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5 Ways To Ease The Pain Of An Antitrust Review

By **Chelsea Naso**

Law360, New York (May 13, 2016, 6:06 PM ET) -- Antitrust scrutiny can easily derail a transaction, but deal makers who go into the process with a plan can ease the pain of a review and bring a deal across the finish line, experts say.

A tough stance from antitrust regulators has already been the death knell for a handful of big-ticket transactions this year, fueling a **record level** of withdrawn deal value that, as of May, has trumped all full-year values on the books, according to data tracked by Dealogic.

"[Regulators] are going to be sympathetic to customers' complaints, to competitors' complaints. There's just a more aggressive view of the world on antitrust," said Christian Fabian, a Mayer Brown LLP partner.

Challenges from the Federal Trade Commission and the U.S. Department of Justice have already foiled the planned **$6.3 billion merger** of Staples Inc. and Office Depot Inc., as well as the anticipated **$38.7 billion tie-up** between Halliburton Co. and Baker Hughes Inc., with general antitrust concerns spurring others to walk away from bids early in the deal-making process.

Here, Law360 outlines five ways companies can sail through the antitrust review process.

Secure Outside Support Early

Antitrust should be considered early and often when weighing a tie-up of companies in competing or even complementary markets, making it essential to bring on outside, experienced antitrust advisers at the beginning of the process, Fabian said.

"People need to really look substantially at antitrust before signing up a deal," he said. "Now it's really important for companies to substantially look at antitrust problems, to involve more people upfront on both sides to really understand how the market and how the government is really going to see this."

Understanding how the market — and its regulators — will interpret the antitrust components of a deal early on can help to better structure a transaction from the outset, as well as identify potential mitigation measures that would still preserve the benefits of the deal.

Aside from legal advisers, companies that anticipate a close look from the DOJ or FTC should consider bringing on an economist to help work through the immense amount of market data likely to be requested by the antitrust agency reviewing the deal, explained Cliff Aronson, Skadden Arps Slate Meagher & Flom LLP partner and North American leader of the firm's antitrust practice group.

"It's really important to get antitrust advice and depending on the transaction, advice with an economist very early on," Aronson said. "Sometimes, antitrust is just not intuitive. And by getting somebody on board early, getting advice early, they can structure their transaction in a way to get by antitrust issues."

And internally, it's essential to have an executive who can communicate and coordinate with outside counsel, an economist and, down the road, antitrust regulators. This person needs to be a relatively high-up executive who can articulate the motivations behind the deal, Aronson said.

"It's really important to have somebody who can articulate to the antitrust lawyers — but then ultimately to the government authorities — why are you doing the deal, what's the nature of competition, how do you see competition in the marketplace," he said.

See the Market From Regulators' View

With an experienced team in place, companies should evaluate the existing level of competition in their various markets and the impact that their anticipated deal could have.

Doing an analysis of the market share concentration can help a company determine how intensive a regulatory review of the proposed deal may be. It's a key factor in planning out and framing a transaction, according to Christopher Ondeck, a Proskauer Rose LLP litigation partner and co-chair of the firm's antitrust group.

"The reason for doing that is it provides a weather vane measurement as to how likely regulatory scrutiny and review will be of the deal according to how much concentration there will be in the market," Ondeck said.

While conducting an analysis, it is also important to evaluate from the perspective of the DOJ and the FTC, said Bruce Sokler, chair of Mintz Levin Cohn Ferris Glovsky & Popeo PC's antitrust section.

"Early on when you're evaluating a transaction, particularly a strategic one between competitors or potential competitors, you need to ask your questions from the perspective of the antitrust reviewing agency," he said.

Companies need to recognize the heightened scrutiny in recent years and examine recently blocked deals to gain a better understanding of how their own transaction and its potential impact on the companies' customers may be interpreted by antitrust regulators, Sokler explained.

"You also have to look at whether the customers are segmented in a way that the antitrust agencies may decide there is a particular category of customers which might have issues with the merger that don't exist over the entire customer base for the products that make sense," he said.

