Antitrust and Competition: Surveying Global M&A Enforcement Trends

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US: Continuation of Aggressive Review and Enforcement

In 2014, the U.S. Department of Justice's Antitrust Division (DOJ) and the Federal Trade Commission (FTC) further embraced their aggressive approach to merger enforcement. U.S. regulators continued their pursuit to enjoin, and in some cases unwind, transactions they believed likely to substantially lessen competition, a trend that is expected to continue for the remainder of the Obama administration.

Merger Challenges: Hart-Scott-Rodino (HSR) Reportable Transactions

Transactions in highly concentrated industries remain at the forefront of the agencies' enforcement agenda. For example, the DOJ recently sued to block National Cinemedia's $375 million acquisition of Screenvision. The DOJ noted that the two companies, which account for approximately 88 percent of all movie theater "preshows" in the U.S., compete aggressively and directly, leading to significant price reductions for advertisers. Assistant Attorney General Bill Baer described this transaction as a "merger to monopoly" and "exactly the type of transaction the antitrust laws were designed to protect." In order to prevail in federal court, the DOJ will have the burden of proving that preshow advertising constitutes an economically relevant market that is separate from other forms of advertising.

Guiding a transaction through the DOJ or FTC can be complicated when other federal agencies also have jurisdiction to review the deal. Two of the most high-profile transactions of the year face ongoing scrutiny from the Federal Communications Commission (FCC). Working hand-in-hand with the DOJ, the FCC continues to investigate the Comcast/Time Warner Cable merger. Key to the agencies' analysis will be the combined company's position at the upstream level — specifically, its ability to control the flow of content to consumers and exert leverage over content providers. And while the DOJ approved AT&T's acquisition of DIRECTV in August, the merger remains under FCC investigation. The acquisition has faced less criticism than some other situations, largely due to anticipated synergies that would result from the combination of a major telecommunications company and one of the largest satellite TV providers.

Divestitures continue to play a significant role as parties consider preemptive measures to enhance the likelihood of agency approval. In anticipation of intense antitrust scrutiny, Reynolds American agreed to divest four of its cigarette brands, in addition to the sale of an e-cigarette line, as a condition of its acquisition of Lorillard, announcing the proposed "fix" at the same time as the larger deal. The Reynolds/Lorillard merger would combine two of the three largest tobacco companies in the U.S. Similarly, Sysco and US Foods, the only two U.S. national food distributors, agreed in their deal documents to divest up to $2 billion in annual sales to secure antitrust approval. Whether these parties' proposed fixes will be sufficient to address competitive concerns remains to be seen, and both the FTC and the DOJ have recently demonstrated they will litigate to challenge a deal rather than accept an inadequate remedy.

Merger Challenges: Nonreportable Transactions

Following a full trial on the merits, Bazaarvoice was required to divest PowerReviews, effectively unwinding the nonreportable acquisition successfully challenged by the DOJ beginning in 2013. Bazaarvoice and PowerReviews were the only two significant competitors in the market for online ratings-and-review platforms. In achieving this result, the DOJ relied heavily on the parties' internal documents to bolster the allegation that the transaction would eliminate competition in the industry and lead to price inflation. The court found this evidence credible and persuasive. The FTC also recorded a significant victory when the U.S. Court of Appeals for the Sixth Circuit upheld an FTC order unwinding a 2010 nonreportable hospital merger between ProMedica and St. Luke's, two Ohio-based hospitals. These rulings highlight the agencies' commitment to pursuing transactions that present anti-competitive risk, even if those transactions do not meet HSR filing thresholds and have closed. Notably, between 2009 and 2013, 20 percent of all merger investigations conducted by the DOJ involved nonreportable transactions, a trend that is expected to continue.

Gun-Jumping

In November, the DOJ announced a $5 million settlement of charges that Flakeboard and SierraPine had engaged in unlawful premerger coordination, despite the fact that the parties ultimately abandoned the merger in light of DOJ concerns. At the request of Flakeboard, SierraPine closed a mill and transitioned customers to Flakeboard prior to the expiration of the HSR mandatory waiting period. The DOJ alleged that the parties' conduct constituted both a *per se* unlawful agreement between competitors to reduce output and allocate customers in violation of Section 1 of the Sherman Act and a premature transfer of beneficial ownership (commonly known as "gun-jumping") in violation of the HSR Act. The DOJ's action underscores the requirement that merging parties must remain separate and independent competitors during the HSR review period.

