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The Evolving Role Of Competitors In Merger Review

Law360, New York (March 12, 2014, 12:46 PM ET) -- The conventional wisdom for many years was that government antitrust policy and U.S. Supreme Court doctrine restricted a competitor's role in merger review. The majority of merger review occurs within the U.S. Department of Justice or the Federal Trade Commission, and the agencies' traditional view was that competitors are motivated to complain only when the deal will make the world more competitive — not less. Thus, unlike antitrust class action litigation and terminated distributor claims, merger review historically presented little opportunity for a "plaintiff's" antitrust practice.

Supreme Court decisions also created barriers for the would-be competitor plaintiff in court. The usual recourse to challenge a merger is to sue for an injunction under Section 16 of the Clayton Act,[1] or to sue for treble damages after the transaction closes.[2] But the Supreme Court made it difficult for a competitor to gain standing in either action, especially preclosing. The controlling case remains Cargill v. Monfort of Colorado Inc,[3] in which the Supreme Court held that a competitor lacked standing to seek an injunction to block a merger. According to the court, "[T]he antitrust injury doctrine "prevent[s] a plaintiff from maintaining suit under the antitrust injunction statute."[4]

The plaintiff there raised two arguments against the merger: first, that it would produce multiplant efficiencies that would allow the combined firm to lower its prices, which in turn would force the plaintiff to lower its own prices, causing a drop in profitability.[5] Second, the plaintiff claimed it would be driven out of business by "sustained predatory pricing" made possible by the merger.[6]

The Supreme Court brushed aside both complaints. As to the initial point, the court stated that "the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws."[7] Contrary to the plaintiff's claim, the court understood that efficiencies would produce even more "vigorous competition" that is healthy for the market and consumers.[8] The court then dismissed the second argument as neither properly alleged nor proven.[9] As the Fifth Circuit subsequently confirmed, "Cargill has imposed significant barriers to competitor attempts to enjoin merger transactions."[10]

While this controlling law on competitor standing has not changed in recent years, contrasting the following two statements demonstrates that government antitrust policy toward competitors at the DOJ and FTC certainly has. In their amicus brief in Cargill 25 years ago, the United States and the FTC fought a competitor's right to challenge a merger,[11] stating:

Competitors' challenges to acquisitions should be viewed with great skepticism. Competitors stand to benefit from, and have no incentive to challenge, acquisitions that may lead to supracompetitive pricing.

On the other hand, competitors have a substantial incentive to challenge acquisitions that will make their rivals more efficient, make their industry more competitive, and reduce the prices they can charge their customers. Rigorous insistence on allegations of antitrust injury to the plaintiff is therefore necessary if competitors are to be prevented from using the antitrust laws for anticompetitive purposes.[12]

The FTC and DOJ thus confirmed their view at the time: Competitors resist mergers only when the transaction is procompetitive, so the government should be wary of a competitor who wants to assist in merger review.

That was then. Now, the DOJ and the FTC routinely invite and enhance competitor participation in the merger review process. The most notable recent example of the agencies' new direction occurred in the proposed AT&T Inc. acquisition of T-Mobile USA Inc.. When competitor Sprint Nextel Corp. sought access to AT&T and T-Mobile documents produced to the government, the government voiced strong support for this competitor's support:

Petitioners [Sprint Nextel et al.] are likely to have the ability and interest to provide informed technological and business responses to Defendants' [AT&T and T-Mobile] assertions and, given the short time available for fact and expert discovery in this case, it makes sense to provide an efficient and expedited process for the review of the parties' factual claims and expert conclusions.[13]

Without acknowledging its prior concerns about competitors' having perverse motivations, the government claimed that competitor participation furthers the goals of merger review, allowing the agency deeper insight into the business and the market.

The remainder of this article presents a "layperson's view" to this evolution. As a high-level look at the evolving role of competitors in merger review, this article oversimplifies much of the agencies' work and will not explore many nuances of antitrust counseling. The goal is instead to assist business executives in understanding their options when their competitors merge.

The agencies' current approach creates new strategic considerations both for parties to a transaction and their competitors. The merging parties must anticipate not only government concerns but also issues raised by competitors acting in their own self-interest. The parties must early on analyze what arguments potential competitors might assert, and plan how best to counter those efforts.

While the merging parties will want to build out the straw-man arguments that the competitors might make, and be prepared with rebuttal points, contemporaneous business records, and expert analysis to undercut them, the strategic challenge is determining whether to engage the agency on arguments that might not otherwise come to their attention if the competitors prove to be less aggressive than anticipated.

A competitor, on the other hand, must decide how best to play its hand to capitalize on opportunities created by the review process. Should it call the government of its own accord or wait for the government to make initial contact? Calling can seem overly anxious and raise the specter of the old view that still lingers in the background, while not calling risks missing out on the opportunity.

The right strategy often depends on the competitor's ultimate goal, as reflected in the answers to questions such as: Do you want a "seat at the table," in the form of ongoing communication with the review team that allows you to follow the progress of the investigation at some level by the government, the remedies being considered, and other “real-time” information (which is generally presented as hypotheticals to protect the confidentiality of the investigation and the merging parties' submissions, but which nonetheless allow the complaining competitor some degree of visibility into the on-going merger review process)? Do you want to present yourself as a viable less-anti-competitive purchaser that may help motivate the government to challenge the transaction? Or do you want to encourage divestiture of certain business units that you are interested in buying?

