Harm to Potential Competition Triggers FTC Merger Challenge

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The Federal Trade Commission (“FTC” or “Commission”) filed an administrative complaint last week challenging the proposed $1.9 billion merger of Steris Corporation (“Steris”) and Synergy Health plc (“Synergy”), charging that the transaction would significantly reduce future competition in regional markets for radiation sterilization services. FTC v. Steris Corporation, File No. 1510032 (May 29, 2015). The Commission also authorized the agency to seek a temporary restraining order and preliminary injunction in federal court pending the results of the administrative trial. Importantly, the FTC’s concern here is not about a current overlap or direct competition between the parties in the United States. Instead, the Commission is concerned that the transaction will harm likely future competition.

Last October, Steris, an Ohio-based maker of hospital sterilization products, agreed to buy Synergy, a provider of sterilization services for medical-device manufacturers, hospitals and other industries based in England. The parties plan for the merged company to be incorporated in the U.K., while maintaining operational and U.S. headquarters in Ohio. In trying to offset its use of the controversial tax-inversion structure, Steris has stressed that the transaction will increase its revenues, broaden its global reach, and result in synergies. In January, the FTC issued a Second Request to the parties seeking additional information and material regarding the transaction pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

According to the FTC’s press release, the complaint describes both companies as providing contract sterilization services for companies that need to ensure their products are free of unwanted microorganisms before they reach customers, such as implanted medical devices. The complaint also states that most companies needing such sterilization services cannot do it in-house, and instead contract with facilities within 500 miles. Sterilization of large volumes of dense and heterogeneously packaged products is only feasible with gamma radiation generated by Cobalt 60, according to the complaint. In the U.S., only Steris and one other company currently provide contract gamma sterilization services. The FTC alleged that at the time the merger was announced, Synergy was implementing a plan to open new facilities that would provide x-ray sterilization services. The FTC further claimed that the x-ray services offered by Synergy, which are not currently available in the United States, would provide a competitive alternative to gamma radiation. The FTC’s antitrust theory is that the merger of Steris and Synergy will eliminate likely future competition between Steris’s gamma sterilization services and Synergy’s planned x-ray sterilization services.

While the merits of the FTC’s challenge remain to be litigated, this matter underscores that the FTC’s merger analysis is not limited to present competition—only parties that do not currently compete can still face antitrust scrutiny when either party’s strategic plans indicate a future intent to enter a market that would result in competition with the other party.

The case law on potential competition is somewhat dated and sparse. The cases have spoken about both “actual potential competition” (where a market would become more competitive through the impending entry of a party but for the merger) and “perceived potential competition” (where one party’s conduct has been influenced by the threat of potential competition from the other party). The 2010 Horizontal Merger Guidelines (the “Guidelines”) published jointly by the FTC and the Department of Justice also provide some guidance on the issue. For example, the Guidelines include “[f]irms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future” as market participants for purposes of calculating market shares and concentration. Likewise, the Guidelines include firms that are not current producers in the relevant market as market participants if they could rapidly enter in the event of an anticompetitive price increase. Potential entrants are also discussed in the Guidelines as a counter to potential harm to competition from a proposed merger. Typically, under the Guidelines, potential entrants are used by merging parties to demonstrate that a proposed transaction will not result in harm to competition. However, in the proposed Steris/Synergy merger, the FTC has instead used Synergy’s status as a potential entrant to allege harm to competition from the loss of entry.

The fundamental takeaway here is that the antitrust risk assessment of any contemplated transaction should include an analysis of whether the transaction might reduce future competition, even if there is no impact on current competition.

The parties have announced that they plan to fight the FTC’s challenge. The administrative trial is scheduled to begin on October 28, 2015.

If you have any questions about this topic, please contact the author(s) or your principal Mintz Levin attorney.

Endnotes


2 The 1984 Merger Guidelines expressly recognized both “actual potential competition” and “perceived potential competition.” U.S. Dep’t of Justice,


4 Id.

5 Id. at § 9 ("the prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern.").