3 Key Trends In Antitrust Merger Review

Law360, New York (June 09, 2014, 10:16 AM ET) -- The latest annual joint report by the U.S. Department of Justice and the Federal Trade Commission, which analyzes the agencies' enforcement activity under the Hart-Scott-Rodino Act, provides valuable insights into three key current trends. As detailed by the 2013 report, the number of HSR filings is down, the size of deals is up, and, most importantly, the agencies continue to ramp up enforcement.

The HSR Process

Exploring these trends warrants a brief discussion of the HSR Act's context. The HSR Act requires that acquisitions exceeding a certain threshold — $75.9 million in 2014 — and not otherwise "exempt" must be reported to the DOJ and the FTC. Deal parties then must honor a waiting period (generally 30 days) before they may close their acquisition. HSR reports must contain fundamental competitive information, including revenue data by product code and documents used by each party's management to evaluate the transaction's competitive aspects and the potential for growth, synergies and efficiencies. If either agency has competitive concerns, it will request "clearance" to conduct a preliminary investigation.

A subset of cleared transactions then results in a "request for additional information," commonly referred to as a "second request," an extensive discovery exercise that can be both expensive (potentially costing millions of dollars) and time-consuming (often taking three to six months or more). A further subset of second request investigations results in a formal challenge to block a deal.

Three Key Trends

The first trend revealed by the 2013 report is a decline in the number of deals filed last year under HSR. This decline suggests a surprising weakness in deal flow. In 2009, there was an unsurprising but severe recession-driven decline to only 684 adjusted transactions, as compared to 1,656 in 2008. Recovery to 1,128 transactions in 2010 and 1,414 in 2011 leveled off to 1,400 adjusted transactions in 2012.

In 2013, adjusted transactions dropped sharply to 1,286. The adjustment element of the foregoing figures accounts for filings the agencies were not authorized to investigate in detail, such as incomplete, withdrawn or mistaken filings. While the 2013 report does not analyze why the drop in filings occurred, it does provide a concrete measurement of deal flow.

The second trend is an apparent increase in the size of transactions filed. In 2012, 208 transactions valued at $500 million to $1 billion were filed, representing 14.9 percent of the total. In 2013, the

number of these significant deals jumped to 251 transactions, representing 19.5 percent of the total and a nearly 31 percent increase. The only larger category tracked — transactions valued above $1 billion — declined from 156 to 142 but was essentially flat in percentage terms. Smaller-size categories ($50 million to $100 million, $100 million to $150 million, $150 million to $200 million, $200 million to $300 million and $300 million to $500 million) all declined.

The third trend is an increase in enforcement. This trend is far more subtle, especially given that the number of formal merger challenges declined from 44 in 2012 to 38 in 2013. Yet we think it undeniable that enforcement scrutiny overall is rising, given two measures.

First, the percentage of transactions garnering detailed second request investigations increased from 3.5 percent to 3.7 percent. While this is a small percentage increase, it is nevertheless noteworthy that the number of second requests stayed essentially flat (47 in 2013 compared to 49 in 2013) in a year with 114 fewer adjusted transactions filed.

Second, and more importantly, at least one of the agencies requested and was granted "clearance" to conduct a preliminary investigation in 217 transactions in 2013, up from 206 such requests in 2012. The percentage of transactions requiring clearance increased 15 percent (from 14.7 percent in 2012 to 16.9 percent in 2013). This increase is especially significant considering the overall decline in adjusted transactions and the sharp turnaround from 2011 to 2012, a period when the number of clearance requests declined significantly (from 257 to 206).

The clearance process is a mystery to many businesspeople, especially given that the term represents a positive development elsewhere in the world. In most foreign jurisdictions, "clearance" represents essentially the approval of the transaction to proceed free of further antitrust scrutiny, as in clearing a hurdle. By contrast, in the United States, clearance is a decidedly negative development from the parties' perspective, because it occurs only when an agency would like to investigate the acquisition further and makes a formal request to do so. Thus, clearance may be considered the first stage of U.S. antitrust enforcement, and a 15 percent increase year on year is important to bear in mind for any companies considering strategic acquisitions and their advisers.

Key Takeaways

The agencies obviously do not control initial deal flow. Yet faced with fewer deals in 2013 than in 2012, they exercised higher scrutiny on what was filed, imposing added costs and delays on deals in the pipeline even though formal challenges decline. The latest numbers as reported by the agencies demonstrate that enforcement activity remains significant, and why careful predeal review of competitively sensitive deals may be warranted.

—By Barry M. Block, Michael Jahnke, Dan McInnis and Rachel Talay, Thompson Hine LLP

Barry Block is a partner in Thompson Hine's Dayton, Ohio, office. Michael Jahnke is a partner in the firm's New York office. Dan McInnis is a partner and Rachel Talay is counsel in the firm's Washington, D.C., office.