Should You Complain: Opposing A Proposed Merger [top]

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Introduction

The merger wave is predicted to return. There are already early signs that merger activity has begun to flourish: In 2004, merger activity once again increased in volume with the number of Hart-Scott-Rodino filings increasing 42 percent from fiscal year 2003.

Mergers are investigated by the Antitrust Division of the Department of Justice, the Federal Trade Commission and/or state attorneys general. When mergers are announced, both customers and competitors have an important decision: Should they complain about the merger? Although many mergers benefit competition and consumers by allowing companies to operate more efficiently and by lowering prices, in certain cases, a merger can result in higher prices and reduced market entry and expansion by new or existing companies in the industry. Talking to the antitrust authorities can help assure that competition is not lost from the merger. Moreover, if the agencies require a divestiture or other remedy to cure the anticompetitive effects, a complainant may be the "white knight" acquiring the divested assets and entering the market to restore competition.

The underlying concern of the antitrust laws is whether a merger will harm competition by enabling the merged firm (either individually or with its rivals) to raise prices or decrease service or innovation. The purpose of the antitrust laws is to protect consumers. Thus, where the agencies believe that a merger has the potential to result in higher prices, substantial market concentration, less innovation, or create difficulty for new companies to enter the market or rivals to expand, they will be more likely to investigate and challenge such transactions.

The merger review process is critical to protecting competition and the ability to compete. First, if one is concerned about possible anticompetitive activity from the merger, it is far preferable to convince the antitrust agencies to stop the merger in the first place. Once the merger is completed it is far less likely that the government will launch enforcement action to stop anticompetitive practices such as price increases. The agencies bring only one or two cases a year, usually challenging only fairly egregious abuses of market power. As a result, customers or competitors need to rely upon private antitrust litigation to challenge post-merger anticompetitive conduct. It is simply better to try to stop the conduct before it occurs.

Second, a merger investigation is an intense review of an industry by the agency. It offers the opportunity for the agency to identify potentially anticompetitive activities in a given market. In fact, some prominent criminal and anticompetitive conduct cases have resulted from merger investigations. A merger investi-

gation may lead the agencies to attack some other form of anticompetitive conduct.

Best Practices for Bringing a Complaint

What do the agencies pay attention to when considering whether a merger raises potential concerns, and how do you best alert the agencies to possible competitive problems with mergers? Here are some of the factors to consider when going through the process:

- **Bring concerns to the attention of the agencies as early as possible.** Once a merger filing is made, the agencies have 30 days to decide whether to conduct a more extensive investigation. Thus, it is crucial to make contact with the agencies during that initial period. By bringing concerns to the attention of the agencies early, your company may be able to help focus the agencies' staff on relevant issues and frame the discussion.

- **Recognize that this could be a time consuming and expensive process.** As in many areas, be careful what you wish for. As an instigator of an investigation, a party does not control the scope, timing, direction and level of intrusiveness involved in an investigation. Staff for the agencies will want to engage in dialogue with your business people and economists. They will desire a productive and ongoing relationship during the course of the investigation and will want to know that, as a complainant, your company will make available personnel who are knowledgeable about the industry and that you will devote time and resources in cooperating with any necessary interactions, formal presentations to the agencies, producing documents and follow-up queries.

- **Retain and involve experienced antitrust legal counsel.** While agency staff will want to interact with and engage your business people and economists, legal counsel should be involved at all stages of the investigation as an intermediary. Antitrust counsel will know the process and often know many of the key government players. In a sense, they can forge separate relationships with agency staff while protecting your company throughout the investigation. In particular, counsel can be invaluable in discussions and negotiations over any sensitive topics or data and, as discussed below, the confidentiality of information made available to the agencies.

- **Always be respectful and professional with the agencies and their staff.** Agency attorneys and economists are key to any merger investigation and many investigations are won or lost at this level. They know legal antitrust theory and are adept at applying the facts at issue in any particular investigation. Try to find a sympathetic ear among agency staff and attempt to provide an understanding of the relevant facts in early discussions. In almost all circumstances, never go over the heads of staff to higher level agency officials. Typically, such officials will defer to the staff and decline to intervene until the staff analysis is complete and the investigation is formally sent up to their level for review. Nothing can be gained by being disrespectful or dismissing the efforts of staff. However, much can be lost, as your arguments could be viewed with skepticism.

