HSN/Liberty Interactive: wide market definition including Amazon, e-commerce rivals expected - attorneys

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- Office Depot/OfficeMax illustrative of evolving retail analysis
- Constraining power of online alternatives, entry drive outcome
- FCC involvement, though uncertain, could extend merger review

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Antitrust enforcers reviewing the merger of QVC, owned by Liberty Interactive [NASDAQ:QVCA], and HSN [NASDAQ:HSNI] are likely to define the relevant product market broadly to encompass Amazon [NASDAQ:AMZN], Wal-Mart [NYSE:WMT] and eBay [NASDAQ:EBAY], three antitrust attorneys said.

Such a market definition would enable the USD 2.1bn merger of the pay television and broadcast rivals to survive antitrust scrutiny despite Federal Trade Commission (FTC) opposition that prevented them from combining in the 1990s.

“Competition is one click away for these TV shopping networks,” said Amanda Wait, former FTC lawyer and head of the competition and consumer protection practice at Hunton & Williams.

“A deal that wouldn’t have passed muster under antitrust laws 10 or 12 or 15 years ago now seems much more likely to get through,” Wait said. The retail sector specialist served on the FTC trial team that challenged the 2007 tie-up of Whole Foods [NASDAQ:WFM] and Wild Oats Marketplace, resulting in 32 store divestitures.

A narrow market definition that only encompasses items sold on home shopping channels, however, would increase the antitrust risk, the attorneys cautioned.

The boundaries that antitrust enforcers agree on may be informed by how the companies view the marketplace. “If their [internal] docs go tit for tat” in portraying each other as fierce rivals, you cannot rule out the possibility of a challenge, said the first attorney, whose experience includes retail deals.

Liberty Interactive holds a 38% stake in HSN and also owns the

PROPRIETARY

Sector: Consumer: Retail
Topics: Agencies, Merger Review, Policy Developments

Grade: Rumoured

Companies
Sirius XM Holdings Inc.
Whole Foods Market, Inc.
Wild Oats Markets, Inc.
EBay Inc.
Amazon.com, Inc.
Wal-Mart Stores, Inc.
QVC, Inc.
Office Depot, Inc
Macy's Inc
OfficeMax Inc.
Bass Pro Group
Liberty Interactive Corporation
Lawyer
Baker Botts LLP
Financial Advisor
Allen & Company LLC
Cabela's Inc
HSN, Inc.
Lawyer
Davis Polk & Wardwell LLP
Financial Advisor
Centerview Partners
Goldman Sachs & Co. LLC

Agencies
US Department Of Justice (DoJ)
US Federal Trade Commission (FTC)
Federal Communications Commission (FCC)

M&A
Wild Oats Markets, Inc. / Whole Foods Market, Inc.
OfficeMax Inc. / Office Depot, Inc
Cabela's Inc / Bass Pro Group
Whole Foods Market, Inc. / Amazon.com, Inc.
HSN, Inc. / Liberty Interactive Corporation

Zulily [NASDAQ:ZU] shopping site.

Second request prospects

The attorneys were divided on prospects for a second request from antitrust enforcers for additional business and financial information.

The first attorney anticipates a second request to enable a more detailed marketplace analysis. Wait suggested that the merger parties might pull and refile to avoid such a request or reduce its duration and scope.

Jonathan Rubin, partner at MoginRubin, considers a second request doubtful because antitrust agencies are "looking for reasons to clear deals."

Antitrust enforcers would investigate the potential for monopsony power since the deal would combine the nation's largest television home shopping networks.

But they are unlikely to identify a problem given the range of alternative distribution channels, from department and discount stores to online and direct mail, some of the attorneys concluded.

The enforcers also would consider whether QVC and HSN have unique attributes that might be lost through the merger, the first attorney said.

Given the scope of online competition, and the ease with which new websites and smartphone apps can be launched, there also was agreement that barriers to entry are low.

Rubin highlighted the fact that entry is not attractive. While there is nothing to prevent a new entrant from launching a television home shopping network, "there is no industry with downward trends that is going to attract entry," Rubin said.

According to US government merger guidelines, "Entry is likely if it would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved."

Of course, an entry analysis only comes into the picture if the agencies have concerns about market concentration. "Once you define the market more broadly," the first attorney added, "barriers to entry are going to be irrelevant."

In 1993, the companies reportedly abandoned a planned tie-up after the FTC raised competition concerns. That deal unraveled in a different era — before the 1994 launch of Amazon and with the internet still in its infancy.

Today, the companies face a marketplace in which Amazon is often cited as a major competitive threat to traditional retail outlets.

Some products featured on the home shopping networks are exclusive and not readily available through Amazon or other vendors. Even when consumers cannot find the same items elsewhere, there are ample substitutes online and at brick-and-mortar stores.

Precedent deals

The FTC's 2013 clearance of the USD 1.2bn merger of Office Depot [NASDAQ:ODP] and OfficeMax was cited most frequently as precedent. The commission based its decision partly on growing competition from Amazon and other internet retailers and noted that the marketplace had changed considerably from the 1990s.

In recent years, mergers of direct rivals have consummated in light of expansive market definitions. The most recent example is the USD 5.5bn combination of Cabela's [NYSE:CAB] and Bass Pro Shops, cleared by the FTC this month.

Others include the 2008 USD 13bn merger of XM and Sirius satellite radio and the 2005 USD 17bn merger of the Federated, now Macy's [NYSE:M], and May department stores.

It was not clear at press time whether the FTC or Department of Justice (DoJ) would review the transaction.

FCC review unclear

There is uncertainty over whether the Federal Communications Commission (FCC) would join the review. The final determination is important because agency involvement could impact both timing and possible conditions, Wait noted.

Since the commission subjects mergers to a 180-day informal shot clock that can be halted indefinitely, the commission might take longer to complete its review than an antitrust agency.

The commission also has the authority to impose conditions that exceed strict merger analysis. The FCC's "public-interest standard" can take into account issues such as diversity or the availability of free, local over-the-air programming.

Liberty Interactive states in a 5 July SEC filing that the deal also requires FCC approval. But an FCC spokesman told this news service that agency review is unsettled.

Commission review of mergers hinges on the transfer of communications licenses. "According to the [FCC Media Bureau's]

Video Division, there do not appear to be any broadcast TV licenses involved in this proposal," he wrote via email.

"However, there could be other types of FCC authorizations that are involved. We wouldn't know until anything is filed with us what licenses they would want to move," the spokesman added.

While the DoJ routinely tag-teams with the FCC on media transactions, the FTC historically reviews retail deals.
The FTC and FCC have collaborated before. In 2006, both agencies cleared the purchase of Adelphia Communications' cable assets by Comcast [NASDAQ:CMCSA] and Time Warner Cable, now part of Charter Communications [NASDAQ:CHRT].

Spokespeople for the DoJ, FTC, QVC, HSN and Liberty declined to comment.

by David Hatch in Washington DC