

FTC Report Suggests Increase in Merger Activity

AntitrustConnect Blog

February 16, 2011

Jeffrey May (Wolters Kluwer)

Please refer to this post as: Jeffrey May, 'FTC Report Suggests Increase in Merger Activity', AntitrustConnect Blog, February 16 2011, <http://antitrustconnect.com/2011/02/16/ftc-report-suggests-increase-in-merger-activity/>

News headlines suggesting an uptick in merger activity in 2010 were validated by the Federal Trade Commission's 33rd "Hart-Scott-Rodino (HSR) Annual Report," which was released today by the FTC with the concurrence of the Department of Justice Antitrust Division.

According to the report, the number of transactions notified to the federal antitrust agencies grew by 63 percent—from 716 in Fiscal Year (FY) 2009 (a recent low for transactions reported) to 1,166 in FY 2010. The total dollar value of reported transactions increased from \$533 billion in FY 2009 to \$780 billion for FY 2010.

Since the HSR filing thresholds were adjusted in 2001 to cover only larger transactions, the number of filings has been consistently above 1,000, with FY 2009 as the exception. FY 2007 saw the highest number of reported transactions under the revised thresholds, with 2,201 transactions.

Pursuant to the HSR Act, plans for large acquisitions and mergers must be disclosed to the Department of Justice and the FTC. The parties are then required to wait before closing the transaction, while the enforcement authorities examine the competitive effects of the transactions. If potentially significant competitive concerns are raised by the transactions, then the agencies can challenge the deals.

Enforcement Activity

The report summarizes enforcement activities between October 1, 2009 and September 30, 2010. During FY 2010, the agencies challenged 41 transactions, according to the report. The FTC challenged 22 transactions, leading to 19 consent orders and three abandoned transactions. The Antitrust Division challenged 19 merger transactions, with 11 court filings. Ten of the court cases were resolved by consent decree, and one matter remains in litigation. As for the other eight transactions, the parties in four instances abandoned the deal and in four other instances restructured the proposed transaction to avoid competitive problems. By comparison, the agencies challenged 31 transactions in FY 2009, with 19 at the FTC and 12 at the Antitrust Division, according to last year's report.

The current report also notes the significant amount of international cooperation in merger reviews. In FY 2010, the FTC reportedly worked on approximately 15 international merger investigations that involved coordination or cooperation with international counterparts. Of the Antitrust Division's investigations that were closed during FY 2010, the Antitrust Division coordinated with one or more non-U.S. competition agencies in 11 matters. These enforcement actions are detailed in the report.

Requests for Early Termination

In both FY 2009 and FY 2010, parties requested early termination of the HSR waiting period in 84 percent of transactions reported. The percentage of requests granted out of the total requested increased from 69 percent in FY 2009 to 74 percent in FY 2010, it was noted.

Second Requests

Where the agencies are unable to make a determination on the competitive impact of a transaction during an investigation, they may request additional information and documentary material from the parties. This request, known as a second request, may be time-consuming and burdensome for merging parties. The percentage of transactions resulting in second requests decreased slightly in FY 2010 to 4.1 percent, from 4.5 percent in FY 2009. Second requests were issued in 46 merger investigations in FY 2010 (20 issued by the FTC and 26 issued by the Division). The largest transactions, those valued at over \$1 billion, were the most likely to involve a second request in FY 2010.