

FTC Challenges Axon's Consummated Acquisition of Body-Worn Camera Competitor

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The US antitrust regulators continue to challenge consummated transactions. On January 3, 2020, the FTC filed an administrative complaint against Axon Enterprise, Inc., challenging its consummated acquisition of VieVu, a body-worn camera competitor, from Safariland. The FTC also challenged non-compete agreements that Axon and Safariland signed in connection with the acquisition. The complaint demonstrates the FTC's continued focus on challenging consummated transactions, and on defining "price discrimination markets" around sets of customers with unique needs. The FTC's challenge also shows that merging parties should avoid signing non-compete agreements that are not reasonably limited in scope and duration. If these agreements are not appropriately tailored to achieving a legitimate business interest, the FTC may challenge them as anticompetitive.

WHAT HAPPENED:

- In May 2018, Axon acquired VieVu from Safariland for approximately \$7 million in upfront cash and stock. The deal was not reportable under the HSR Act. About a month after Axon announced the acquisition, the FTC began investigating the deal.
- Axon and the FTC were unable to reach a settlement agreement, and on January 3, 2020, the FTC announced that it had issued an administrative complaint challenging Axon's acquisition of VieVu.
- In its complaint, the FTC defines the relevant market around products sold to large, metropolitan police departments. Specifically, the FTC alleges that the relevant market is the sale of body-worn cameras and digital evidence management systems (DEMS) to large, metropolitan police departments in the United States. DEMS software, used in conjunction with body-worn cameras, enables police departments to store camera data in a central location, redact images and share evidence with prosecutors. According to the FTC, large, metropolitan police departments have distinct requirements for body-worn cameras and DEMS that differ from the needs of other law enforcement organizations. For example, the

large departments may require feature-rich or cloud-based DEMS and other advanced technical features.

- Axon is the leading manufacturer and supplier of body-worn cameras and DEMS in the United States. The FTC alleges that, prior to the acquisition, VieVu was Axon's closest competitor in supplying body-worn cameras and DEMS to large, metropolitan police departments. VieVu aggressively challenged Axon by offering lower prices to customers, according to the FTC. VieVu won a number of large accounts at prices below Axon's, including the New York City Police Department account. The FTC alleges that other competitors rarely provided significant competition for RFPs issued by large, metropolitan police departments.
- The FTC alleges that the transaction increased concentration in an already concentrated market and was presumptively unlawful. Post-transaction, Axon has enacted substantial price increases and stopped developing new generations of VieVu products, according to the FTC.
- The FTC also challenged non-compete and non-solicitation agreements that Axon and Safariland signed in connection with the VieVu acquisition. Per these agreements, Safariland agreed not to compete for products and services that Axon supplies, including products unrelated to the VieVu acquisition, or for Axon's customers. In addition, Axon and Safariland agreed not to hire or affirmatively solicit each other's employees. Each of these agreements lasts at least 10 years. In its complaint, FTC alleges that these non-competes are not reasonably limited in scope and time or necessary to protect Axon's investment in VieVu.
- In response to the FTC's administrative complaint, Axon has filed its own complaint against FTC in federal court. Axon claims that the FTC's administrative trial process is unconstitutional and argues that the FTC must challenge the transaction in federal court.

WHAT THIS MEANS:

- The FTC's complaint shows that it remains willing to challenge consummated transactions, no matter how small the transaction. Parties should carefully evaluate their antitrust risks, even if a deal is not reportable. Merging parties also should not assume that they are in the clear after closing their deal. The FTC has the authority to challenge deals that are not reportable under the HSR Act and will bring suit to block, or break up, unreported deals when it believes they are anticompetitive.
- The complaint also provides another example of the FTC defining the relevant market around a particular class of customers (e., a price discrimination market). Where a class of customers has unique needs and suppliers can price separately for those customers, the FTC may define a narrow market around those customers.
- In addition, the complaint shows that the FTC is willing to challenge non-compete agreements signed in connection with mergers. Merging parties should be aware that FTC will view non-competes that are not reasonably limited in duration and scope as anticompetitive and may bring challenges to them.

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