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Biggest Merger Reviews Of 2019: Midyear Report

By **Matthew Perlman**

Law360 (July 8, 2019, 5:06 PM EDT) -- The start of 2019 saw a big loss for the Justice Department on its attempt to block the AT&T-Time Warner merger, while two more megadeals probed by the agency got mired in arduous reviews that are ongoing. The Federal Trade Commission, for its part, split on several vertical merger calls, and enforcers from Europe and the U.K. effectively blocked a string of deals.

Here, Law360 looks at the merger review highlights from the first half of the year.

Ongoing Reviews

Two of the most significant merger reviews of the year so far are still playing out in the U.S., concerning CVS Health Corp.'s $69 billion deal for Aetna Inc. and the $56 billion merger between Sprint Corp. and T-Mobile USA Inc.

The U.S. Department of Justice reached a settlement with CVS and Aetna in October for the companies to sell Aetna's Medicare Part D prescription drug plan business to WellCare Health Plans Inc. in order to win clearance for the transaction. Under the Tunney Act, settlements inked by the antitrust agencies to clear mergers must be reviewed by a federal court to ensure they're in the public interest.

While the process is mostly seen as a rubber stamp, U.S. District Judge Richard Leon has heeded calls from consumer and public interest groups to give an in-depth review of his own. As a result he held evidentiary hearings featuring live testimony in early June, a first for a Tunney Act merger review.

The DOJ and the companies contend the judge's assessment should be limited to the concerns identified by the government, which center on overlaps of prescription drug plans. But the outside groups — the American Medical Association, AIDS Healthcare Foundation, U.S. PIRG and Consumer Action — have pressed for a more encompassing look, including the potential impact on pharmacy benefit management services.

It remains to be seen what issues Judge Leon will ultimately consider when making his determination, but Joel Mitnick, a partner with Cadwalader Wickersham & Taft LLP, told Law360 it would be difficult for the judge to expand the analysis beyond what the DOJ claims the harms would be, saying the court's authority is limited in Tunney Act reviews.

"I don't think the law supports the notion that the court in a Tunney Act review gets to substitute its

judgment for the DOJ's prosecutorial discretion," Mitnick said. "This has come up before, and it almost always ends badly for the judge who is trying to expand judicial powers. The sad fact is that the Tunney Act is not much more than a fig leaf."

Oral arguments on the DOJ's settlement are slated for mid-July.

Meanwhile, a group of states preempted decisions from the federal agencies on the planned Sprint-T-Mobile merger, filing a lawsuit in June seeking to block the tie-up over concerns about concentration in the market for national mobile service.

The Federal Communications Commission's Republican majority signaled its willingness to approve the deal in May after commitments from the companies to build out rural 5G service, divest prepaid-wireless unit Boost Mobile and deploy unused spectrum holdings. Since then, rumors have abounded that the DOJ is preparing to ink a deal clearing the merger, and Dish Network Corp. has emerged as a potential buyer for Boost Mobile and other holdings.

Rani Habash, a partner with Dechert LLP, told Law360 that DOJ negotiations over a merger settlement often focus on additional conditions or provisions aimed at ensuring that a buyer can effectively replace the competition that would be lost through the merger. This can include issues such as transitional service agreements, hiring rights for employees or the sale of additional assets.

"It's a very thorough vetting process that the DOJ goes through to make sure that the buyers are given everything that they need to increase the likelihood that they'll succeed with the assets," Habash said.

If the DOJ does reach a deal to clear the move, the states will have to decide if the fixes extracted by the federal agencies are enough cure their concerns. They could then choose to continue litigating their own suit, but the fixes secured by the DOJ will also have to be factored in.

The states could also attempt to inject themselves into the Tunney Act proceeding for the DOJ deal, but Habash said the public interest standard in that process would make it hard for the states to gain much traction.

"Where you're actually filing a lawsuit under the Clayton Act directly, like the states are doing here, it's an entirely different standard," he said.

AT&T-Time Warner

In February, a D.C. Circuit panel affirmed the DOJ's loss of its first fully litigated challenge to a vertical merger in decades, rejecting the agency's argument that AT&T Inc.'s $85 billion purchase of Time Warner Inc. will drive up consumer prices by millions of dollars.

The deal is considered vertical because it combines AT&T, which has millions of video subscribers through its DirecTV unit in addition to its wireless users, with the parent company of Turner Broadcasting, HBOand Warner Bros. The government relied on an economic model asserting that AT&T's ownership of both Time Warner and DirecTV will give the combined company enough leverage over rival cable, satellite and video streaming services to extract higher licensing rates for its content.

While the appellate court didn't reject the bargaining model outright, the panel said there was evidence that it's in the interest of a content creator like Time Warner to license its content to as many

distributors as possible, and that there was no real threat that AT&T would withhold that content from other distributors through a blackout.

Michael J. Perry, a partner with Baker Botts LLP, told Law360 that the case highlights how difficult it is for the government to prevail in a vertical merger challenge, where it is unable to rely on a presumption of harm from the deal. On horizontal mergers between direct competitors, some harm can be presumed because the deal increases the market share of the combined company, but that's not the case with a vertical tie-up.

"The agencies ultimately have to go to court to prove that the merger is likely to have, on balance, anti-competitive effects," Perry said. "The outcome in AT&T-Time Warner shows that's difficult to do, particularly outside the horizontal context."

Importantly, Habash said, the D.C. Circuit also acknowledged that vertical deals often create pro-competitive effects that need to be factored into any analysis of the transaction, including that the deal will reduce costs for the combined company, since one level of the supply chain is being removed, and that these savings can be passed on to consumers.