HSR Fines

Berkshire Hathaway Inc. agreed to pay a civil penalty of $896,000 resulting from its failure to make an HSR filing in conjunction with its December 2013 conversion of notes into voting securities of USG Corporation. Notwithstanding the fact that the failure to file was inadvertent, Berkshire Hathaway did not qualify for the "one free pass" for inadvertently failing to file, because it had committed a similar infraction previously that resulted in a corrective filing in connection with a different issuer.

All signs point to continued aggressive enforcement by the FTC and DOJ in 2015.

European Union Merger Regulation

A number of important changes in EU merger control policy took place in 2014, including the adoption of several legislative measures that are expected to shape merger control enforcement in 2015. Additionally, recent merger decisions confirm the aggressive enforcement by the European Commission of the procedural requirements under the EU Merger Regulation (EUMR).

EU Merger Simplification Package

The commission has adopted important revisions to its merger control procedures with the Merger Simplification Package, which entered into force on January 1, 2014. The purpose of these revisions is to streamline the EU merger review process for unproblematic transactions, which are now eligible for review under a less burdensome and faster, simplified procedure. The revisions expand the scope of the simplified filing procedure to apply to a broader set of transactions and shorten (and in certain cases eliminate) the need for a prenotification consultation process.

White Paper on Acquisitions of Minority Shareholdings

On July 9, 2014, the EU Commission published a white paper setting out proposed changes to the EUMR. The most relevant proposal is the extension of the EUMR to cover acquisitions of minority shareholdings, which it currently does not do. The white paper proposes to introduce a "targeted transparency system" pursuant to which acquisitions of noncontrolling minority interests with an EU dimension would be subject to a notice requirement. The stated goal of the proposal is to limit the commission's jurisdiction to review the acquisition of minority interests to potentially problematic transactions, identified as transactions that create a competitively significant link between two companies. Transactions meeting both of the two following criteria would be deemed to create such a link: (1) the target company is a competitor of the acquirer or active in a vertically related market; and (2) the equity or voting interest acquired is (a) around 20 percent, or (b) above 5 percent and accompanied by additional elements, such as de facto blocking minority rights, a seat on the board of directors or access to commercially sensitive information of the target company.

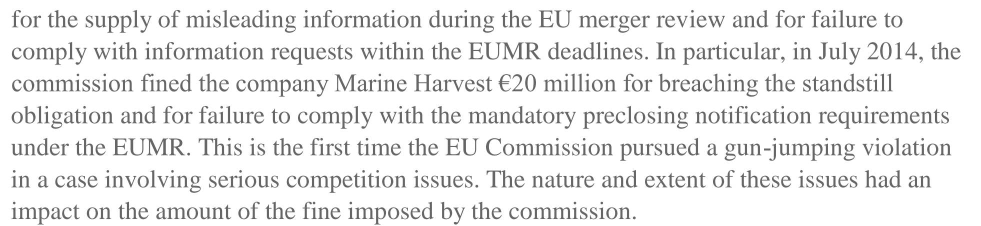
The EU Commission also is considering the introduction of a waiting period of 15 working days following the submission of the information notice, during which the parties would be prevented from completing the transaction. Within this period the commission would decide whether further investigation is warranted on the basis of a full FORM CO notification in the context of a normal EUMR review procedure. The proposals reflect some of the aspects of the merger control review systems applicable in EU member states such as Germany and Austria, without going as far as extending the standard review procedure to minority investments.

The commission anticipates that the new system will capture a limited number of transactions (around 20 to 30 annually) and that the burden on businesses will be relatively limited. The proposals in the white paper are expected to be formalized in a legislative proposal in 2015, which will be subject to the vote of the EU Council and the consent of the European Parliament.

Recent Trends in EU Merger Control Review

Two key trends emerge in reviewing the EU Commission's 2014 merger control decisions.

First, they reveal a stricter application of the EU procedural requirements. During 2014, the commission took enforcement action against merging companies for gun-jumping violations,


for the supply of misleading information during the EU merger review and for failure to comply with information requests within the EUMR deadlines. In particular, in July 2014, the commission fined the company Marine Harvest €20 million for breaching the standstill obligation and for failure to comply with the mandatory preclosing notification requirements under the EUMR. This is the first time the EU Commission pursued a gun-jumping violation in a case involving serious competition issues. The nature and extent of these issues had an impact on the amount of the fine imposed by the commission.

Second, the commission also adopted a tougher stand on merger remedies in a number of cases. Recent trends include, in particular, a greater reliance on upfront-buyer commitments, stricter purchaser approval requirements and a broader scope of remedy packages, all of which are likely to continue in 2015.