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Lax Merger Enforcement In An Obama Administration?

Law360, New York (December 31, 2008) -- The antitrust bar in Washington has been telling clients for the past year that they should hurry up and get their strategic deals done quickly. The regulatory environment for merger clearance has been extremely favorable in the waning days of the Bush administration. But with a Democratic victory, that window of opportunity will not only firmly close, it will be nailed shut.

That advice of course was based on the conventional wisdom that Republican administrations are more business-friendly while Democrats generally enforce the anti-merger laws more aggressively.

There is no better evidence of the former than critics lamenting the current U.S. Department of Justice Antitrust Division as having "the weakest record of antitrust enforcement in the last half century."

And the contrasting point is certainly supported by the Obama campaign's statement that as president he will "reinvigorate antitrust enforcement" and "step up review of merger activity."

But as President-elect Obama prepares to take office, the picture is very different. What is happening to the economy changes everything, including the conventional antitrust wisdom.

In a world where the very survival of the U.S. automotive industry is at stake, the next Assistant Attorney General for Antitrust and the next Chair of the Federal Trade Commission will recognize the need to take account of this searing economic reality.

How will they do so? Are the antitrust laws really so malleable? What makes a high market share different in financial crisis?

The answers to these questions start with the basics. Mergers are reviewed under the Clayton Act, which prohibits transactions that may "substantially lessen competition" in any line of commerce.

That very general language from 1914 is the only guidance Congress has provided. The rest of the analytical framework has been filled in by the agencies and the courts over time.

In the modern era, the merger analysis undertaken by the DOJ and the FTC is flexible enough to account for economic realities affecting a particular industry. There are two basic issues that are examined in each case.

First, is the merger likely to reduce competition, most commonly by combining two companies that previously competed with each other?

Second, are there offsetting benefits to competition from the combination, for example enhancing technology development or lowering costs?

While the analysis is complex, suffice it to say these two factors are weighed together to determine if the net effect of the transaction on competition and consumers is positive or negative.

Striking that balance involves consideration of a vast array of information about the specific circumstances in the industry involved. What is the relevant market? Who are the other competitors? What are the shares? Who are the customers and how do they buy? What specific synergies are there? And on and on.

Precisely because there are so many factors to be analyzed and weighed in each case, the process is far from formulaic. Indeed, it involves evaluation of bits of evidence that often are qualitative rather than quantitative, and of varying clarity and strength, if not downright contradictory.
And therein lies the scope for the agencies to apply judgment in making the ultimate decision whether or not to challenge a merger as anticompetitive.

So where does an economic crisis fit in to this framework? Admittedly it is not a factor mentioned specifically in the DOJ/FTC Merger Guidelines, nor in leading judicial decisions. But it is nevertheless relevant in several respects.

First, evaluating competitive effects is inherently a forward looking exercise. One key question is whether past market shares accurately reflect the future competitive significance of the merging parties.

While this issue often is thought of in the extreme case of a "failing company," it is broad enough to include the concept of competitors who have been fundamentally weakened by economic circumstances.

And the issue is even more clearly pertinent to the benefits side of the equation. Two competitors who are struggling may well be able to show that together they will be able to weather the crisis and emerge as a far more viable competitive presence than either could alone.

This is not a traditional "economic efficiency," but certainly there is room in merger analysis to consider this effect.

Does all this mean that we are in for a few more years of what some would consider lax merger enforcement? No one should think that all you need to do is invoke the economic crisis and your deal will sail through. The issue is far more nuanced than that.

What the agencies will do is consider the economic context, as it relates to the future competitiveness of the merging parties. And they will be particularly concerned about the long-term competitiveness of industries that are important to national priorities, like security and infrastructure.

So the parties to these transactions will need to think more broadly about the points to make in presenting their case to the FTC or DOJ.

The unconventional wisdom is this: Companies who see real benefits to merging with a competitor should not self-censor by relegating such deals to the "non-starter" category just because the Democrats are taking over.

Rather, they should re-focus their analysis on how the economic crisis has affected — and is likely to continue to affect — their industry, and how the merger could create a stronger competitor for the future. That window of opportunity will remain open for some time into the next administration.

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