Updates
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2019 ABA Antitrust Spring Meeting: Merger Analysis Takeaways

This is the second article in a three-part series on the American Bar Association's 67th Antitrust Law spring meeting.

The meeting earlier this month included many sessions on merger enforcement. A number of the important issues addressed by the panels are discussed here.

International Merger Control

Over the past decade, many nations have adopted merger control regulatory regimes. There are now over 80 such jurisdictions, many of which are suspensory—that is, the parties must file with the local competition authority and wait a prescribed number of days before closing. Reportability is typically based on the volume of the parties' in-country revenues and/or the existence of in-country assets exceeding a certain value. Reporting thresholds may vary markedly from country to country, and there is a trend toward lowering reporting thresholds, thus expanding the number of reportable deals.

Foreign merger control regimes are very different than premerger notification under the Hart-Scott-Rodino Antitrust Improvements Act in the United States. HSR filings require the parties to submit a limited amount of data and a relatively small number of documents. Once the reports are filed, the 30-day preliminary waiting period begins.

Foreign merger control, by contrast, often requires the reporting parties to include in their reports substantive antitrust analyses of the affected markets, including the identification of customers and competitors, market shares and information about barriers to entry. This analysis requires the parties to consult with competition agency staff well before filing, submit preliminary reports and seek agency input regarding their need for information and analysis. This prefiling consultation process can take weeks, and in some cases months. When the parties submit their proposed "official" report, the agency must agree that it is "complete" before the waiting period will begin.

Where a transaction raises competition concerns, remedies may vary among different reporting jurisdictions depending on the transaction's impact on each jurisdiction. Typically, jurisdictions will follow the lead of the primary investigating nation (often the United States or the European Commission) and will accept whatever remedy those authorities impose on the parties.

The key takeaway is that parties contemplating transnational mergers must plan well in advance for merger review.

Vertical Merger Enforcement

The panels discussed several issues.

First, what is the future of merger review after *United States v. AT&T-Time Warner*, the first vertical merger case tried by the government in 40 years? The government challenged AT&T's acquisition of Time Warner, alleging that AT&T's ownership of Time Warner's content would enable AT&T to price-discriminate against content distributors competing with AT&T-owned distributor DirecTV.

The government's case relied heavily on structural vertical merger simulations commonly used in horizontal merger investigations. Vertical simulations, however, are far more complex and require many more assumptions about competitive conditions in both the upstream and downstream markets. For these reasons, vertical simulations have far less predictive power, and were rejected in this case by both the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit.

There was general consensus that in the future, less complex "intuitive" analyses grounded in past market events ("natural experiments") and easily documented changes in the market (especially new entry) may come to govern vertical merger analysis.

Second, panels discussed remedies in vertical merger cases—in particular, whether behavioral (as opposed to structural) remedies will continue to play a role in merger enforcement. The Trump administration's Antitrust Division has stated that it will consider behavioral remedies only in a very limited number of cases. The Federal Trade Commission, by contrast, remains open to behavioral remedies. One example is the recent consent decree that permitted Staples Inc. to acquire supplier Essendant Inc. on the condition that Staples create an information firewall to prevent it from accessing data about Essendant's wholesale customers. Accepting a behavioral remedy in lieu of divestiture or litigation blocking the deal caused a split between the Republican commissioners (Joseph Simons, Noah Phillips and Christine Wilson) and their Democratic colleagues (Rebecca Kelly Slaughter and Rohit Chopra).

Finally, several panels discussed the unused (but still judicially cited) 1984 non-horizontal merger guidelines. Both the FTC and DOJ announced that they are looking at revising the guidelines, although it is not clear that they will issue joint guidelines. It is also unclear whether the new guidelines will simply identify the types of data the agencies may employ in their analysis, or, like the horizontal merger guidelines, articulate theories of anti-competitive harm. A forthcoming FTC hearing will focus on merger retrospectives, and the FTC has been looking at this specifically in the context of vertical mergers.

