Federal Trade Commission Loses Challenge to Steris-Synergy Deal

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09/25/15

On September 24, 2015, the U.S. District Court for the Northern District of Ohio denied the Federal Trade Commission's (FTC) bid to enjoin Steris Corporation (Steris) from acquiring its alleged potential competitor, Synergy Health plc (Synergy). The loss breaks a string of victories in merger challenges the FTC has litigated since 2011.

Steris and Synergy are the second- and third-largest health care sterilization companies in the world, respectively. In the United States, Steris is one of only two U.S. providers of gamma sterilization services. (Sterigenics International LLC is the other.) Synergy operates more than 36 sterilization facilities outside of the U.S., using both gamma and X-ray sterilization.

On May 29, 2015, the FTC filed a complaint for a temporary restraining order and preliminary injunction against Steris and Synergy, contending that the acquisition of Synergy by Steris would violate Section 7 of the Clayton Act. The FTC alleged that Synergy had plans to enter the U.S. with an X-ray sterilization technology that would have competed directly with Steris' and Sterigenics' gamma sterilization services, but terminated those plans as a result of the pending merger with Steris. Under this "actual potential competition" theory, a merger between a firm already in the market and another firm that would likely enter the market absent the merger can violate Section 7 by reducing competition that would otherwise take place in the future because the two firms may become horizontal competitors. This theory has not been recognized by the U.S. Supreme Court and has met with varying degrees of success elsewhere, but in a boost to the FTC's chances, the district court directed the litigants to focus on the factual elements of the theory during the trial rather than dispute the validity of the theory itself.

Under the FTC's actual potential competition theory, the agency had the burden to show that, but for the acquisition, Synergy "probably" would have entered the U.S. sterilization market within a reasonable period of time. The FTC argued that Synergy had publicly committed to entering the U.S. market before the Steris merger was announced and urged the court to discount evidence favorable to the merging firms that was created after the announcement as self-serving. The merging parties countered that, despite its best efforts, Synergy could not justify the investment necessary to build capacity in the U.S. and introduce the new technology, and that it was these business problems, not the potential merger with Steris, that drove Synergy's decision to terminate its entry plans.

In reaching its decision, the court considered contemporaneous evidence of Synergy's U.S. X-ray project's costs and viability, as well as evidence — including trial testimony by the FTC's own witnesses — that U.S. customers were not receptive to switching technologies and committing to purchases. The court also credited the fact that Synergy's work on the project "continued unabated" for four months after the October 13, 2014, announcement of the proposed merger before it was terminated. Ultimately, the court concluded that the FTC's version of the facts was simply not correct and rejected the FTC's contentions that Synergy was likely to enter the U.S. market with its X-ray project and that the potential merger with Steris caused Synergy to terminate the project.

In contrast to other recent FTC merger challenges, the Steris-Synergy case is of limited significance for merger analysis and strategy going forward. Although brought under a nontraditional theory of competitive harm, which opened the possibility of further development of the case law on potential competition as a Section 7 theory, the actual potential competition theory was assumed to be valid rather than litigated. In addition, given the court's directions, the trial did not focus on the competitive dynamics of combining the Steris and Synergy products or the likelihood that competition would be reduced at some

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Clifford H. Aronson
New York
212.735.2644
clifford.aronson@skadden.com

Matthew P. Hendrickson
New York
212.735.2066
matthew.hendrickson@skadden.com

John H. Lyons
Washington, D.C.
202.371.7333
john.h.lyons@skadden.com

Maria Raptis
New York
212.735.2425
maria.raptis@skadden.com

Kenneth B. Schwartz
New York
212.735.2731
ken.schwartz@skadden.com

Steven C. Sunshine
Washington, D.C.
202.371.7860
steve.sunshine@skadden.com

1440 New York Avenue, N.W.
Washington, D.C. 20005
202.371.7000

Four Times Square
New York, NY 10036
+1.212.735.3000

skadden.com

point in the future. Most unusually, there was no economic analysis and testimony, which is customarily the centerpiece of merger analysis and litigation. At issue was simply a narrow question of fact: Did the evidence show that Synergy probably would have entered the U.S. contract sterilization market with its emerging X-ray technology within a reasonable period of time absent the acquisition? Based on Synergy's continued efforts to bring its new product to the U.S. market post-announcement, and the difficulties in demonstrating a business case to justify the investment required, the court concluded the proposed merger was not the more probable reason keeping Synergy from competing independently against Steris in the U.S.

Additional Contacts in the Antitrust and Competition Group

Simon Baxter
Brussels
32.2.639.0310
simon.baxter@skadden.com

C. Benjamin Crisman, Jr.
Washington, D.C.
202.371.7330
benjamin.crisman@skadden.com

Frederic Depoortere
Brussels
32.2.639.0334
frederic.depoortere@skadden.com

Paul M. Eckles
New York
212.735.2578
paul.eckles@skadden.com

Shepard Goldfein
New York
212.735.3610
shepard.goldfein@skadden.com

Peter E. Greene
New York
212.735.3620
peter.greene@skadden.com

James A. Keyte
New York
212.735.2583
james.keyte@skadden.com

Karen Hoffman Lent
New York
212.735.3276
karen.lent@skadden.com

Jeffrey A. Mishkin
New York
212.735.3230
jeffrey.mishkin@skadden.com

John M. Nannes
Washington, D.C.
202.371.7500
john.nannes@skadden.com

Neal R. Stoll
New York
212.735.3660
neal.stoll@skadden.com

Ingrid Vandenborre
Brussels
32.2.639.0336
ingrid.vandenborre@skadden.com

James S. Venit
Brussels
32.2.639.0300
james.venit@skadden.com