

Corporate Counseling Committee Monthly Antitrust Update Program October 2015

Lauren Rackow

The Corporate Counseling Committee's Monthly Update program presented on November 9, 2015 by Cahill Gordon & Reindel LLP, with speakers David Januszewski, Elai Katz, Richard Kelly, and Lauren Rackow, covered private and government antitrust litigation, mergers, and international developments that took place in October 2015. The mergers portion of the presentation included discussion of contentious challenges to mergers by both the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ"), an FTC challenge to a consummated acquisition, private litigation about the alleged anticompetitive impact of an acquisition, and a fine for the failure to comply with premerger reporting requirements. This article will highlight three government actions related to mergers discussed during the panel.

In October 2015, the FTC decided not to appeal a district court's decision to deny the FTC's motion for an injunction to block Steris Corp's ("Steris") acquisition of Synergy Health PLC¹⁹ ("Synergy") and dismissed its administrative complaint.²⁰ The FTC focused on concerns of potential competition between the two sterilization equipment companies and alleged that absent the deal, U.K.-based Synergy would have entered the U.S. market for sterilization by importing X-ray sterilization currently only offered in Europe. Steris and Synergy argued that the acquisition was not anticompetitive because Synergy never intended to enter the sterilization market in the U.S. and the companies did not significantly overlap in any relevant geographic market. The district court found that (i) not a single customer was willing to provide the revenue commitments needed for Synergy to enter the U.S. X-ray sterilization market and (ii) the business model for entry was unlikely to obtain board approval. The companies closed the acquisition soon after the FTC dismissed its complaint.

The DOJ had filed a lawsuit to block AB Electrolux and Electrolux North America's (together, "Electrolux") now-abandoned acquisition of General Electric Company's ("GE") appliance business, alleging that the deal would eliminate competition for the manufacture of top ovens and cooktops in the U.S. by combining two of the leading manufacturers for these products.²¹ In October, the DOJ continued to pursue this litigation and rejected Electrolux's and GE's second divestiture offer to spin-off limited assets to a company that does not currently manufacture appliances in the U.S., asserting that this proposed divestiture was insufficient to solve the Department's anticompetitive concerns. The deal was abandoned on December 7, 2015.

Previously, the trial court decided that four top in-house lawyers at GE (two competition and two litigation attorneys) would not be denied access to confidential information produced by intervenors in the lawsuit who were competitors of GE.²² Although courts in merger litigation can prohibit access to confidential information by "competitive decision makers"—who participate in the company's decisions regarding pricing, product design, etc.—the court here explained that GE's in-house lawyers stipulated that they did not participate in GE's competitive decisions, while the intervenors had no refuting evidence. The court had also issued a protective order for this information, with severe penalties for violating the order, and found that between the in-house lawyers' stipulations and the protective order, the intervenors' confidential information was sufficiently protected. Separately, the court ordered Electrolux to produce to the DOJ documents that related to the views of its former CEO, current CEO, and certain other employees regarding the company's competition strategy.²³

¹⁹ *Federal Trade Commission v. Steris Corp. and Synergy Health PLC*, 2015 WL 5657294 (N.D. Ohio Sept. 24, 2015).

²⁰ *In re: Steris Corp. and Synergy Health PLC*, Order Returning Matter to Adjudication and Dismissing Complaint, No. 9365 (Federal Trade Commission Oct. 30, 2015).

²¹ *United States v. AB Electrolux, et al.*, Complaint, 1:15-cv-01039 (D.D.C. Jul. 1, 2015).

²² *United States v. AB Electrolux, et al.*, Memorandum Opinion, 1:15-cv-01039 (D.D.C. Oct. 9, 2015).

²³ *United States v. AB Electrolux, et al.*, Order, 1:15-cv-01039 (D.D.C. Oct. 5, 2015).

Two Pennsylvania orthopedic practices, Keystone Orthopaedic Specialists, LLC (“Keystone”) and Orthopaedic Associates of Reading, Ltd. (“Orthopaedic Associates”), settled FTC charges that their 2011 consummated merger was anticompetitive because the merger allegedly combined 19 of the 25 orthopedists in Berks County, Pennsylvania, into one practice (combined market share of 76%).²⁴ Notably, in 2014 Orthopaedic Associates separated from this group for business reasons predating the FTC’s investigation, reducing the number of Keystone orthopedists to eleven.²⁵ The FTC alleged that prior to the merger health plans could choose among the different, independent practices and form a network with some of these practices, but that after the merger, the combined entity negotiated with health plans on behalf of all of its members and allegedly raised prices. The consent order requires Keystone and Orthopaedic Associates to (i) obtain prior approval from the FTC before acquiring any interests in each other, another orthopedic practice in Berks County, or hiring or offering membership to another orthopedist who has provided services in the county; and (ii) refrain from any anticompetitive, illegal activity, such as coordinating their prices with other orthopedists in the market or jointly negotiating or refusing to deal with payors. The FTC noted that it did not require a divestiture because market conditions changed since the 2011 merger primarily due to Orthopaedic Associates’ leaving Keystone and becoming a major player in the market.²⁶



Lauren Rackow is an associate in the New York office of Cahill Gordon & Reindel LLP.

COPYRIGHT NOTICE

©Copyright 2015 American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. To request permission, contact the ABA’s Department of Copyrights and Contracts via www.americanbar.org/utility/reprint.

The Antitrust Counselor is published quarterly by the American Bar Association Section of Antitrust Law, Corporate Counseling Committee.

The views expressed in *The Antitrust Counselor* are the authors’ only and not necessarily those of their employers, the American Bar Association, the Section of Antitrust Law, the Corporate Counseling Committee, or the editors of this newsletter. If you wish to comment on the contents of *The Antitrust Counselor*, please write to:

The American Bar Association
Section of Antitrust Law
321 North Clark Street
Chicago, IL 60654

Nothing contained in this Newsletter is to be considered to be the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel.

You may also contact us by emailing Rani Habash at rani.habash@dechert.com or Joel Cohen at joel.cohen@davispolk.com.

²⁴ Keystone Orthopaedic Specialists, LLC and Orthopaedic Associates of Reading, Ltd.; Analysis to Aid Public Comment, 80 Fed. Reg. 63,787 (Oct. 21, 2015).

²⁵ *Id.*

²⁶ *Id.*