"Even though the case itself was very fact-specific, that's potentially one general point for vertical mergers going forward," Habash said.

FTC Splits

The FTC showed some ideological fissures in the first half of the year, with a pair of decisions split down party lines on vertical deals and a near deadlock saved by the intervention of a state attorney general.

In January, the commission voted 3-2 to allow Staples Inc. to proceed with its planned $483 million purchase of Essendant Inc. after the companies agreed to put up a firewall preventing Staples from accessing Essendant's customer information. Chairman Joseph Simons, along with fellow Republican commissioners Noah Joshua Phillips and Christine S. Wilson, voted in favor of accepting the commitments, which they said cured concerns about Staples leveraging the information to get a leg up over Essendant's wholesale customers.

Commissioners Rebecca Kelly Slaughter and Rohit Chopra, both Democrats, issued strongly worded dissenting opinions on the clearance that also raised broader questions about vertical merger enforcement, among other issues.

The commission split along the same lines in February when it agreed to allow Fresenius Medical Care AG & Co. to go forward with its $2 billion deal for medical technology company NxStage Medical Inc. with the sale of a business related to the production of hemodialysis bloodlines — single-use plastic tube sets used during hemodialysis treatments.

That deal had horizontal and vertical components in the dialysis industry, and the Democratic commissioners contended in a pair of dissents that the majority only addressed the horizontal part.

Then in June, the FTC cleared UnitedHealth Group subsidiary Optum's $4.3 billion purchase of an independent medical clinic operator from DeVita Inc., but only after nearly deadlocking. With Simons recused, the commission ultimately voted 4-0 to accept a settlement that included the sale of a Las Vegas business to cure concerns about a largely horizontal overlap in Nevada.

The two Democratic commissioners had raised concerns about the deal's impact in Colorado as well, where the combination was largely vertical, and only voted for the deal because the companies reached a separate agreement with Colorado's attorney general.

Perry said the split decisions show the commissioners have been debating what theories of harm should be employed on particular deals and what evidence would be needed to support a vertical claim. It's not that the Republican members are ignoring the vertical aspects of deals, he said.

"They're looking into those issues, but they're not reaching the same conclusion as to whether a remedy is necessary," Perry said.

EC Blocks

Europe's competition enforcers had a busy first half of 2019, including a pair of prohibitions on large-scale industrial deals.

In February, the European Commission blocked the €15 billion ($16.9 billion) proposed merger between Alstom SA and Siemens AG over concerns about railway signaling systems and the market for very high-speed trains. The move came despite objections from France and Germany, which had advocated for clearing the deal and argued it was needed to counter international competition, especially from China.

After the merger's rejection, French and German officials continued to call for tweaks to European Union antitrust rules to facilitate future deals that might create "European Champions," but other member states have pushed back against the idea of changing the rules. Alex Nourry, a partner with Clifford Chance in London, told Law360 that the Siemens-Alstom decision was significant because of the policy debate it gave rise to, but said that talk has since quieted down.

"I think pretty much everybody, including the Germans, have now walked back from the idea of modifying the merger control regime to allow commission decisions to be overridden on industrial policy grounds," he said.

Alec Burnside, a partner with Dechert in Brussels who represented a third party in connection with the Siemens-Alstom review, agreed that the idea of changing the merger control rules to allow for "European Champions" received "a lot of pushback" after the decision, also noting that he doesn't think the proposal has much momentum.

But he said the commission is expected to see new leadership soon and that policy approaches could change.

"It may be that it lives on," Burnside said of the Franco-German effort.

In June, the commission formally blocked a planned joint venture between ThyssenKrupp and Tata Steel over concerns about the automotive and canned food industries, after the companies had signaled they would likely abandon the move because of regulatory scrutiny. Nourry noted this was another case where the merger could have been seen as a way for a European business to compete globally, especially "if you look at the state of the European steel industry."

“This was another case where the pressures of global competition might have outweighed the protection of European customers and consumers but where again the latter unsurprisingly prevailed,” he said.

CMA Blocks

The U.K.’s Competition and Markets Authority has also been busy so far this year, with a string of mergers either blocked or dropped in the face of scrutiny.

The biggest came in April when the CMA blocked supermarket chain Sainsbury’s planned £7.3 billion ($9.4 billion) acquisition of Walmart Inc. unit Asda. The CMA said the companies are two of the country’s top supermarkets and that a combination could bring about price increases and reductions in quality or choice for shoppers.

There was also concern that the merger would inflate fuel prices for motorists at the more than 125 gas stations the two companies own.

Nourry said the agency analyzed both national and regional markets in reaching its decision and said it could have an impact on other deals in the U.K. supermarket sector moving forward.

“It means that the further scope for future consolidation in the U.K. supermarket sector is likely to be severely limited,” Nourry said.

In February, credit data company Experian PLC scrapped its planned £275 million purchase of rival ClearScore. The CMA had said it was unlikely to approve the deal because a merger between the U.K.’s two biggest credit-checking companies would stifle competition and innovation.

In June, Thermo Fisher Scientific Inc. called off its planned $925 million purchase of California-based electron microscope maker Gatan Inc. from Roper Technologies Inc. The CMA had concluded that U.K. universities and researchers could wind up paying higher prices for lower quality microscopes if the deal were to go through, promoting the parties to abandon their bid.

Nourry said the CMA reviews on the credit-checking and microscope deals reflect a growing concern among enforcers worldwide about so-called killer acquisitions, where an established company purchases a potential future competitor.

“The CMA like the EC and many other antitrust agencies has a growing concern about larger incumbents acquiring smaller or nascent companies and how these might create greater harm than good in maintaining or promoting innovation and competition, especially in digital markets,” he said.

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