FTC Finds Consummated Merger Anticompetitive, Orders Assets to be Divested

November 15, 2019

On November 6, 2019, the Federal Trade Commission unanimously found that the consummated merger of two sellers of prosthetic knees violated United States antitrust law, ordering the purchaser to divest completely the acquired assets to an FTC-approved buyer.

The case is notable because the transaction was not reportable under the Hart-Scott-Rodino ("HSR") Act, but the FTC nevertheless reviewed the deal subsequent to closing and found it to be anticompetitive. The Commission's decision serves as another reminder that the antitrust agencies have the authority to review transactions that are not subject to filing under the HSR Act and that the buyer can be subject to post-closing remedies including complete divestiture.

The HSR Act's Reporting Requirements

The HSR Act requires that parties to certain mergers and acquisitions make filings with the DOJ and FTC prior to the consummation of these transactions. The HSR filing contains information regarding the nature of the proposed transaction, the revenues and subsidiaries of the parties, and certain kinds of business documents (commonly called "4(c) documents") that provide information related to the competitive effects of the transaction, relative market shares, and synergies.

The HSR Act requires parties to observe a 30-day waiting period after they submit the HSR filings, during which the relevant agency may review the proposed transaction. In some cases, the agency requests additional information from the parties (often called a "second request"), which extends the waiting period. The parties cannot consummate the transaction until the waiting period expires.

Importantly, however, if the transaction is valued at less than $90 million (2019 threshold) or one of a number of exemptions apply, no filing is required and the parties are free to close their transaction.

The Transaction

On September 22, 2017, Otto Bock HealthCare North America, Inc., a manufacturer and seller of prosthetic knees that integrate microprocessors, or MPKs, acquired FIH Group Holdings, LLC (also known as Freedom), which also manufactures and sells lower leg MPKs, among other products. Prior to the acquisition, the firms were the first and third largest manufactures of MPKs in the U.S. by revenue, and, according to the FTC, "competed vigorously against each other on both price and innovation."[1] Indeed, according to the complaint, the consummation of the transaction brought Otto Bock's market share in the all-MPK relevant market to over 80%.[2] Shortly after closing the deal Otto Bock issued a press release announcing the benefits of the deal, stating "[t]ogether, [Otto Bock] and Freedom

[1] **Opinion of the Commission**, *In the Matter of Otto Bock HealthCare North America, Inc.* p. 2 (November 6, 2019)

[2] **Complaint**, *In the Matter of Otto Bock HealthCare North America, Inc.* p. 2 (December 20, 2017)

Innovations—the number one and the number three on the American market—will benefit from their combined sales power and portfolios."[3]

What Happened?

Two months after the acquisition closed, the FTC issued an administrative complaint challenging the transaction, specifically asserting that the merger violated Section 5 of the FTC Act and Section 7 of the Clayton Act. In the complaint, the FTC alleged that the merger "harmed competition in the U.S. market for microprocessor prosthetic knees by eliminating head-to-head competition between two companies, removing a significant and disruptive competitor, and entrenching Otto Bock's position as the dominant supplier."[4] On the day before the FTC filed the Complaint, Otto Bock entered into a Hold Separate and Asset Maintenance Agreement with the FTC and proposed a divestiture in an attempt to allay the FTC's concerns.[5] As administrative proceedings continued, Otto Bock put forth a number of affirmative defenses, and claimed the proposed divestiture would address any anticompetitive effect in the MPK industry.

An Administrative Law Judge found that the merger violated antitrust law in a decision issued on April 29, 2019. There, it held that Otto Bock's high market share, coupled with the resulting elimination of competition between Otto Bock and Freedom, proved a reasonable likelihood of anticompetitive effects in the relevant MPK market. Regarding the proposed divestiture, the ALJ found it to be too speculative and lacking in necessary terms to properly evaluate whether it would sufficiently counteract any anticompetitive effects.[6]

On November 6, 2019, more than two years after the deal closed, the Commission unanimously upheld the ALJ's decision. In its decision, the Commission pointed to the highly concentrated market, and evidence from clinical customers that viewed Otto Bock and Freedom's products as their first and second choice prior to the merger. It also cited evidence that the companies vigorously competed against each other prior to the premerger, as well as evidence of Otto Bock's intent to raise prices on the companies' products after the acquisition.[7] The Commission also determined that, because the proposed divestiture was only brought up after the consummation of the acquisition, it could not be considered as part of the challenged transaction, and thus would not impact its decision on whether the transaction violated the antitrust laws.[8] The Commission did consider the proposed divestiture as part of its remedy analysis, but found that it was inadequate for a variety of reasons. As a result, the Commission ordered Otto Bock to "divest Freedom's entire business" with limited exceptions.[9]

Takeaways

- **Transactions in which HSR filings are not required may come to the attention of the agencies through other means.** The Otto Bock-Freedom transaction was not subject to HSR filing, but nonetheless became subject of FTC investigation and an adverse decision after its consummation. The agencies may become aware of a non-reportable transaction in

[3] **Ottobock acquires Freedom Innovations, https://insideoandp.com/2017/09/26/ottobock-acquires-freedom-innovations.**

[4] **Complaint**, *In the Matter of Otto Bock HealthCare North America, Inc.* p. 1 (December 20, 2017)

[5] **Opinion of the Commission**, *In the Matter of Otto Bock HealthCare North America, Inc.* p. 9 (December 20, 2017)

[6] Id. at 11.

[7] Id. at 25, 32.

[8] Id. at 51-52.

[9] Id. at 4.

a variety of ways, including customer complaints and routine internet searches that return press releases and articles.

- **Non-reportable transactions may be subject to post-closing investigation and action.** The Otto Bock-Freedom proceedings were not resolved until more than two years after the consummation of the acquisition. Parties engaged in transactions not subject to HSR filing should be aware that the antitrust agencies may take action if they become aware of an acquisition that is perceived to have anticompetitive effects, that resolution of such issues may take significant periods of time, and that remedies up to and including complete divestiture may be ordered.
- **Divestiture and other mitigation offers will be discounted by the FTC if implemented after the deal is closed.** In other cases, the antitrust agencies and courts have taken into account a proposed divestiture in evaluating whether a transaction – as modified by the divestiture substantially harms competition. This is commonly referred to as "litigating the fix." In this case, however, Otto Bock only proposed the divesture after closing and on the eve of the FTC's challenge. The FTC concluded that such a post-closing divestiture cannot be considered in evaluating whether the initial acquisition was legal.
- **HSR "clearance" should still provide comfort.** The Otto Bock-Freedom merger was not reportable under the HSR Act, and was investigated and unwound post-closing. Parties to the vast majority of transactions where there are no or minimal antitrust concerns can still look to HSR "clearance" as a positive milestone in the lifecycle of a transaction.

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