DOJ CLEARANCE OF THE WHIRLPOOL/MAYTAG TRANSACTION MAY SIGNAL A GREATER RECOGNITION OF FOREIGN COMPETITION IN U.S. MERGER ANALYSIS

In March 2006, the Antitrust Division of the U.S. Department of Justice ("DOJ" or the "Division") approved the acquisition of Maytag Corporation ("Maytag") by Whirlpool Corporation ("Whirlpool") (together, the "Companies"), finding that the merger of the two appliance manufacturers was unlikely to substantially reduce competition in any market. The Division imposed no conditions upon the transaction.

News reports regarding the proposed acquisition indicated that Whirlpool, then the largest U.S. appliance manufacturer, and Maytag, then the third largest U.S. appliance manufacturer, had a combined 70% share of U.S. sales of residential laundry machines, and a combined 50% share of U.S. sales of residential dishwashers. Traditionally, antitrust enforcement agencies have been wary of transactions that would produce shares of those magnitudes. Indeed, news articles published during the final stages of the DOJ investigation indicated that the Division staff had recommended that DOJ challenge the proposed acquisition.

In a statement issued by DOJ upon its closure of the investigation, the Division acknowledged that the Companies had a "relatively high share of laundry product sales in the United States." *See* http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm. The Division concluded, however, that a combined Whirlpool/Maytag entity would not likely have the power to raise prices above competitive levels. DOJ listed several factors in support of that conclusion, including excess capacity among rival U.S. appliance manufacturers and the power of large appliance retailers. Most notably, however, DOJ emphasized the presence of foreign appliance manufacturers that could increase imports into the U.S. in response to a Maytag/Whirlpool price increase.

The DOJ statement further provided the following list of justifications:

- Though Whirlpool and Maytag are two well-known brands in the industry, "rival appliance brands . . . are also well established."
- "[N]ewer brands such as LG and Samsung have quickly established themselves in recent years."
- "LG, Samsung, and other foreign manufacturers could increase their imports into the U.S."
- "Existing U.S. manufacturers have excess capacity and could increase their production."
- "[T]he large retailers through which the majority of these appliances are sold—Sears, Lowe's . . . and Best Buy—have alternatives available to help them resist an attempt by the merged entity to raise prices."
- "[T]he parties substantiated large cost savings and other efficiencies that should benefit consumers."

A series of press releases issued by Whirlpool during the course of the DOJ investigation indicates that, even as the transaction was pending, competitive conditions were shifting, with foreign manufacturers increasing their U.S. sales. As that shift progressed, foreign — or global — competition became an increasingly important element in the Companies' defense of the transaction.

For example, when Whirlpool first proposed the acquisition in July 2005, its press releases, while mentioning a "competitive global market," noted only briefly "new Asian competitors" as potentially affecting Whirlpool's business. By the end of August 2005, however, Whirlpool characterized the industry as "the increasingly competitive global home-appliance industry," and placed additional emphasis on "the strength of new and established Asian competitors in the United States and abroad." By November 2005, Whirlpool described "intense competition in the home appliance industry reflecting the impact of . . . new and established global, including Asian and European, manufacturers." Those foreign competitors had reached the top of Whirlpool's list of factors that could affect Whirlpool's financial success. In contrast, in August 2005, the "new Asian competitors" had been listed as number fourteen among those factors.

Whirlpool and Maytag also argued that the entry by foreign manufacturers was facilitated by the strength of large trade customers. DOJ found such strong buyers to be an important factor in its assessment. DOJ stated that "LG has grown to a significant volume of sales at [stores such as] Best Buy . . . in a short period of time, and Samsung very recently began selling its first laundry products in the U.S., selling at Lowe's and Best Buy." That statement corroborates other reports that DOJ was persuaded that entry by significant foreign competitors in the U.S. sale of residential clothes washers and dryers was already underway and proceeding quickly.

Implications

The Whirlpool acquisition reflects a willingness by DOJ (and probably the Federal Trade Commission) to recognize the extent to which foreign competitors and strong retailers can affect domestic competition. Entry and buyer power have played an important role in merger analysis over the last few decades. The Whirlpool acquisition underscores the geographic dimension to those factors and that they may play dispositive roles in achieving merger clearance.

The Whirlpool acquisition also highlights the speed with which foreign entry can transform competition in domestic markets. Some have said that, three years ago, the Whirlpool/Maytag acquisition would almost certainly have been successfully challenged. In 2005 and 2006, the acquisition was carefully scrutinized and ultimately cleared. In 2010, the acquisition might not have received a second request for additional information. Markets thus change quickly, and acquisitions that seem unlikely to achieve clearance at one time may become legally plausible just a few years later.

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August 9, 2006