Increased Scrutiny From DOJ Spells Trouble For Megamergers

By Benjamin Horney

Law360, New York (April 6, 2016, 9:41 PM ET) -- The U.S. government’s suit to derail Halliburton’s $34.6 billion merger with Baker Hughes reinforces a growing trend of skepticism from the U.S. Department of Justice that megamerger remedies and concessions will maintain enough market competition, which has been picking up since last year’s Albertsons-Safeway deal, experts say.

Halliburton Co. and Baker Hughes Inc. quickly hit back at Wednesday morning assertions from the U.S. Department of Justice that their merger would eliminate a significant amount of competition in the oil field services industry, contending that the deal is pro-competitive and good for consumers.

The duo also touted a package of proposed divestitures they believe will allow for adequate post-merger competition in the industry, but their stance will do little to quell concerns from antitrust enforcers, according to Bruce Sokler, an antitrust attorney at Mintz Levin Cohn Ferris Glovsky & Popeo PC.

“The FTC and DOJ have been burned in several cases where it was clear that the divestiture package did not work,” he told Law360. “I suspect that there’s a fair amount of skepticism that they’ll see the alleged benefits.”

Some of the cynicism from enforcement authorities over divestiture packages can be traced back to last year, when the Federal Trade Commission approved the $9.2 billion merger of Albertsons LLC and Safeway Inc. despite concerns that the combination would harm consumers since the companies operated overlapping stores.

The FTC gave the green light after the supermarket chains agreed to sell 168 stores to defuse those worries, but when the smaller chain that bought 146 of the grocery stores went bankrupt because it couldn’t handle the rapid expansion, the agency was forced to allow Albertsons to buy back 30 of the stores.

The Albertsons-Safeway debacle showcases what is likely one of the DOJ’s biggest concerns over Halliburton and Baker Hughes’ merger, according to Diana Moss, president of the American Antitrust Institute. Because suitable buyers for the proposed divestitures simply don’t exist most of the time, asset-shedding often fails to have the intended impact, she explained. Instead, it reduces the number of major players in a given market, making it more difficult for smaller fish to compete.

“It’s difficult because there are no viable buyers,” she said.

In the case of Halliburton and Baker Hughes, it’s clear the deal will lead to a duopoly, Moss said, leaving the merged entity and Schlumberger Ltd. as the only true competitors in the
oil field services industry. The sour taste left in enforcers’ mouths from previous megamergers gone wrong has made it difficult to successfully negotiate remedies in these instances, she added.

“Companies coming in with offers to divest really targeted assets misses the whole bigger picture of how a merger will consolidate the market further,” she said. “When you’re creating two national or global competitors, divesting little pieces isn’t changing the fact that the market is being consolidated, and that’s the problem.”

There is also evidence to support the notion that concessions and remedies largely fail to bring the positive outcomes predicted by companies that are attempting to merge.

John Kwoka, an economics professor at Northeastern University, published a paper in the 2013 American Bar Association Antitrust Law Journal that studied the outcomes of 60 mergers in the past quarter-century or so, looking at whether the benefits promised by companies, including lower prices and heightened competition, typically panned out.

According to the paper, a “very large fraction” of the mergers Kwoka looked at showed that the deals resulted in higher prices, even when a remedy was imposed, and that remedies including divestitures did not appear “generally effective in preventing post-merger price increases.”

“I find that the remedies imposed — divestiture and conduct or conditions remedies — are not generally adequate to the task of preserving competition,” he wrote. “Price increases persist in the face of these remedies, and more so in cases where nonstructural conduct or conditions remedies are employed.”

Such empirical evidence, combined with a growing consensus that megamergers typically have a high likelihood of hurting consumers and hampering competition, has led to an increased willingness by authorities to challenge the deals, Sokler noted.

“They find it harder to accept general and aspirational efficiency claims in the face of retrospective studies that show the benefits haven’t occurred and prices have risen,” he said.

Meanwhile, Halliburton and Baker Hughes made clear that they intend to fight the DOJ, and it’s still possible they will prevail. History shows that the outcome of this litigation is in no way certain as there are recent examples that feature both positive and negative results for the companies attempting to merge.

For instance, H.J. Heinz Co. successfully joined forces with Kraft Foods Group Inc. last year, creating the third-largest food and beverage company in the U.S., But over the summer, Sysco Foods wound up pulling the plug on its $3.5 billion proposed merger with US Foods after a D.C. federal judge ruled that the FTC could likely prove the tie-up would thwart competition.

“Spirited litigation” is to be expected in the fight between the DOJ and Halliburton and Baker Hughes, according to Andrea Agathoklis Murino, co-chairwoman of Goodwin Procter LLP’s antitrust and competition law practice. A settlement is not likely due to the fact that both sides probably “thoroughly vetted and explored” the idea prior to the DOJ’s Wednesday announcement, Murino said.

Companies are also increasingly aware of the difficulties that come with fighting against the government when it has a strong position, which the DOJ seems to have in the case of Halliburton and Baker Hughes, Moss said. Abandonment of contested megadeals has become a pattern as a result, she added.
“I think they’re going to see that litigating is probably an uphill battle,” she said.

--Editing by Christine Chun and Kat Laskowski.

All Content © 2003-2016, Portfolio Media, Inc.