecessary costs when developing initiatives. Training allows those working on new initiatives to identify potential antitrust issues at an early stage and to contact experienced internal or external counsel to provide further guidance to assure that legal risk is minimized while also achieving the desired business outcome.

Following the news that Qualcomm is being investigated by the Chinese government, what can companies do to enhance compliance?

Companies need to make key employees aware of the different legal structures and norms they face in different jurisdictions. This holds true not only for antitrust, but for other areas such as contract and employment law. Modes of operation or legal decision making processes may be significantly different in other jurisdictions, and companies need to make sure that relevant employees understand those differences before they enter new markets and need to be reminded of those differences on a regular basis. This need is not limited to entry into developing markets; for example, distribution methods that may be legal in North America can run afoul of European competition law. And this is not simply a matter of understanding the differences in blackletter law, but also understanding, and keeping track of, political issues that could result in changes in enforcement policies in jurisdictions in the countries in which the company operates.

What are the most common challenges that arise in your area of practice?

In merger clearance investigations, challenges including, meeting the timing expectations of the parties consistent with developing and presenting the best possible arguments on behalf of the transaction, as well as the need to coordinate reviews in multiple jurisdictions. In conduct matters, it can, at the beginning, be a challenge to make sure targets take the government's investigation sufficiently seriously and focus on addressing the key lines of government inquiry.

How do you navigate them?

In all government investigations it is critical to remember that the matter is not, at that stage, a litigation and that aggressive or obstructionist behavior is almost always counter-productive. Litigation tactics should be reserved for any actual litigation and should not be used during the investigation. In contested merger clearance investigations there are four key factors that increase the likelihood of a successful outcome: (a) early and thorough preparation including full factual investigation and early retention of and coordination with economic experts; (b) early and frequent affirmative engagement with the relevant enforcement agencies on the merits of the transaction; (c) rapid and thorough responses to government requests for information or identification of key issues; and (d) close coordination of investigations across jurisdictions. In conduct investigations, it is critical that the company and its counsel fully understand the issues and facts before engaging substantively with the government in order to maintain credibility and the opportunity for favorable resolution of the investigation.

How do companies avoid litigation or government conduct investigations?

In the US, compliance should be focused on avoiding liability, not litigation. For better or worse, litigation (and investigations) are fairly easy to initiate in the US, and too great a focus on avoiding any conduct that might attract litigation could result in companies avoiding pro-competitive, beneficial and legal conduct due to small levels of litigation risk. Companies should, instead, focus their compliance efforts on assuring that they are abiding by clear legal rules, are not creating documents that provide misleading impressions of their conduct, and properly document the pro-competitive and compliant nature of their conduct.

Do you see the need for legislative, policy or procedural changes in antitrust enforcement?

In the US, the Federal Trade Commission needs to clarify the scope of Section 5 of the FTC Act. The Commission has failed to state clearly the types of offenses that may be captured by Section 5, and the absence of guidance by the Commission or the courts creates significant difficulty for compliance efforts. Enforcement agencies also need to work to avoid the creation of "secret law" - rules known to those few who practice regularly before the agencies but not generally accessible by other counsel, leading to potential and unnecessary surprises for even extremely diligent practitioners who are not privy to such rules. The FTC's Hart-Scott-Rodino program is particularly subject to the "secret law" issue. Finally, merger enforcers need to be more upfront about the timing of their investigations. Numerous agencies, including those in the US, EC and China, often manipulate statutory timing limits by strong-arming parties into various forms of delay. Where the agencies do not think they can function within the legislated time frames, they should seek to amend those rules to assure clarity on the true length of the review processes.

Is there anything else you would like to add?

Companies considering transactions, including joint ventures, with competitors should involve experienced internal or external competition counsel at early stages in order to obtain guidance on the level of merger control risk, timing and scope of filing and investigative requirements, and costs of those processes. This allows the parties to make appropriate judgments regarding valuation, risk sharing and termination timing at relatively early stages of the negotiation process and reduces the potential for unexpected regulatory challenges. **LM**

Contact:

Jim Lowe
WilmerHale
1875 Pennsylvania Avenue NW
Washington, DC 20006
Tel: (202) 663-6059
Email: james.lowe@wilmerhale.com

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