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Antitrust Action Moves To Europe

EU Seen as Friendlier Forum For Slowing Down Mega-Deals

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In the ever-shrinking world of global commerce, American companies set on sabotaging a domestic competitor's merger are increasingly turning to the European Union for help.

It is a cut-throat strategy, and not without risk, but large U.S. corporations have come to realize that lobbying regulators in Brussels can be a back-door way to delay approval, impose conditions, or block a rival's deal outright.

Now, with conservatives Charles James and Timothy Muris poised to take the helm of U.S. antitrust policy, lawyers on both sides of the Atlantic say that aggressive EU appeals are likely to grow more common in the years to come.

"My advice to clients is to go in there with all guns blazing," says Patton Boggs partner Glenn Manishin, a telecom and antitrust specialist. "The EU is already more aggressive than American antitrust has been, and certainly will be more aggressive than any Bush antitrust [regulators]."

While few competition lawyers expect a dramatic shift in U.S. policy, most anticipate that officials here will start to take a more hands-off approach to approving deals, especially those that create efficiencies of scale.

The result? Europe will stand out even more as a place where regulators may be persuaded to intervene.

Consider GTE Corp.'s strategy for killing the MCI-Worldcom merger, or Walt Disney Co.'s attempt to derail AOL Time Warner, or Sun Microsystems Inc.'s bid to stop Microsoft Corp. from acquiring a stake in Telewest. All are examples where high-profile American intervenors directed substantial firepower on influencing proceedings in Europe.

"American firms are increasingly running to Brussels to complain. They now know Brussels is a more receptive audience," says William Kolasky, an antitrust partner at Wilmer, Cutler & Pickering. "Given how effective their opposition of mergers has been in Europe, I expect the trend to continue."

The EU has been in the business of reviewing mergers for 10 years and has jurisdiction over deals where total European revenue tops $225 million. Although precise figures were not available, EU Competition Commissioner Mario Monti says that "cooperation in merger cases has been more intensive during the last 12 months than ever before. A large number of operations were scrutinized simultaneously on both sides of the Atlantic."

While the relevant antitrust law in the United States and the EU is similar, a basic procedural difference explains much of the enthusiasm for making a case in Brussels: In the EU, third parties are an integral part of the process.

"The U.S. will listen to competitors, but tends to discount their views," says Barry Hawk, a New York-based antitrust partner with Skadden, Arps, Slate, Meagher & Flom. "In the EU, far more weight is given to competitors' views."

Indeed, the EU solicits written comments from rival companies when considering a merger. If a second-stage investigation is opened, a two-day hearing is held in which competitors have the opportunity to testify. In the United States, by contrast, the role of competitors is more constrained, and regulators here tend to be skeptical of their motives.

"We listen very closely to customers, but competitors we have to listen to with a more critical ear," says Randolph Tritell, assistant director for international antitrust at the Federal Trade Commission. "The question is, why are they complaining?"

The answer, almost invariably, is because they have something to gain—and if U.S. regulators are not inclined to hear them out, the EU provides a satisfactory alternative.

"A lot of companies are trying to influence the merger process, not out of any real competitive concerns, but just to be a nuisance to their competitors, or because they hope the commission will impose conditions," says Frank Montag, an antitrust partner in the Brussels office of Freshfields Bruckhaus Deringer. "It's quite common. . . . And as long as one has the impression that it is relatively easy to be at least partially successful, people will continue to do it."

Increasingly, U.S. companies are going all-out to exert influence over the outcome of the proceedings in Brussels.

"Intervenors put a huge amount of effort into this," says Rachel Brandenburger, who is also with Freshfields and works in Brussels

and London. “They sometimes do nearly as much work in employing attorneys and economists as the parties themselves.”

For competitors, the most modest goal is to delay a transaction’s approval by raising so many questions that EU regulators feel obligated to open a second-stage investigation, which takes four months.

“Often, getting a deal into stage two accomplishes what you want, because the timetable goes to pot,” says Michael Reynolds, head of London-based Allen & Overy’s European antitrust practice.

