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No HSR Filing Doesn't Mean No Antitrust Concern

Law360, New York (October 26, 2012, 12:31 PM ET) -- In a stark reminder that non-Hart-Scott-Rodino-reportable transactions are fully subject to the antitrust laws — even after they have closed — the Federal Trade Commission, on Oct. 12, 2012, filed a complaint and accompanying consent agreement attacking Magnesium Elektron North America Inc.'s (MEL) 2007 acquisition of competitor Revere Graphics Worldwide Inc.[1]

The $15 million acquisition was too small to be reportable under the Hart-Scott-Rodino Premerger Notification Act of 1976, as amended.[2] While the government's antitrust authority to challenge already consummated transactions is unquestioned, it is very unusual for the FTC (or the U.S. Justice Department Antitrust Division)to reach back this far in time.

Transaction

In September 2007, MEL, a division of the Luxfer Group, acquired the worldwide assets of Revere for approximately $15 million.[3] At the time of the transaction, MEL specialized in the manufacture of magnesium products, including photoengraving magnesium plates.[4] Revere also manufactured magnesium photoengraving plates, in addition to zinc, copper and brass plates.[5]

In its three-page complaint, the FTC alleged that the transaction was an unlawful merger-to-monopoly in the worldwide market for photoengraving magnesium plates. The FTC stated that the transaction "[e]liminated actual, direct, and substantial competition between MEL and Revere," "[s]ubstantially increased the level of concentration in the relevant market" and "[i]ncreased MEL's ability to exercise market power unilaterally in the relevant market."[6]

The complaint did not allege that any anti-competitive price increase had actually occurred. However, it is certainly reasonable to surmise that the FTC would not have been motivated to challenge a small, five-year-old transaction without evidence of substantial price increases — accompanied by customer complaints.

Consent Order

The agreed consent order is designed to create a new competitor in the market — Universal Engraving Inc., a manufacturer in an adjacent market — that would be as strong as the acquired company Revere had been prior to the 2007 transaction.

The order requires MEL to provide Universal with "the intellectual property and know-how used to roll and coat magnesium plates for photoengraving applications," as well as customer lists and certain customer contracts.[7] Additionally, MEL is required to supply Universal with finished product and certain chemicals to permit Universal to compete in the marketplace prior to getting its own production up and running.

Consummated Transaction Challenges

The FTC's challenge to the MEL/Revere transaction is the latest in a long line of FTC and Antitrust Division attacks on non-HSR-reportable consummated transactions, following in the wake of the 2001 increase in the HSR size-of-transaction filing threshold from $15 million to $50 million. (The threshold, which adjusts annually, is currently $68.2 million.[8]) Since 2001, the antitrust agencies have challenged more than 30 consummated transactions, and about half of these have occurred since 2009.

While the government occasionally attacks HSR-reportable transactions after they have closed, most post-consummation challenges involve deals falling beneath the HSR minimum-size threshold. At $15 million, the MEL/Revere transaction fell well below the $59.8 million threshold in effect in September 2007. The agencies have recently challenged nonreportable consummated transactions as small as $3.1 million.[9]

Lessons

The FTC's action against the five-year-old MEL/Revere merger serves as yet another warning that, in the M&A antitrust world, the past may never be dead. Nonreportable transactions of any size may still face antitrust scrutiny — and potential enforcement action — years after a deal is announced and consummated. (As noted, HSR-reportable transactions can also theoretically be attacked after consummation, but such attacks are very infrequent.) Mergers-to-monopoly, as in the MEL/Revere deal, are particularly tempting FTC targets. However, any horizontal mergers involving high market shares, significant post-transaction price increases and customer complaints could be vulnerable.

Thus, firms contemplating an acquisition must remember that "no Hart-Scott filing" does not mean "no antitrust concern." Both in the planning stage and in the post-consummation market-behavior stage, firms involved in an acquisition presenting a substantial horizontal competitive overlap need to be aware of potential antitrust risks.

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[1] Press Release, FTC Order Restores Competition in Market for Magnesium Plates for Photoengraving, Oct. 12, 2012, available athttp://www.ftc.gov/opa/2012/10/magelektron.shtm.

[2] 15 U.S.C. § 18a. Each year, the filing thresholds are adjusted, and the current minimum threshold is $68.2 million. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 77 Fed. Reg. 4323 (Jan. 27, 2012).

[3] Complaint, In the matter of Magnesium Elektron North America, Inc., File No. 091 0094 (F.T.C. Oct. 12, 2012) (available athttp://www.ftc.gov/os/caselist/0910094/121012magelektroncmpt.pdf).

[4] Id.

[5] Id.

[6] Id.

[7] Analysis of Agreement containing Consent Orders to Aid Public Comment, In the matter of Magnesium Elektron, File No. 091-0094 (F.T.C. Oct. 12, 2012) (available at http://www.ftc.gov/os/caselist/0910094/121012magelektronanal.pdf).

[8] 2000 Amendments to Section 7A(a) of the Clayton Act, 15 U.S.C. 18a(a), Pub. L. 106-553. The current $68.2 million threshold became effective in February 2012. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 77 Fed. Reg. 4323 (Jan. 27, 2012).

[9] See Competitive Impact Statement, United States v. George's Foods LLC, 5:11-cv-00043 (W.D. Va. June 23, 2011) (available athttp://www.justice.gov/atr/cases/f272500/272501.pdf).
