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Schering-Plough's $41 Billion Acquisition of Merck Clears Antitrust Hurdles With Consent Order

The Federal Trade Commission announced in October 2009 that it will allow Schering-Plough Corporation's proposed $41.1 billion acquisition of Merck & Co., Inc. to proceed, subject to a consent order requiring the parties to each divest certain interests and assets in businesses where the FTC was concerned the transaction would have substantially reduced competition.

Schering-Plough and Merck are each engaged in the research, development, manufacture, distribution and sale of human pharmaceutical and animal health products. Merck's animal health business is conducted through a joint venture equally owned by Merck and Sanofi-Aventis S.A. The joint venture is called Merial Limited.

Pursuant to an Agreement and Plan of Merger dated March 8, 2009, Schering-Plough proposed to acquire Merck and rename the surviving entity Merck, in a transaction valued at approximately $41.1 billion. According to a complaint the FTC issued on October 29, 2009, the proposed acquisition would combine two of the top four animal health suppliers in the United States.

Relevant Markets Affected by the Proposed Acquisition

The FTC identified several specific relevant markets in which the proposed acquisition would have raised competitive concerns. These include the manufacture and sale of a particular type of drug, a neurokinin 1 or "NK 1" receptor antagonist, used to treat chemotherapy-induced nausea and vomiting and post-operative nausea and vomiting in humans; live and killed poultry vaccines for the prevention or treatment of certain diseases; and cattle gonadotropins (protein hormones).

More particularly, Merck's NK 1 receptor antagonist for chemotheraphy and surgery induced nausea and vomiting, sold under the trademark Emend, is the only drug of its kind approved in the United States. Very few neurokinin 1 receptor antagonists are in development in the U.S. market for the same uses as Emend. At the time Schering-Plough announced its acquisition of Merck, however, Schering-Plough was in the process of licensing its own, newly developed NK 1 receptor antagonist for nausea and vomiting, rolapitant, to a third party.

As to the animal health product relevant markets the FTC identified as of concern, the FTC

alleged in its complaint that Merck and Schering-Plough are two of the largest poultry vaccine producers in the country. Together, the companies account for over 75 percent of all poultry vaccine sales in the United States. Three other poultry vaccine suppliers account for the balance of U.S. sales, making for highly concentrated relevant markets, as measured by the Herfindahl-Hirschman Index. Further, Merck and Schering-Plough are two of only three suppliers of cattle gonadotropins in the United States.

The FTC further alleged in its complaint that new entry would not be timely, likely or sufficient to deter or counteract the anticompetitive effects of the transaction, because of the time and cost associated with researching and developing the relevant products, obtaining regulatory approval, and gaining customer approval. Expansion by smaller competitors into the relevant markets would not be timely, likely or sufficient, the FTC stated.

Anticipated Anticompetitive Effects of the Proposed Acquisition

The complaint specified several anticompetitive effects of the proposed acquisition. According to the FTC, the proposed acquisition would eliminate future competition between Merck's Emend and Schering-Plough's rolapitant in the U.S. market, thereby decreasing the likelihood that the combined entity would forgo or delay the launch of rolapitant, and increasing the likelihood that the combined entity would delay or eliminate the additional price competition that would have resulted from rolapitant's entry into the market. In addition, the complaint alleges the proposed transaction would eliminate competition between Merck and Schering-Plough in the animal health product relevant markets identified in the complaint. It would increase the likelihood of the merged entity's exercise of market power in these markets, increase the likelihood and degree of coordination among suppliers in these concentrated markets, reduce the merged entity's incentives to pursue further innovation in these markets, and increase the likelihood that consumers would be forced to pay higher prices for each of the products in these markets. The complaint thus charged Schering-Plough and Merck with violating Section 7 of the Clayton Act and Section 5 of the FTC Act.

Consent Order Remedies Antitrust Concerns

To settle these charges, on October 29, 2009, the FTC, Schering-Plough and Merck entered into a settlement agreement containing a decision and order. According to the decision and order, Merck is required to divest its 50 percent interest in Merial to Sanofi-Aventis, as well as terminate all interests it has in Merial, within ten days after the effective date of the agreement (by November 8, 2009). Merck did so in September 2009, in response to concerns raised by the FTC. Merck must submit all confidential business information related to Merial to Sanofi-Aventi as soon as practicable as well. Neither Schering-Plough nor Merck, nor the surviving entity, may acquire any ownership in Merial either, for a period of ten years from the date of the consent order. As well, the consent agreement requires Schering-Plough to divest its rolapitant product assets and grant rolapitant product licenses to another firm, Opko Health, within ten days of acquiring Merck. The agreement terminates on October 29, 2019. As stated in the FTC's press release announcing the settlement, the consent order "remedies the proposed acquisition's alleged anticompetitive effects and ensures continued competition in these important animal and human health markets."

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