

DOJ Challenges Consummated Asset Acquisition; Seeks Divestiture of Acquired Assets

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On December 18, the federal government sued to break up a consummated merger for the second time in two days. The Antitrust Division of the U.S. Department of Justice alleged that Microsemi Corporation's acquisition of Semicoa, Inc. reduced competition in the development, manufacture, and sale of semiconductor devices used by the U.S. Department of Defense (DOD) and NASA. Coming on the heels of the Federal Trade Commission's (FTC's) suit to rescind Ovation Pharmaceuticals's 2006 purchase of NeoProfen, the suit against Microsemi makes it clear that transactions that are not reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) can be vulnerable to challenge after they have closed.

Microsemi paid \$25 million to acquire Semicoa in July 2008, including technology and manufacturing assets for "small signal transistors" and "ultrafast recovery diodes" that the DOD and NASA buy for military and aerospace applications essential to national security. Semicoa and Microsemi were the only two manufacturers of small signal transistors that can meet the DOD's and NASA's specifications, and two of three manufacturers of ultrafast recovery diodes that meet defense and NASA specifications. The Antitrust Division claims that the acquisition caused prices to increase "significantly" and reduced Microsemi's incentive to innovate.

The Antitrust Division wants Microsemi to sell all of its Semicoa assets.

Lessons

No transaction is too small for antitrust review—even deals that are not HSR reportable can be challenged. The Antitrust Division and FTC have said repeatedly that the size of a transaction is not relevant to their level of interest. These two cases bring home that the government will sue to break up transactions that are too small to satisfy the \$63.1 million HSR Act threshold.

The government will seek to break up closed transactions. The two cases also substantiate the FTC's and the Antitrust Division's statements that they will review and, if necessary, seek to unwind consummated mergers.

No market is too small for antitrust review. The cases against Microsemi and Ovation demonstrate that the concern for consumer harm outweighs the size of the relevant market. According to the DOJ, the relevant markets had sales of less than \$20 million. The FTC complaint against Ovation involved only a \$45 million market.

The antitrust enforcement agencies take the impact on government consumers seriously. The case against Microsemi involved products that were subject to strict government technical standards and essential to the DOD and NASA. It was the competitive impact on these national security agencies that likely led to the DOJ complaint.

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Parties cannot assume that small deals in small markets are immune from challenge and should assess the risk before signing.

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