The competitor must also decide whether to take a clear position on the transaction, or remain neutral. If the competitor remains neutral, it may more credibly position itself as a resource for information to the government, and in turn obtain a better window into the flow of information to agency officials. The value of being an information resource cannot be understated. There are frequently transactions, particularly in the internet and technology sectors, where the government is less familiar with the marketplace, who the significant players are, and how competition works.

Such situations present an opportunity to help educate the government in the early stages of an investigation and remain available to pressure test theories and facts throughout the process. Even in more mature industries that are well known to the government, interested competitors can provide valuable information to vet — or possibly contradict — assertions made by the merging parties. Of course, credibility is critical throughout the process. The purpose of a merger investigation is to gather evidence and, if necessary, build a strong case to seek an injunction or a remedy. The credibility of third parties, their complaints and the evidence they provide is an important factor in the agencies' decision to bring a case.

Once the competitor is engaged with the agency, either of its own accord or by request, it should also expect to receive a civil investigative demand as a third party. The CID requests production of documents and data, likely focusing not just on market data but also, and perhaps more importantly, on internal communications among company executives that reflect views on the transaction or the market. That likelihood maps back to initial planning. When the deal is first announced, employees should be made aware that their documents could be subpoenaed, and consider that possibility when drafting documents (especially email chatter) concerning the deal and its potential effects on competition or the competitor.

But if the agency does not issue a CID of its own accord, the competitor must decide whether to provide information voluntarily or request a “friendly” CID from the agency. The desire to produce information must be balanced with the downside of a document production: though a competitor may focus on a smaller set of key documents in a voluntary production, once the CID is issued, the competitor is obliged to produce all documents requested, with the attendant burden and risk, subject to negotiating the scope of the CID. The agencies are generally willing to negotiate a more focused and tailored response from third parties than the merging parties themselves.

To enhance its position as a “concerned third party” in the merger review, the competitor might attempt to claim the mantle of a supplier or a customer of the merging parties. In this way, the competitor can highlight how the merger affects upstream or downstream markets, rather than simply direct competition. Sprint Nextel and Cellular South Inc. used this tactic when the companies sought to enjoin AT&T's proposed acquisition of T-Mobile.[14]

Though Sprint Nextel and Cellular South both competed directly with AT&T for wireless customers, the plaintiffs alleged injuries that stemmed from both horizontal and vertical aspects of AT&T's proposed merger.[15] That is, AT&T's competitors portrayed themselves not only as rivals but also as customers who would be injured by downstream effects of the proposed merger.

Sprint Nextel and Cellular South both alleged that the proposed merger would hurt their relationship with AT&T as “purchasers of services that AT&T sells,” namely in the market for roaming.[16] The plaintiffs thus portrayed themselves as customers of AT&T and T-mobile who purchased supplemental capacity from the merging parties.

Though Sprint’s claim ultimately failed on the facts, the court allowed Cellular South’s claim to move forward, stating “[G]iven that roaming is a necessary input for Cellular South, ... ‘the removal of T-Mobile from the marketplace would leave only AT&T as a potential [] roaming partner.’”[17] The merger, then, purportedly harmed Cellular South directly, rather than merely creating a more competitive market. As this example shows, a competitor’s concerns — and, perhaps, its resulting standing with the agency as a key player in the merger review — can be strengthened when it approaches the agency as a customer.

In sum, the increasing role of competitors in merger review necessitates an additional layer of planning and strategy for the merging parties and their antitrust teams. The parties must not only anticipate agency concern over the combination but also intervention by competitors seeking to disrupt the transaction for their own gain. For competitors, the agencies’ new “open door” policy means an active competitor can use this new welcome mat at the agency’s door to participate in the review process.

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[1] 15 U.S.C. § 26.

[2] 15 U.S.C. § 15.

[3] 479 U.S. 104 (1986).

[4] Brodley, Joseph F., “Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals.” 94 Mich. L. Rev. 1, 5 (1996).

[5] 479 U.S. at 115.

[6] 479 U.S. at 117.

[7] 479 U.S. at 116.

[8] 479 U.S. at 116.

[9] 479 U.S. at 118–19.

[10] Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95, 102 (5th Cir. 1988).

[11] See Brief for the United States and the Federal Trade Commission as Amici Curiae, Cargill Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) [hereinafter FTC Cargill Brief].

[12] FTC Cargill Brief at 9 (emphasis added).

[13] Plaintiffs' Statement in Support of Sprint's, Cellular South's, and Corr Wireless's Motion to Amend the Protective Order, U.S. et al. v. AT&T Inc., T-Mobile USA, Inc., and Deutsche Telekom AG at 2, Civil Action No. 11-01560 (2011) [hereinafter Plaintiffs' Statement re AT&T Merger].

[14] See Sprint Nextel Corp. v. AT&T Inc., Civil Action No. 11-1600 (ESH) (D.D.C. Nov. 2, 2011) (memorandum opinion granting in part and denying in part defendant's motion to dismiss) [hereinafter Memorandum Opinion in Sprint v. AT&T].

[15] Memorandum Opinion in Sprint v. AT&T, at 10.

[16] Memorandum Opinion in Sprint v. AT&T, at 30.

[17] Memorandum Opinion in Sprint v. AT&T, at 36.
