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'Killer' Deals, Internet Mergers Caught Enforcers' Eyes In 2020

By **Bryan Koenig**

Law360 (December 18, 2020, 12:07 PM EST) -- It was a busy year for U.S. merger enforcers who opened some of the most important forays yet against internet platforms, while also launching the first litigated challenge to a so-called killer acquisition in four decades.

Antitrust professionals spoke with Law360 on some of the merger challenges that helped define 2020.

The DOJ Loses A Sabre Duel

The U.S. Department of Justice's challenge of Sabre's planned $360 million acquisition of its "disruptive" airline booking technology competitor Farelogix sent an important signal about enforcers' attempts to contest purchases of nascent competitors by established rivals. It just wasn't the result the DOJ was hoping for.

U.S. District Judge Leonard P. Stark rejected that challenge in April, finding that the DOJ had failed to show that the two companies are outright competitors, that the deal will harm competition or delay innovation, or that entry into the airline booking services market was particularly difficult.

Those findings served as a powerful check on the enforcer's challenge, which accused a dominant industry player of trying to snuff out a potential rival before it can grow to become a real threat. The blow was made all the more damaging to enforcers by the fact that it was the first nascent competitor case to go to court in roughly 40 years, a point highlighted by Visa as it faces down another DOJ attempt to stop a nascent competitor deal — the credit card giant's acquisition of Plaid. The Visa challenge, filed in early November, will be top of mind for antitrust professionals next year.

Sabre was one of three cases in the last year to demonstrate federal enforcers' interest in killer acquisitions. The second, following allegations that the practice is rampant in Silicon Valley, were the cases against Facebook brought by the Federal Trade Commission and attorneys general over the social media platform's allegedly monopolistic conduct, which the FTC says includes the past acquisitions of WhatsApp and Instagram.

The FTC has been increasingly interested in probing small deals as it and the DOJ put technology platforms under the microscope, demanding Google, Amazon, Apple, Facebook and Microsoft turn over years of internal material related to "hundreds" of small deals they carried out in the past decade that were so small they came in under mandatory reporting thresholds.

Nascent competitor cases pose an extra layer of complication thanks to the need for assessing what a company might become in the future, even while it's relatively small and often sold relatively cheap in the moment.

"It's a little more challenging to evaluate. But the agencies have recently focused on this issue," said James A. Fishkin, a partner with Dechert LLP.

The third killer acquisition case was the FTC's challenge of Illumina Inc.'s planned $1.2 billion purchase of fellow DNA sequencing company Pacific Biosciences, called off at the beginning of January two weeks after the commission sought to contest the deal.

The Sabre case rings several important bells for antitrust professionals, including its status as one of the first cases to employ the U.S. Supreme Court's 2018 decision in Ohio v. American Express Co., a landmark ruling that deals with the analysis of two-sided transaction markets, where a company connects two distinct markets of customers.

The judge, according to Freshfields Bruckhaus Deringer LLP partner Andrew Ewalt, specifically faulted the DOJ for how it approached the competition between sides of the platform.

"That raises all kinds of questions about the direction the law about 2-sided platforms is going to develop," Ewalt said.

The Sabre case also raises important international questions, thanks to the intervention of the United Kingdom's Competition and Markets Authority. The CMA blocked the deal a day after Judge Stark rejected the DOJ challenge and Sabre is currently appealing, arguing little or no U.K. ties to trigger the authority's jurisdiction.

The U.K. case could prove an important test of the CMA's reach under an unusual jurisdictional threshold called the share of supply test. That test permits CMA scrutiny if the transaction participants will "supply or acquire at least 25%" of any particular goods or services "of that kind supplied in the U.K. or in a substantial part of it," and the deal would increase that share.

The CMA appears poised to use the test to its limits as the agency asserts itself on the post-Brexit world stage.

