Federal Trade Commission Hints at Tough Position on Mergers between Online Competitors

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In June 2001, TMP Worldwide, owner of the dominant online job board “Monster.com,” agreed to purchase the second largest online job board, “HotJobs.” Rather than permitting the merger to go forward as scheduled, the Federal Trade Commission (“FTC”) prevented the closing indefinitely until the parties provided all of the additional information that the FTC requested. The FTC’s review was still continuing in December when Yahoo! made an unsolicited bid for HotJobs. Yahoo! touted its offer as superior in a variety of ways to the Monster.com bid, including posing less “regulatory risk.” HotJobs accepted the Yahoo! proposal before the end of the year, and the FTC terminated its review of the Yahoo! transaction early, paving the way for Yahoo! to formally acquire HotJobs in February 2002.

Although the Monster/HotJobs transaction never came to a formal FTC vote, the press had begun to report that the FTC staff was preparing to recommend blocking the deal. The fact that the FTC’s review of the proposed merger of the first and second-largest online job boards continued for six months suggests that the FTC staff had determined that the "relevant market" within which to evaluate the competitive impact of the transaction included only online job services. Presumably, had the FTC staff considered other more traditional methods to be part of the relevant market, such as newspaper classifieds and traditional personnel agencies, the Monster acquisition of HotJobs would not have caused competitive concern. The market would have been sufficiently large, so that even a combined Monster and HotJobs would not have had a significant share of that market.

The determination of the “relevant market” in merger reviews often determines the outcome of an antitrust merger analysis. As the 1992 Horizontal Merger Guidelines (jointly issued by the Department of Justice and the FTC) state, “a merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured.” The larger the “relevant market,” the less likely it is that any merger will result in a substantial increase in concentration in that market. Conversely, the smaller the "relevant market" -- in this case, online job services -- the more likely that a merger will be found to substantially increase concentration in that market. Defining markets is often somewhat subjective because the analysis rests on predicting customer and production responses to the proposed merger.

The FTC’s staff appears to have concluded that bricks (traditional methods) do not sufficiently compete with clicks (online methods), so as to be in the same relevant market, at least in some instances. This view suggests that mergers between online businesses may face more intense antitrust scrutiny in the future even when there are many other types of businesses performing the same function without using the Internet.

For a general discussion of antitrust issues faced by online companies, see our December 17, 1999 Internet Alert.

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