

OnPoint

Dechert
LLP

January 2013

A legal update from Dechert LLP

FTC Report Shows that Oil Sector and Pharmaceutical Sector Mergers Are Under the Antitrust Spotlight

The U.S. Federal Trade Commission (“FTC”) issued a [data report](#) on January 4 regarding its horizontal merger investigation and enforcement action record over the past fifteen years. The report shows, sector-by-sector, the level of market concentration triggering FTC action, as well as the impact of other antitrust enforcement variables including the presence of hot documents, the presence of strong customer complaints, the number of significant competitors, and entry conditions.

One major take-away from the report is that oil sector and pharmaceutical sector mergers stand out for antitrust scrutiny. Another practical implication of the report's data is that counsel should place heightened focus on managing document creation and customer communications, both in connection with prospective mergers and in the ordinary course of business.

The FTC investigates and challenges oil sector mergers at lower market share levels. The report leaves little doubt that the most antitrust-sensitive industry by far is oil. The FTC data on second-request investigations by market concentration (as measured by the Herfindahl-Hirschman Index or “HHI”) show that 71% of oil sector second-request investigations involved markets with HHIs below 2,400. The next closest sector was grocery, at 11%. For all sectors other than oil, the rate was just 2%. Indeed, over the past fifteen years, the FTC brought enforcement actions challenging mergers in 90 markets with HHI levels below 2,000. The oil sector accounted for 100% of these. No other industry experienced an FTC merger challenge at these concentration levels. The FTC will investigate and challenge oil sector mergers with relatively low market shares.

When investigated, pharmaceutical sector mergers are most likely to be challenged. The report shows that the FTC has not been investigating or challenging pharmaceutical sector mergers at relatively low market shares, but when the FTC does investigate mergers in the pharmaceutical sector, it almost always brings an enforcement action. Roughly 98% of second-request investigations in the pharmaceutical sector result in some enforcement action, compared to 75% for all other sectors. Even in the oil sector, second-request investigations lead to enforcement actions at a rate of about 75%. Once the FTC initiates an investigation, pharmaceutical sector mergers are extremely likely to be challenged.

Hot documents and strong customer complaints may be fatal. The FTC report also provides evidence on the impact of hot documents. The FTC defines “hot documents” as those in which the parties predict the merger will lead to an adverse price or non-price effect (e.g., a capacity restriction). The presence of hot documents, so defined, is relatively infrequent – the FTC uncovers hot documents just about 10% of the time. When they do arise, however, hot documents may doom the transaction. The FTC brought enforcement actions in 89% of the investigations in which hot documents are present.

A similar picture emerges with respect to the data on “strong customer complaints” – defined as a credible customer concern that a significant anticompetitive effect would result. The FTC brought enforcement actions in 97% of the mergers involving strong customer complaints.

information, please contact:



Mike Cowie
Washington, D.C.
[Send an email](#)
T: +1 202 261 3339



Michael L. Weiner
New York
[Send an email](#)
T: +1 212 698 3608



To browse our library of legal updates, please visit dechert.com/publications

To see the full list of antitrust lawyers, please [visit our website](#).

[Unsubscribe](#) | [Manage my mailings](#) | [Forward to a colleague](#)

dechert.com

© 2013 Dechert LLP. All rights reserved. This publication should not be considered as legal opinions on specific facts or as a substitute for legal counsel. It is provided by Dechert LLP as a general informational service and may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome. We can be reached at the following postal addresses: in the US: 1095 Avenue of the Americas, New York, NY 10036-6797 (+1 212 698 3500); in Hong Kong: 27/F Henley Building, 5 Queen's Road Central, Hong Kong (+852 3518 4700); and in the UK: 160 Queen Victoria Street, London EC4V 4QQ (+44 20 7184 7000).

Dechert internationally is a combination of separate limited liability partnerships and other entities registered in different jurisdictions. Dechert has more than 800 qualified lawyers and 700 staff members in its offices in Belgium, China, France, Germany, Georgia, Hong Kong, Ireland, Kazakhstan, Luxembourg, Russia, the United Arab Emirates, the UK and the US. Further details of these partnerships and entities can be found at dechert.com on our [Legal Notices](#) page.