"They've been very flexible in identifying markets they want to look at," said Ingrid Vandenborre, the head of Skadden Arps Slate Meagher & Flom LLP's Brussels office. Skadden is representing Sabre but Vandenborre is not part of that team.

Attorneys General Strike Out On Their Own Against T-Mobile/Sprint

The 14 Democratic attorneys general who challenged T-Mobile's purchase of Sprint lost their lawsuit in February. But they nevertheless cut a path that antitrust professionals say states may follow in the future to go after deals cleared by their federal peers.

T-Mobile and Sprint cut deals with the DOJ and the Federal Communications Commission to move their deal forward. But the attorneys general argued those settlements — including network buildout commitments and the divestiture of Sprint's pre-paid assets to Dish — simply didn't go far enough to

counterbalance the combination of two of the country's four national wireless carriers.

"That case really highlighted the growing rift between the DOJ and the state AGs," Ewalt said.

State enforcers, Ewalt said, have increasingly taken on an aggressive antitrust role likely to continue showing itself going forward. That role also manifested itself in the last year in the separate state probes into Facebook and Google, with the Facebook case in particular resulting in a lawsuit against the social media giant from the attorneys general of 46 states along with the District of Columbia and Guam, deliberately filed separately from the FTC case. A number of state enforcers conversely signed on directly to the DOJ monopolization suit against Google, although several of those same states, including Texas, also filed their own antitrust case against the search giant in mid-December.

Alexis J. Gilman, a partner at Crowell & Moring LLP and former assistant director at the FTC, anticipates more activity in the future where state enforcers "are charting their own course, whether or not federal agencies go along with them."

"I think we're going to continue seeing the states being aggressive, whether it's merger or non-merger," said Paul Cuomo, a partner with Baker Botts LLP.

Moving forward, antitrust professionals say they'll be watching how the Biden administration interacts with state antitrust enforcers.

"With the new administration coming in there's a chance for reset there," Ewalt said. The transition, Ewalt said further, raises the question of whether that incoming Biden administration is interested in rebuilding the kind of relationship state and federal enforcers have had in the past.

Divergent state and federal approaches also make navigating mergers that much more difficult for private parties, according to Ewalt. "That's definitely a risk for companies now that the states have done it before," he said.

Arbitration Becomes DOJ's (Money-Saving) Friend

Not every merger case in 2020 needed a judge, either in federal court or within the FTC. One of the DOJ's most likely trend-setters came from an arbitrator.

The DOJ invoked its never-before-used authority to send its challenge of Novelis Inc.'s planned $2.6 billion purchase of Aleris Corp. to arbitration, resulting in a March decision from arbitrator Kevin Arquit, co-chair of the antitrust group at Kasowitz Benson Torres LLP and a former FTC official, agreeing with the enforcer's narrow view of the market for auto body metal.

In letting an arbitrator decide the crux of the case — whether the relevant market includes steel and aluminum suppliers, as the companies contended, or only suppliers of aluminum — Novelis had agreed upfront that a loss would trigger the divestiture of all of Aleris' North American aluminum auto body sheet operations. Had the companies prevailed on their argument that they compete with suppliers of steel for automotive parts, in addition to aluminum suppliers, the DOJ had agreed to drop the case.

Antitrust Division chief Makan Delrahim contends that sending the market definition issue to arbitration helped save time and money that would otherwise go into a federal court challenge. Those benefits mean that while the arbitration authority hadn't previously been used since its creation more than 20

years earlier, its success in the Novelis case could mean it gets trotted out again under the right circumstances.

Constantine Cannon LLP partner Henry C. Su, an FTC alum, called the arbitration move an "unorthodox" one that ultimately paid off, even if it risked limiting the arguments the department could otherwise make in a federal courtroom where issues extend far beyond market definition. In cases where only a single issue defines a contested deal, however, Su said arbitration may prove an economical approach for enforcers to try.

Eyes On The FTC's Administrative Court?