Concentrated Common Ownership

One session followed up on the FTC's hearing regarding concentrated common ownership, or CCO, on Dec. 6, 2018. CCO consists of ownership by institutional investors of noncontrolling blocks of shares in competing firms (e.g., a large private equity firm's holding of shares in competing airlines). There is no dispute regarding the fact of common ownership and little dispute about the degree of concentration in the affected industries. There is much dispute, however, as to whether CCO leads to reduced price competition between portfolio firms.

Panelists noted several problems. First, any "reduction on competition" requires the fact-finder to compare current market prices to prices in comparable markets (cross-market analysis) or prices in the affected market before or after it became characterized by CCO. These analyses are subject to methodological attack.

Second, what is the mechanism through which competition is reduced? There are two competing theories. The first theory posits direction from an institutional investor to its portfolio company managers ("ringmaster"). The second theory posits that the economic incentives of company managers are themselves sufficient to reduce competition among the firms ("quiet life"). Both theories are problematic for many reasons, including that they assume company managers are willing to violate fiduciary duties to their employers on behalf of minority shareholders. This may be implausible, especially for large publicly held portfolio companies.

Non-price Effects in Merger Reviews

The panel compared U.S. and EC approaches to non-price effects in merger review. As a threshold matter, there is a debate whether non-price effects are a factor independent of price, or whether those effects are subsumed within price on the theory that any price has already been adjusted to reflect the value of non-price factors.

Assuming non-price effects are an independent factor, there were three points of consensus. First, non-price effects are difficult to quantify. Second, non-price efficiency arguments are viewed skeptically by merger enforcement authorities. Third, strong evidence of an adverse effect on innovation may play a role leading to enforcement action (e.g., in pharmaceuticals markets where innovation and product efficacy are more important than price).

Vulnerable Customers in Merger Challenges

The panel discussed recent cases in which the government alleged a transaction would reduce competition in sales to targeted customers, typically businesses that required the provision of products or services at many locations throughout the United States.

The cases include *FTC v. Sysco Corp.* (broadline food-service distribution services), *FTC v. Staples* (sale and distribution of consumable office supplies to large B2B customers), *United States v. Anthem Inc.* (sale of health insurance to national accounts) and *FTC v. Wilh. Wilhelmsen ASA* (supply of water treatment chemicals and services to global oceanic fleets).

In these cases, the government argued successfully that the merging parties were able to price discriminate against these customers because of their unique need for centrally controlled national or global supply or service. The cases initially drew criticism that the government was devoting law enforcement resources to protect large business customers that presumably enjoy a degree of countervailing power in their price negotiations with suppliers. The government's theory, however, has typically been supported by internal documents by the merging firms that identified large customers as a discrete market and describe pricing strategies specific to those customers.

Cross-Market Healthcare Mergers

Agency enforcement against hospital mergers has typically addressed cases in which the merging parties were substantial direct competitors in a discrete geographic market. Recent research, however, suggests that even where there is little or no geographic market overlap, cross-market hospital mergers may yield higher post-merger prices in situations in which the merging hospitals serve large, multimarket employers. To win the business of a large employer, an insurance company needs to be able to cover virtually all the employer's employees, wherever located. Thus, a hospital group serving all those areas may be able to raise prices above those charged by individual hospitals in any one area. Although the FTC has yet to bring a case on this theory, it is aware of the research and is exploring its potential.

HSR Guidance From the FTC

Several panels noted that the submission of deficient privilege logs with HSR filings has increased. On at least two occasions, a filing was bounced as deficient solely on this basis. To address this, the FTC is preparing guidelines on the submission of privilege logs.

Bruce Hoffman, director of the FTC's Bureau of Competition, recommended that, in investigations in which the agency has issued second requests, the parties execute the FTC's model timing agreement. This gives the FTC sufficient time to consider and resolve potential substantive issues without the need to prepare for litigation. He also cautioned parties against waiting to resolve privilege issues until the eve of depositions.

Read the entire ABA Antitrust Law Spring Meeting recap series:

Part 1: Federal and State Antitrust Enforcement Takeaways

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