Developments and Antitrust Issues in M&A Activity and Regulation

By Kostis Hatzitaskos

Like most other measures of economic activity, mergers and acquisitions suffered in the wake of the recession that began in late 2007, both in the United States and internationally. While the economic recovery that started in 2010 has been slow and uneven, the number of companies engaged in M&A deals has trended steadily upward. M&A activity is up significantly year-over-year, both in terms of the number of deals and the total size of the deals. By many measures, these levels have not been seen since 2007. Deal making has boomed in the first half of 2015.

M&A Activity Is Growing, Especially in the Healthcare Sector

The growth in activity has also brought an increase in the number of so-called mega-mergers. For example, from 2010 through 2013, there were only seven deals above $20 billion. In 2014, there were eight, with more proposed but failing to close or are still working their way through the regulatory review process. In the first half of 2015, we have already seen three such deals.

The healthcare sector has been particularly active. With global deals now topping a record $300 billion, healthcare has been the most targeted industry in the first half of 2015. Many expect the trend to continue, especially in the United States. Much of the recent domestic M&A activity has involved hospital and physician group mergers, but many observers now also expect a wave of consolidation in healthcare insurance. The Affordable Care Act, whose subsidies were recently upheld in a U.S. Supreme Court ruling, includes provisions calling for insurers to minimise cost increases. Insurers are exploring mergers as a way to achieve increased scale and cost savings. Early indications show that some of the largest insurers may try to merge in the near future.

Trends in Regulatory Enforcement and Antitrust Considerations

Barring large ripples from the developing crisis in the Eurozone, economic conditions are likely to remain favourable in the short run, and 2015 could be a record year for M&A, or close to it. As companies rush not to be left behind, it is important to remain aware of regulatory hurdles. Obtaining antitrust clearance from authorities can sometimes be as much of a challenge as arranging the deal itself. In this context, it is important to note the trends in regulatory enforcement and potential antitrust issues.

In the United States, the Hart-Scott-Rodino (HSR) Act mandates that deals over a certain threshold require antitrust clearance from either the Federal Trade Commission or the Department of Justice. Some telecommunications and media mergers are also evaluated by the Federal Communications Commission. In addition, even smaller mergers or acquisitions can be examined by the U.S. government and challenged as anticompetitive. For example, Bazaarvoice bought its rival PowerReviews in 2012. The merger was not reported under the HSR Act. Once the Department of Justice became aware of the merger, however, it investigated and decided to sue Bazaarvoice for diminishing competition by removing its main rival. The merged company was forced to sell the acquired firm in 2014. This “unscrambling of the eggs” can be very costly and disruptive to a business. In hindsight, the companies might have been better off had they reported the transaction and sought antitrust clearance before closing.

U.S. antitrust agencies have received more than a thousand HSR notifications in all but one of the last 10 years. Most mergers do not raise antitrust issues and are cleared after less than a month’s review. If the initial review leads the agency to conclude that the proposed merger warrants further scrutiny, it will issue a second request. This is a call for the parties to supply substantially more information that the agency believes will allow it to determine whether to block the deal. The agencies typically issue somewhere between 40 and 60 second requests per year, depending on the overall number of deals reviewed. While every merger must be evaluated on its own terms, there are some interesting broad trends at the industry level. For example, the rate at which mergers between manufacturing firms faced a second request fell by about a third in 2012–2014 compared to 2008–2010. In contrast, the rate at which healthcare mergers faced a second request increased by roughly 50% over the same period.

Companies can benefit from having antitrust counsel and consultants evaluate a proposed merger for potential antitrust concerns early on, even before the deal is finalised. Besides being costly, a prolonged and difficult investigation by
regulatory agencies can delay or even block a deal. The company can make better decisions about whether to close a deal and how to structure the agreement if it has a better understanding of the potential antitrust issues. If the deal is likely to receive attention at the agencies, an early start can be important to achieving a successful outcome.

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