The deal itself is small, but Axon Enterprise Inc.'s completed $13 million purchase of body camera supplier Vievu is proving an important test of the FTC's power to challenge mergers through its in-house administrative law process. Hours before the FTC initiated an administrative challenge of the transaction, Axon in early January filed a preemptive lawsuit alleging that the administrative law judge process is unconstitutional.

So far, the FTC has successfully argued that its administrative process warrants federal court scrutiny only after the challenge to the Vievu deal has run its course. In April, U.S. District Judge Dominic W. Lanza tossed Axon's lawsuit on the theory that the company must make its constitutional arguments in front of the FTC first before it can make them in federal court. Axon is currently appealing that ruling and convinced the Ninth Circuit in October to pause the FTC challenge while the appeal plays out.

Axon's challenge is one of the most public tests of a longtime complaint about the FTC and the broader U.S. merger review process. Under that process, the commission votes to authorize staffers to bring challenges, which are heard before administrative law judges appointed by the commission. ALJ decisions are in turn subject to appeal first before the commission.

Axon argues that the ALJ process is fixed in the FTC's favor because it effectively serves as prosecutor, judge and jury, a paradigm that means the commission hasn't sided against a complaint brought by its staffers in more than two decades. It's also taken aim at the so-called clearance process by which the FTC and DOJ decide which agency will analyze a merger — the clearance process has no statutory basis and no oversight, with Axon noting that while the FTC has a choice between contesting mergers in court or before an ALJ, the DOJ can bring challenges only in federal court.

If the Ninth Circuit says the district judge should consider the constitutionality of the process, according to Ewalt, "it opens up another possibility that similar cases could be brought, basically whenever the FTC is about to challenge the merger."

For the FTC, an even more damaging outcome, according to Ewalt, would be if the appellate court reverses and sends the case back with the suggestion that the constitutional claims have some merit. That, Ewalt said, "would be open season on the FTC."

FTC Digs Up A Coal Deal

The FTC suffered several jarring losses in 2020, starting with the first case to break its winning streak in merger challenges when a federal judge in January rejected its efforts against Evonik's planned $625 million purchase of fellow hydrogen peroxide producer PeroxyChem. Another big defeat was the agency's December loss contesting the tie-up between Philadelphia-area health care systems Jefferson

Health and Albert Einstein Healthcare Network, now on appeal.

Nevertheless, the agency also notched an important win in September when U.S. District Judge Sarah E. Pitlyk granted a preliminary injunction blocking Arch Coal Inc. and Peabody Energy Corp. from plans to jointly operate their coal assets in Wyoming. After the ruling, the companies said they'd throw out the planned tie-up.

The last time the FTC faced Arch, in 2004 over its bid to buy a mine from Triton Coal Co., the company successfully beat back the challenge.

The secret to that loss: Arch promised to divest a second Triton mine it had originally also planned on purchasing, a remedy rejected by the FTC but accepted by the court as likely to address any competitive harm by preserving the same number of competitors mining the basin's high-quality coal. The judge's willingness to accept a remedy that the commission had already turned down helped create a precedent allowing companies to present their own competition fixes against merger challenges, a tactic that's become known in antitrust circles as "litigating the fix."

Sixteen years later, however, the FTC convinced Judge Pitlyk that a combined Arch and Peabody would amass too much market strength over power companies, in a fight that rested heavily on the waning economic might of coal.

Judge Pitlyk held that while coal producers face significant competition from other energy sources, it doesn't negate the fact that direct competition between coal providers remains important. Because the two St. Louis based energy giants jointly control about 68% of the coal market in the country, their potential union posed a significant threat of hampering competition in the sale of coal, the judge said.

"Even with an accepted declining industry … consolidation potentially can raise issues. And in this particular combination, the FTC prevailed," said Fishkin, who also noted the entire proceedings were litigated in St. Louis during the pandemic. Fishkin was also on the Dechert team that successfully defended PeroxyChem against the FTC's challenge.

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