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The Widening Gap Between FTC, DOJ Merger Review

Law360, New York (January 21, 2009) -- Over the course of the past year, there has been a growing divergence in merger enforcement between the U.S. Federal Trade Commission and Department of Justice as the FTC has pressed in federal court its position that substantive merger review belongs to the FTC, not the courts.

As a result of the FTC's success in these efforts, the FTC's burden for obtaining an injunction and the procedure associated with an FTC challenge have become so dissimilar from its sister agency, the DOJ, that parties can reasonably anticipate the possibility of a different substantive outcome depending on which agency has jurisdiction to review the transaction.

Such a result has been justifiably criticized by practitioners and raises the question: why should there be any substantive differences in merger review processes of these two agencies?

Background

The DOJ and FTC both enforce the antitrust laws. With respect to mergers and acquisitions, both agencies enforce Section 7 of the Clayton Act, are subject to the timing requirements of the Hart-Scott-Rodino Act, and investigate mergers under the same substantive rubric, the Merger Guidelines.

(The FTC also enforces the antitrust laws through the FTC Act, which is generally considered to be co-extensive with the Clayton and Sherman Acts.)

Whether the FTC or DOJ has jurisdiction over a proposed merger depends on the agency's experience in a particular industry. In some instances, for example, acquisitions solely involving in the pharmaceutical industry (FTC) or the steel industry (DOJ), jurisdiction is clear.

For acquisitions in other industries, such as defense industry, in which both agencies have experience, it can be difficult to predict which agency will handle the review of a merger.

Until recently, the agencies' differences with respect to merger review were mostly procedural and were unlikely to result in diverging outcomes.

In addition to the obvious differences between a bipartisan Commission and a cabinet level agency, the agencies' processes and requirements for obtaining consent decrees differ, and many practitioners hold the view that matters move more quickly though the DOJ.

The difference between the FTC's and the DOJ's processes for obtaining injunctive relief, has until recently had only a minor impact on the outcome of the merger review process.

Although both agencies must first seek a preliminary injunction to block a deal, the processes for obtaining a permanent injunction are different.

Section 13(b) of the FTC Act provides that the FTC must seek a preliminary injunction in federal district court and a permanent injunction in the FTC's administrative court, also known as Part III proceedings.

It may also pursue Part III proceedings even when the district court denies the preliminary injunction, but it does so rarely. In contrast, the DOJ must seek both preliminary and permanent injunctions in federal court, and the claims for relief are usually consolidated into a trial on the merits.

Because mergers are typically abandoned if the merging parties lose a preliminary injunction hearing, no pre-closing mergers have gone to trial in Part III proceedings since 13(b) was enacted in 1973.

Indeed, federal district courts have typically held merits hearings or trials regardless of whether the action was brought by the DOJ or FTC. (Arch Coal, Swedish Match, Oracle, etc.)

Until this year, it has been open to debate whether there is a difference between the standards the agencies must meet for preliminary relief.

Some commentators — most notably the Antitrust Modernization Commission (the" AMC") — had suggested that the FTC's burden is lower than the DOJ's, especially in light of the fact that the DOJ typically has to meet both the preliminary and permanent injunction standards in the same proceeding.

Nevertheless, the case law has historically articulated similar standards for the DOJ and the FTC, suggesting that the burdens may not differ. Indeed, in his testimony before the AMC in 2005 current FTC General Counsel William Blumenthal stated that the burdens are essentially the same.

The FTC's Recent Actions

Today, in light of the FTC's efforts, there is no longer significant debate about whether the FTC believes it has a lesser burden in connection with obtaining a preliminary injunction.

The FTC argues that a preliminary injunction merely preserves the status quo until the FTC has an opportunity to litigate the matter in administrative court. This argument has achieved some degree of success in the past year, as two courts, both in the D.C. Circuit, have suggested substantial agreement with the FTC.

As a result, the FTC now files an administrative complaint at the same time or even prior to filing a complaint in federal court and opposes anything more than a cursory review by the federal district court in determining whether to grant the preliminary injunction.

Specifically, the FTC argues that discovery should be limited and that no live testimony should be required for the district court to make a decision in the FTC's favor.

The FTC further argues that, unlike actions brought by the DOJ, the federal district courts do not have the power to determine the merits of a merger case brought by the FTC, rather such merits review must take place in the Part III proceedings.

In June 2008, Judge Hilton in Inova-Prince William agreed with the FTC's position and denied the merging parties' motion for a three-day evidentiary hearing with live witnesses.

He stated the merger decision "needed to be tried before the Commission" not before a district court and that "the issue before me is a narrow one, as to whether or not a preliminary injunction should be issued." Upon losing their motion, the parties abandoned the transaction.

Subsequently, the D.C. Circuit's decision in the Whole Foods case, although not squarely addressing the standard the FTC must meet, suggests that the FTC's burden is lower than the DOJ's burden.

In this regard, though the other two judges did not concur with her opinion (one dissented,

the other concurred with only the judgment), Judge Brown, writing in support of the decision, stated that the FTC was not required “to settle on a market definition at this preliminary stage” because preliminary injunctions sought under Section 13(b) of the FTC Act “are meant to be readily available to preserve the status quo while the FTC develops its ultimate case."

Implications

The FTC's new approach is troubling for various reasons. The central concern is that the FTC has created a wide gap in the standards applied by the FTC and the DOJ in connection with federal antitrust review of proposed mergers.

In addition, practitioners have expressed doubt as to whether it makes sense for an FTC Commissioner (who may have been involved in the decision whether to bring the action) should serve as the Administrative Law Judge in a trial on the merits.

This divergence between the FTC and the DOJ means that parties now find themselves subject not only to a different standard of review but to vastly different timeframes.

Despite the FTC's proposed rule changes designed to resolve Part III proceedings more quickly and the FTC's assurances to that effect, parties are likely to experience up to three months of additional delay depending on their industry — for example, medical devices (FTC) or washing machines (DOJ).

In addition, parties in industries within the jurisdiction of the FTC also face the burden of preparing to litigate simultaneously before a federal district court judge and the FTC, whose trier of fact may have participated in the decision to bring the action.

Moreover, the divergence in standards and timing cause the FTC's staff to be more reluctant to engage in settlement discussions.

There are several ways to restore the balance. While many commentators have suggested that Congress amend the FTC Act to abolish Part III litigation involving pre-closing transactions or even to abolish Part III litigation all together, others go farther and recommend moving all merger review authority to the DOJ.

Still others seek a judicial solution. For example, on Dec. 8, 2009, Whole Foods filed a motion for injunctive and declaratory relief, seeking to preclude the FTC from bringing its administrative action.

For over 30 years, the antitrust bar has debated the merits of dual enforcement of the antitrust laws.

The debate continues, and although having two agencies enforce the antitrust laws may have some benefits, the recent developments at the FTC raise serious questions about whether it is fair or appropriate for parties to face materially different outcomes depending on which agency happens to review the transaction.

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