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Carrier Consolidation

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"UPS to spend $1.25 billion to acquire Overnite."

"Yellow Roadway seeks to buy USF Corporation for $1.47 billion."

"A.P. Moller – Maresk (through its subsidiary Maresk Sealand) attempts to buyout P&O Nedlloyd for $2.95 billion."

"ProLogis to acquire Catellus Development for $4.9 billion."

"U.S. Airways and American West to merge."

These are some of the more dramatic headlines the transportation industry has seen in the last few months. Major players in the motor carrier, ocean trades, airlines and logistics segments have all announced acquisitions or contemplated acquisitions. The prices involved often exceed $1 billion.

Shippers, connecting carriers, suppliers and competitors all wonder how such consolidations will impact them. A frequent question is whether mergers among such large companies providing the same types of services will run afoul of the antitrust laws.

In fact, relatively few acquisitions actually are found to violate the antitrust laws. Essentially any acquisition where the acquiring entity would end up holding more than $50 million of the voting securities or assets of the company being required must make a premerger notification filing with both the Department of Justice and the Federal Trade Commission (FTC). The filing requires that each party submit a great deal of financial information as well as studies on market share and any information on how customers may be impacted. The two agencies divide various industries between them so that both do not review the same merger. In transportation it is usually Justice that does the premerger review.

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Premerger reviews are not formal proceedings. The reviewing agency does not make issues public and the submitted documents are not available to outsiders. They are exempt from the Freedom of Information Act. However, Justice and the FTC welcome informal contacts from customers, suppliers or rivals to the merging companies. These interested entities often provide Justice with an insight into the state of competition in an industry as well as price structures and ease of entry. Often these informal presentations can be kept confidential.

So what does Justice and the FTC look for when large transportation service providers propose a merger? The agencies look to see if the acquisition would substantially "lessen competition or to tend to create a monopoly." The most important first step is to define the market. The larger the number of players in a market the less chance of an antitrust problem.

Market definition gets tricky. Those who support the merger want a broad definition and those opposing it want a narrow definition. If one trucking company is acquiring another will it unduly concentrate the market? If one of the carriers traditionally hauled only LTL freight and the other was exclusively a tank truck carrier then there may be no change in the market if the markets are defined as LTL movements and tank truck haulage. If they are in the same transportation market segment, then Justice may closely examine the proposal. An ocean carrier that principally transports containers may not have a serious anti-competitive situation if it is combined with a break baulk carrier. The same reasoning applies to carriers that operate in different geographic regions and do not presently compete for the same traffic.

The "failing firm" doctrine may also come into play. If one or both parties to a merger are in a weak financial situation then the combination is much less likely to be opposed. When Justice recently announced it would take no action to block the U.S. Airways-American West merger the financial stability of the carriers may have been taken into consideration.

Rail carrier mergers are outside of this review system. Rail mergers must, by statute, be approved by the Surface Transportation Board (STB). If approved they are then exempt from the antitrust laws. STB rail merger proceedings are public and usually produce a host of shippers, communities, unions, etc. participating in the proceeding. The impact on competition is one of the factors the STB considers.

Under the antitrust laws bigness is not badness, so simply because name companies worth billions of dollars are merging does not mean the antitrust laws will prevent the amalgamation. In transportation an intense review by Justice will not necessarily stop the merger (although Justice may condition approval on the divestiture of certain assets). The key question is how concentrated will the market become and will the merged entities be able to dominate that market?

Stay tuned. It can be expected that more transportation service providers bill be combining and as markets become more concentrated the antitrust laws will come to play an increasingly important role.