Budget Time and Money for the Review Process

Companies can avoid a major pain point if they make sure to budget enough time and money for the antitrust review process; otherwise, they could be caught off-guard by a potentially lengthy and expensive roadblock.

Even if the company doesn't expect to see an in-depth review, it's best to be prepared, Ondeck said.

"They need to, at that point, include the possibility of an extensive agency antitrust review in their timeline. That is one of the most common errors or surprises to companies that are

not anticipating antitrust opposition — the amount of time surprises them," he said. "The companies should hope for the best but plan for the worst."

A transaction that draws serious opposition from the DOJ or FTC could see the review process take three to nine months. Those extra months are not only a delay to closing the transaction, but also extra months of handling the logistics of a review process, including providing needed documents, emails or other discovery materials, Ondeck explained.

"It can be a significant logistical burden on usually the top executive managers in companies," he said. "Planning that out in advance and advance awareness and preparation can make an enormous difference."

All of that time — and, if it comes to it, litigation — can add up fast. Companies that anticipate pushback from antitrust regulators need to budget upward of $1 million as a deal cost, Ondeck said.

Word Internal Documents Thoughtfully

Ahead of a transaction, companies need to take time to review their internal documents to see how they have described the competitive landscape to make sure it will support rather than upend their argument for why such a deal would be pro-competitive, explained Aronson.

Then that pro-competitive story needs to be consciously woven into the documents concerning the deal to highlight what the companies believe are the benefits to the deal, such as greater efficiency that will lead to lower prices for customers.

"Really think about what your rationale is for doing the transaction. If it's going to be antitrust-sensitive, you want to have a pro-competitive story; I call it the good guy story," Aronson said. "And that good guy story will be woven through all of your docs because it's part of the rationale for the deal."

Additionally, management or even investment bankers often are prone to talk tough about transactions. It's essential to discuss with everyone involved in the deal the potential implications of such language making it into written materials, which will more than likely be reviewed by antitrust regulators, Ondeck said.

"Executives who are involved in the M&A process and their outside investment bankers often engage in what I call chest-thumping descriptions of what they claim will be the benefits of the deal," he said. "Those are rarely the true reasons that companies engage in strategic mergers and acquisitions. So the business people should be educated so they describe the benefits to customers and the benefits to competition and efficiency that the potential deal will generate."

Any tough talk or limiting descriptions of the competitive landscape in internal documentation could be the death knell for a transaction, making it crucial for companies to be mindful to be accurately portraying the transactions' motivations and implications, noted Matt Reilly, a Simpson Thacher & Bartlett LLP partner and a former assistant director of the FTC.

"Nothing is going to create more heartburn and headache later on than draft documents that could give the agencies the impressions that an issue should be more seriously construed," Reilly said.

Don't Hesitate to Contact Regulators

Each deal is different, which in turn means the decisions regarding the antitrust review

process vary by transaction. Determining the right time to start the conversation with antitrust regulators can help ease an otherwise challenging process.

For deals that are likely to get at least a first look from either the DOJ or FTC, taking a wait-and-see approach to whether or not regulators will investigate the transaction can be tempting. However, in an environment of increased scrutiny, it's best to be prepared, according to Reilly.

"In this day and age, you just want to do as much work as you can before," he said.

For deals on the fence or those that will no doubt see a thorough review, starting the dialogue early can help highlight the pro-competitive justifications for the deal and pull the positive aspects of the deal to the forefront.

"Start the narrative. Start making sure you are identifying issues or potential issues and framing them in a way you want them looked at," Reilly said.

Getting out in front of the transaction can also build credibility with the agency, Sokler said.

"You only get one chance to make a first impression with the antitrust agency that is reviewing the transaction," he said. "While sometimes it may be tactical or some people might argue that you're best to lay back and wait and see if there is an interest, I think that you are more successful in ultimately getting the transaction through, or avoiding a second request or narrowing the scope of the review of the transaction so it can be done by taking a more lean forward approach."

--Editing by Katherine Rautenberg and Philip Shea.