Lawyers cite Boeing Co.’s acquisition of the satellite division of Hughes Electronics Corp. last fall as one example where input from competitors such as Lockheed Martin Corp. and Arianespace pushed the deal into stage two review. The EU ultimately cleared the deal without conditions, while, ironically, the FTC imposed several of them.

An earlier Boeing merger, with McDonnell Douglas in 1997, is infamous among the international antitrust bar as an example where a third-party intervenor, in that case the European commercial aircraft maker Airbus Consortium, had a dramatic impact on the review process. The FTC cleared the deal, while the EU was prepared to block it. Ultimately, in the face of White House intervention and the threat of a trade war, the EU approved the transaction with conditions.

As another example, one with an all-American cast of players, lawyers point to efforts by the GTE Corp. (now Verizon) to derail successive MCI mergers.

When MCI and Worldcom announced their intention to merge in 1997, GTE was one of several vocal opponents, both in the United States and in Europe. To help convince regulators in Brussels that the merger was anti-competitive, the company hired prominent French economist Jean Tirole, who wrote a paper warning of the network effects and tipping points of the union. When the EU held closed-door hearings on the deal, GTE General Counsel William Barr, attorney general under former President George Bush, spoke, according to a company spokesman.

GTE advocated that MCI be forced to divest its Internet backbone—a recommendation that was ultimately adopted by the European Commission when it approved the deal in July 1998. The backbone was then scooped up by Britain’s Cable & Wireless, another intervenor in the deal, although C&W later sued MCI over the acquisition.

Still, lawyers call that acquisition a classic example of what companies hope to accomplish by complaining to Brussels. “It’s not just to derail mergers,” says Michael Miller, special counsel with Sullivan & Cromwell in New York. “Sometimes, you want to buy some piece of the company. Then you can ride up on a white horse and take the little gems off the parties’ hands.”

But the MCI-Worldcom merger provides another lesson, this one cautionary, about the consequences of complaining. At GTE’s side, protesting almost as loudly about the effects of a union between MCI and Worldcom, was the Sprint Corp. Less than two years later, the company was back before the EU, this time with the awkward task of explaining why MCI plus Worldcom would create a monopoly, but MCIWorldcom plus Sprint was OK. The EU blocked the deal last summer.

Brandenburger of Freshfields says she has several questions for companies that are considering opposing a merger: “Do you really want to do that? What are your plans and aspirations in the future? Could you find yourself wanting approval for a merger and having shot yourself in the foot with your previous arguments? And what if you’re not successful? Is there some way the merging parties can retaliate against you?

“You have to have really high stakes to decide not to pull punches,” she says.

In recent years, EU experts say overworked regulators have relied too heavily on information provided by competitors.

“It’s an almost common view now among practitioners in Brussels that the commission may have gone too far,” says Montag of Freshfields. “The commission is aware of the criticism being voiced by quite a number of people now, and hopefully, they will be looking a bit harder at what competitors tell them.”

While measuring the results of intervention is difficult, Miller of Sullivan & Cromwell reports instances where EU regulators have sometimes adopted his arguments almost verbatim. “I’ve seen decisions where I say, ‘Boy, that text sounds pretty familiar,’ ” he says, although he declines to name examples, citing client confidentiality.

As for the EU, Monti defends the commission’s practice. “We are sufficiently non-naive as to be able to discount the elements provided by competitors for their vested interest,” he said last week at the American Bar Association’s antitrust meeting. “Competitors are a rather powerful source of information for overall assessment of mergers and potentially for the identification of remedies.”

Despite all the efforts by intervenors in Brussels, the United States and the EU have yet to reach totally opposite conclusions on a merger, where one agency says yes and the other gives a flat-out no.

While such a scenario, says Tritell of the FTC, is “theoretically possible, we do what we can to minimize the differences.”

Still, he adds, “while some may say the EU is more solicitous of the views of competitors, almost to a case, we still come out in the exact same place in the end.” ■