

*Consummated
Mergers
Caught in
FTC Net*

EXECUTIVE SUMMARY

It is well known that the Hart-Scott-Rodino Antitrust Improvements Act requires pre-merger notification filings (“HSR filings”) to be made at the Federal Trade Commission (“FTC”) and the Department of Justice Antitrust Division (“Antitrust Division”) for proposed transactions that meet the statutory thresholds for size of transaction and size of person. It also is well known that FTC and Antitrust Division review of HSR filings may result in challenges to potentially anticompetitive transactions prior to their closing. What is less well known, is that both agencies can and do challenge consummated mergers as potentially anticompetitive whether or not they pass through the HSR process. Two recent FTC challenges to consummated mergers are instructive.

**HOLOGIC INC. AND FISCHER
IMAGING CORPORATION**

In July 2006, the FTC challenged the September 2005 acquisition by Hologic Inc., a provider of diagnostic and digital imaging systems, of Fischer Imaging Corporation’s breast cancer screening and diagnosis business. In its complaint, the FTC alleged that the acquisition eliminated Hologic’s only significant competitor in the U.S. market for prone stereotactic breast biopsy systems (“SBBS”), depriving American women of the benefits of price and quality competition in these essential healthcare services.

Under the FTC consent order, Hologic was required to divest the Fischer prone SBBS assets to Siemens AG, a leader in medical imaging, no later than five days after the consent order was accepted for public comment.

**ENTERPRISE PRODUCT PARTNERS,
L.P. AND TEPPCO PARTNERS**

In August 2006, the FTC challenged a deal consummated in February 2005, that combined the natural gas liquids storage businesses of Enterprise Product Partners, L.P. and TEPPCO Partners, L.P. The FTC complaint alleged that the transaction combines the two leading commercial providers of natural gas liquids salt dome storage in the Mont Belvieu, Texas market, reducing the number of such providers from four to three, and placing 70% of all commercially available salt dome storage volume in Mont Belvieu in the hands of the combined entity. According to the complaint, the combined entity would have the enhanced ability unilaterally to exercise market power, likely leading to higher prices and reduced service for natural gas liquids (“NGLs”) storage customers.

Under the FTC consent order, TEPPCO was required to divest its interest in the Mont Belvieu Storage Partners NGL salt dome facility, as well as certain related pipelines, land, and other assets, to an FTC-approved buyer no later than December 31, 2006.

LESSONS LEARNED

Neither the Hologic nor TEPPCO transactions required pre-merger HSR filings. Nevertheless, they attracted the FTC's attention. There are several clear lessons from the FTC's legal challenges to these matters:

- 1) Parties cannot assume that their merger will escape the FTC net simply because an HSR filing is not required. Consumers and competitors can and do complain to the federal agencies about perceived anticompetitive events and effects. Moreover, the agencies themselves keep track of industry mergers and acquisitions apart from the HSR review process.

According to Michael Knight, an Assistant Director of the FTC's Bureau of Competition, "while it certainly is true that the majority of merger investigations stem from the HSR process, pre-merger notification filings are far from the only source. Whenever we have reason to believe that a merger may result in anticompetitive harm to consumers, we will be inclined to investigate, even when the transaction already has consummated."

- 2) If the agency investigates a consummated transaction, it likely will have the ability to collect actual post-consummation market data to help prove anticompetitive effects. Such data can be far more convincing than predictive econometric and other effects data the agency would need to garner in order to challenge a transaction prior to its consummation. Thus, parties

may find it more difficult to defend against a post-consummation challenge than a pre-consummation challenge.

- 3) Parties facing an agency challenge to a consummated transaction may lose the benefit of their original deal — divestitures of the acquired critical crown jewel assets may be required to appease the regulators, and substantial resources likely will be devoted to achieving the divestiture in the time frame and consistent with the terms required by the agency.

WHAT DOES THIS MEAN FOR BUSINESSES?

There is no guarantee against the FTC or the Antitrust Division delving into the competitive intricacies of strategic acquisitions, pre-or-post-consummation. Even passing antitrust muster in the pre-merger HSR process does not give absolute protection against agency challenge after the deal is consummated, although such challenges are rare. Regardless of whether an HSR filing is required, or whether agency review takes place prior to consummation, the best protection from challenge to a consummated transaction is an antitrust assessment of a proposed transaction in its early stages, prior to taking steps toward implementation, so that antitrust risks are identified, understood, and assessed.

FOR MORE INFORMATION

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