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Federal Trade Commission Approves Universal-EMI

Christopher Sagers (Cleveland-Marshall College of Law) · Sunday, September 23rd, 2012

On Friday morning the FTC announced that it had closed its investigation of Universal Music Group's acquisition of EMI's recorded music division. The Commission will not seek any concessions or take other action. Elsewhere I've written and said that I think the merger is probably awfully anticompetitive and that it should be blocked completely.

A few thoughts.

From any older-fashioned structuralist, *Philadelphia-National-Bank* sort of perspective, the merger looks pretty illegal. It is in effect a world-wide 4-to-3. In U.S. markets the existing concentration and the increase in concentration are well in the range of likely anticompetitive effect under the traditional *Merger Guidelines* approach.

Frankly, if I were Queen, that would have been enough. There is so little empirical evidence that business consolidation has done society any good, and so much reason to believe it has done massive, extensive and long-lasting harm, that a really strong structural case really ought to be enough to block a merger, even without an elaborate theory of harm. Occasionally it does seem to be enough, even among our current federal bench—we see cases, like *AT&T/T-Mobile*, *TaxACT*, and the baby-food merger, in which a court or agency by all appearances seems to think a deal is illegal just because it's so darn big. And despite what we now seem to take for granted, there is not actually some strong presumption against government intervention written in to our antitrust laws, at least not according to any evidence the U.S. Congress has ever given us. Quite the opposite, really, if the "incipiency" rule supposedly contained in the Clayton Act since 1950 is anything but a completely dead letter.

But here there is not only a strong structural case, there is also what seems to me a pretty compelling theory of harm. The future of music licensing is widely thought to be in digital streaming. The streaming services, currently represented by firms like Spotify, Rhapsody and Pandora, need to offer very wide selection of variety to their customers. They cannot survive if they can be excluded from some large library of titles, and so it is in a record company's interest to have as large a library as it can. It is more profitable to Universal to own EMI's catalogue of music than to compete with it, and profitable in a way representing antitrust injury.

And so it was pretty hard to find anybody outside the merging firms that thought this deal was a good idea, and quite a lot of journalists, antitrust watchers, consumer advocates, lawyers, and members of both political parties in both House and Senate saying it was bad. (You can find people who think it was good, but they're the kind who think there is never, ever a bad merger.) Now that

both the European Commission and the FTC have approved it, some pretty loud gnashing and wailing is popping up, like the English observer who calls Friday "The Day the Music Died."

Well, the FTC's announcement Friday had some unusual trappings. Let me say first that I am wary of criticizing the agencies, because I think they have a hard job dealing with our current judiciary and the major (and ironic) deficit that antitrust currently suffers in popular legitimacy. Also, after ten years of watching from the outside I think it's just hard to second guess the internal pressures and incentives of law enforcement.

But here's what was funny. The Commission approved the deal 5-0, with no required concessions. (Even the EC, which also approved the deal, demanded major divestitures, though I expect they are not especially worthwhile—they still have the effect of approving a 4:3 merger, following which the 3 likely will just be surrounded by a somewhat larger number of small, independent labels.) But neither the Commission nor any Commissioner filed any opinion or statement, and instead an official statement was released by the Bureau of Competition staff. That seems to me not that typical a way for the Commission to proceed, which suggests that there must have been something worth knowing behind closed doors. Here's what else is funny; the staff report reads rather like a brief to the effect that there is *no* evidence that the deal would be anticompetitive. The argument was two-fold, that the products are differentiated (and therefore that they are not direct competitors, an argument eerily reminiscent of the one so bizarrely used against the Commission in the infamous *Lundbeck* case, and that the major labels may distribute their products through a variety of channels. The whole thing feels staff-driven, and perhaps not driven by the actual author of the staff statement, Bureau Director Rich Feinstein. Maybe it was, who knows. But the statement feels to me more like an effort in a priori speculation from the *Journal of Law & Economics* than it does like the Commission's more typical work product.

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