- **Secure a confidentiality agreement from the agencies.** The agencies go to great lengths to assure that the identity of complainants is not disclosed and that information cannot be secured, absent litigation, by the merging parties. While it is extremely

unlikely that the merging parties will ever discover the identity of complainants, a confidentiality agreement provides additional protection for any disclosures your company may make. All interviews are kept strictly confidential and government attorneys go to great lengths to guarantee they stay that way in order to encourage cooperation in merger reviews. Materials and testimony gathered pursuant to the Hart-Scott-Rodino Act or under subpoena (Civil Investigative Demand) do enjoy certain additional protections from disclosure. However, if an investigation actually evolves into an enforcement case which goes to trial, a complainant could be selected as a witness.

- **Prepare and focus your arguments in advance, and be specific in documenting them with factual assertions.** This approach will allow all parties and the agency staff to focus on the most critical concerns and may increase the likelihood of a complaint being taken seriously. In addition to having a sound basis for believing a violation of the applicable antitrust statutes would occur if a proposed merger went forward, the agencies' review and response is guided by careful application of sound legal and economic principles to the particular facts of the case at hand.[1] Thus, such reviews are factual inquiries, and establishing a strong, credible argument early in the process is important for complainants, particularly if you are a competitor. Agency staff will likely focus their third–party inquiries on market definition, competitive effects of the proposed merger, and barriers to market entry. When appropriate, take advantage of questions raised by staff to submit additional materials to the agencies which could assist in better focusing the staffs' attention on the most critical concerns with the proposed merger.

Evaluation of Whether to Bring a Complaint

Do you really want to complain about a proposed merger? Before committing to and becoming involved in any antitrust agency merger review, your company should carefully consider the following:

- **What are your future business plans?** Remember that the market conditions you discuss with and define to agency staff will be on record and could affect your own business plans in the future. For example, if you plan to conduct acquisitions in the same market, it may not be in your interest to initiate a complaint or cooperate and explain to authorities why an acquisition is problematic. If the deal is blocked, you may find the same arguments presented against your future proposed acquisition.

- **Could your complaint or comments backfire?** While the agencies welcome comments and information from any interested parties regarding a proposed merger, agency staff acknowledge that they find information from suppliers and customers of the merger parties to be the most helpful and unbiased. If you are a competitor, the information and data you provide must be credible and can assist in providing useful insight on market conditions and effects on competition. Nevertheless, the agencies also recognize that a competitor could be complaining out of concern that the proposed merger could actually increase competition and lower prices. So one must fashion the argument carefully.

[1] See "Antitrust Division Policy Guide to Merger Remedies", U.S. Department of Justice, October 2004, Section II.

- **Could you be the beneficiary of relief secured by the agency?** In the end, if these antitrust agencies conclude that a merger would lessen competition, they can address the matter in several ways. Two of these are to prevent the merger from going forward or negotiating a settlement (a Consent Decree including structural or conduct provision) that allows the merger to move forward with certain modifications to preserve market competition. This leads to a final point for consideration, discussed below.

A complaining competitor may often be the "white knight" to restore competition. Sometimes the agencies will require the divestiture of an ongoing business or business segment. Sometimes it will require licensing of intellectual property or resolution of intellectual property disputes. If you have been trying to break into a particular geographic market in which the two merging companies must divest some of their assets, the agencies may approve your purchase of the assets. Perhaps IP litigation between you and one of the merging parties has kept you out of the market. In that case the government may force the parties to resolve the litigation or provide a license. Typically they will approve a purchaser if they believe the acquirer has the incentive and ability to use the divested assets to fully restore competition.

Conclusion

Competitors and customers should carefully consider the risks and benefits of bringing a complaint. If a decision is made to complain, it needs to be done in a well considered manner so as to maximize the impact and minimize the potential downside. When approached carefully, a complainant can add valuable insight and provide factual basis for supporting any agency decision regarding a proposed merger. Ultimately, the complainant may be the "white knight," acquiring the divested assets to restore competition.

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