Abandonment of Merger Highlights Potential Antitrust Scrutiny of Transactions Not Subject to Premerger Review

On June 9, the Federal Trade Commission (the "FTC" or "Commission") issued statements[1] regarding the announcement by Endocare, Inc. that it was terminating its proposed merger with Galil Ltd. in the midst of the Commission's investigation of that merger. The transaction was not reportable under the Hart-Scott-Rodino Act (the "HSR Act"),[2] and yet the parties appear to have received subpoenas from the FTC seeking information not unlike that typically sought by a "second request." The investigation appears to have continued for a period of approximately six months before Endocare announced that it was terminating the proposed merger.

This matter serves as a reminder that transactions that are not reportable under the HSR Act remain subject to antitrust scrutiny and review, and that nonreportable transactions will be investigated by the antitrust enforcement agencies in the event that the agencies become aware of the transaction and perceive a potential antitrust concern. It also highlights the importance of early identification of any antitrust issues, the allocation of antitrust risk and the negotiation of the terms of the parties' conduct in response to any investigation or other challenge prior to closing a merger. In addition, it is a rare situation in that the FTC issued both a statement and a counter-statement regarding the matter, illustrating a split in opinion among the Commissioners about the conduct of the investigation that led to the abandonment of the merger.

I. Background

The proposed merger involved the combination of two small companies that make and sell cryotherapy products used for the treatment of prostate and renal cancer.[3] According to the FTC's statements, the parties appear to be the only two companies that make and market such products, but the FTC's statements leave open the possibility that other methods of treating prostate and renal cancer compete with the cryogenic therapies. The merger was designed, in part, to allow the parties to engage in research and development of cryotherapy products that could be used for the treatment of other forms of cancer.[4] The proposed merger was not reportable under the HSR Act, and the parties were thus not obliged to make premerger filings or observe any waiting period before closing their transaction. Yet under U.S. law, non-reportable transactions may nonetheless violate Section 7 of the Clayton Act,[5] which long predates the HSR Act. It appears that the parties agreed not to close the transaction during the Commission's investigation and that the agreement to merge could be terminated if it did not close by a certain date.

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1 Joint Statement *available at*: http://www.ftc.gov/os/closings/staff/090609galilendocarejointstmt.pdf; Commissioner J. Thomas Rosch's Statement *available at*: http://www.ftc.gov/os/closings/staff/090609galilendocarestmtrosch.pdf.

2 15 U.S.C. §18a. The Act provides that before certain mergers or other acquisition transactions can close, the parties must file certain reporting forms with the FTC and the Department of Justice ("DOJ") and observe a 30-day waiting period when the agencies may determine if the proposed transaction would violate any antitrust laws.

3 The parties' cryotherapy is a form of therapy that combats cancerous growths by freezing them. The FDA has approved the marketing and use of such products for combating prostrate and renal cancer. Endocare, Inc. is a medical device company located in California, while Galil Ltd. is based in Israel with offices in the U.S. and U.K.

4 Rosch, *supra* note 1.

5 15 U.S.C. §18 (prohibiting acquisitions "the effect of" which "may be substantially to lessen competition, or to tend to create a monopoly").

II. Commissioner Statements

Commissioner Rosch issued a statement in response to the abandonment of the proposed merger in which he wrote that the Commission essentially blocked the merger "de facto" by "failing to timely conclude its investigation and reach a determination on the merger's legality."[6] Commissioner Rosch added that the Commission could have returned a more expedient determination of the legality of the merger in light of the lack of indicators that the merger would "pose a threat of supra-competitive pricing" or otherwise adversely affect competition.[7] While he acknowledged that the parties did not fully comply with the Commission's document requests, he argued that the public interest in not blocking the transaction, which involves products to treat the leading form of non-skin cancer afflicting Americans, outweighs any risk based on compliance with the document subpoenas.

In a counter-statement, Chairman Leibowitz and Commissioners Harbour and Kovacic maintained that the FTC could not justify closing its investigation, primarily due to the lack of full disclosure of relevant documents by the parties. Moreover, based on the evidence that was made available, the proposed merger likely would have anticompetitive effects and thus be contrary to the public interest. Given that position, they argued, the Commission could not make an assessment one way or the other. In addition, they maintained that the FTC staff's handling of the investigation was "diligent, competent, even-handed and professional" and did not prolong the process by making "unreasonable demands on the parties" as Commissioner Rosch suggested.[8]

III. Significance of the Development

Such a public revelation of internal disagreement at the FTC provides some useful insight into the inner workings of the agency, and the Endocare-Galil matter also reminds us that while some transactions may escape the premerger notification requirements of the HSR Act, such transactions may still be reviewed by the antitrust enforcement agencies for possible violations of Section 7. Furthermore, such transactions are not immune from challenge by the FTC or DOJ even after they have been consummated.[9] Although many nonreportable transactions do not raise any competitive issues, parties to nonreportable transactions raising horizontal or other potential antitrust issues should consider the possibility that the transaction will be investigated pre- or post-closing and contemplate negotiating language addressing this risk in their agreement.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Laurence T. Sorkin at 212.701.3209 or lsorkin@cahill.com; or Elai Katz at 212.701.3039 or ekatz@cahill.com.

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6 Rosch, *supra* note 1.

7 *Id*.

8 Joint Statement, *supra* note 1.

9 See, e.g., *Hologic Inc.* (FTC File No. 051-0263, July 7, 2006) (FTC challenge); *United States v. Amsted Industries Inc.*, CCH Trade Reg. Rep. ¶¶45,107 (No. 4868), 50,942 (April 18, 2006), also *available at* www.usdoj.gov/atr (DOJ challenge).