was a defense to Akorn's breaches of representations and warranties, and that result would be inconsistent with the reasoning of Delaware courts in other cases. As the court held, Fresenius protected itself by obtaining representations and warranties about Akorn's compliance and that protection could not be unwound based on allegations about what Fresenius knew about potential risks in the industry or should have known from diligence. The court's decision respects the parties' contract. (In any event, the court found that Fresenius did not know the representations were untrue.)

The trial court's opinion also hewed closely to the MAE definition in the parties' agreement. The court declined Akorn's invitation to hold that the events giving rise to an MAE must be unknown at the time of the contract. There was no such requirement in the contractual language—although the court also held that the events giving rise to Akorn's MAEs were in fact unknown.

The court also declined Akorn's invitation to rule that risks known to the parties at the time of the contract could not give rise to an MAE, reasoning that nothing in the MAE definition said this either. Of course, as Chancery noted, many merger agreements do explicitly provide that known risks cannot give rise to an MAE. If that is the result the parties want, they should contract for it.

The Chancery Court's decision also included some interesting analysis of the state-of-play of MAE clauses in M&A contracts, noting that while parties are free to contract for specific MAE conditions by reference to materiality, financial metrics, events or otherwise, often, the end result is a market-standard provision that essentially allocates general market or industry risk to the buyer and company-specific risks to the seller. That type of market-standard provision was present in this agreement. In holding that Akorn suffered an MAE caused by company-specific factors (or industry factors disproportionately affecting Akorn), the court examined factors such as Akorn's year-on-year results (which showed a deterioration far worse than a peer group identified by Akorn's financial advisor in its fairness opinion), the company-specific events driving those results (such as the loss of a contract and unexpected competition for certain products), and Akorn management's own statements suggesting that the decline would be durationally significant.

ECONOMIC EVIDENCE IN MERGER REVIEW: EU'S HIGHEST COURT CLARIFIES RIGHTS OF DEFENSE

By Charlotte Breuvart, Eric Barbier de La Serre, Serge Clerckx and Henry de la Barre d'Erquelinnes

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In 2012, UPS notified the proposed €5.2 billion acquisition of TNT. Following an in-depth review, the Commission found that the merger would reduce competition in the market for international intra-EEA deliveries of small packages in 15 Member States. The Commission blocked the acquisition in June 2013, and the parties abandoned the transaction. Fedex, a UPS rival, subsequently acquired TNT in 2016.

In 2017, the General Court of the European Union ("GC") annulled the Commission's decision, holding that the Commission breached UPS' rights of defense by relying on an economic model that had not been shared in full with the merging parties. The Commission challenged the judgment before the ECJ, which, in January 2019, rejected the appeal and confirmed annulment of the Commission's prohibition decision.

The ruling holds that the Commission violated UPS' rights of defense when it failed to provide UPS with the final economic model used in its decision to block UPS' proposed acquisition of TNT in 2013. The Commission must provide merging parties with all the factors on which it bases a decision to block a transaction, including the key analytical steps and calculations in any economic models.

This ruling is one of the rare instances in which an EU court overturned a Commission merger prohibition decision (the last such judgments were in 2002).

The ECJ Ruling

The EU Charter of Fundamental Rights establishes rights of defense, which include the right to access files and the right to be heard before the European Union takes an adverse action. In merger reviews, the EU Merger Regulation and the Merger Implementing Regulation provide that the Commission must allow notifying parties the opportunity to submit their views on the accuracy and relevance of all the factors on which the Commission bases its decision. When the Commission intends to base its decision, at least in part, on an econometric model, the Commission must share the model with the merging parties and allow them an opportunity to respond.

In this case, although the parties had responded to an earlier version of the Commission's econometric model, changes to the final version on which the Commission relied were "not negligible." Although the ECJ acknowledged the tight deadlines on investigators in merger reviews, it held that the Commission should have informed the parties of the changes, e.g., by issuing a new statement of objections or a letter of facts.

The ECJ then annulled the Commission's decision against the UPS acquisition of TNT. The ECJ stated that annulment was appropriate even if there was just a "slight chance" the outcome would have been different without the procedural error.

The ECJ's ruling also is likely to bolster UPS' €1.74 billion damage claim against the Commission filed in December 2017, although such cases can be difficult to win.

Implications

Although the Commission reports that it already strives to "give the parties ample and sufficient opportunities to comment and respond" to economic analyses, the ECJ ruling should prompt increased transparency from, and earlier dialogue with, the Commission and NCAs regarding economic evidence.

Transacting parties will benefit from such procedural improvements. In particular, in-depth discussions about economic evidence will subject the Commission's economic models to rigorous testing by the parties and could help parties to alleviate the Commission's concerns in some cases. Parties also may have more opportunities to discuss efficiencies, design suitable remedies, and ultimately obtain the Commission's approval.

Three Key Takeaways

1. The ECJ clarified that the Commission must provide merging parties with the key details of any economic models used in its decision-making. The ECJ ruling therefore likely will increase transparency and the focus on rights of defense, not only in merger reviews but also in Commission and NCA conduct investigations.

2. Expanded access to the Commission's economic models may improve merging parties' ability to identify and resolve competition concerns. Merging parties should systematically exercise their right to obtain the Commission's economic models and promptly address any deficiencies.

3. With growing cooperation among global competition authorities, more transparency in Commission merger reviews may benefit parties subject to antitrust reviews in other jurisdictions that are less forthcoming about their economic theories.

"HARDER BETTER FASTER STRONGER": EVALUATING EDM AS A DEFENSE IN VERTICAL MERGERS

By Makan Delrahim

The following are edited remarks made by Assistant Attorney General Makan Delrahim at the 22nd Annual Antitrust Symposium, in Arlington, VA, on February 15, 2019.

My subject today is the economics of vertical mergers,