Market Power: The Double-Edged Sword

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The consolidation that has occurred in many health care markets over the last few years has given many providers market power. While this power may have its benefits (including a more equal bargaining position with managed care plans, increased opportunities to achieve efficiencies, and perhaps greater access to capital), antitrust law imposes additional limitations on firms with market power. Moreover, firms possessing market power run a greater risk that a disgruntled business partner (or would-be business partner) will turn a run-of-the-mill dispute into a complex and expensive antitrust case.

Antitrust law holds monopolists (or firms with market power) to different behavioral standards than firms that do not have market power. Conduct that antitrust law would applaud as aggressive competition if undertaken by a firm without market power, may be considered predatory or otherwise anticompetitive if a firm possessing market power employs those same tactics. A firm possessing market power may compete on price, quality, access, service, etc., but may not use its market power to hamper a competitor's ability to compete.

One of the lessons the health care industry can learn from the Microsoft case is that network effects often provide competitive advantages to the network's participants, but firms with monopoly or market power must be careful as to the manner in which they use those competitive advantages. In essence, the complaint against Microsoft was that it was bundling together a number of different products (including products that consumers had to get from Microsoft) as a package, and forcing consumers to take the entire package. In this way, Microsoft could use its dominant products to stifle competition for its non-dominant products. The development of integrated networks provides a good illustration as to how the issues in the Microsoft case might arise in the health care context. For example, if a hospital that faces significant competition enters affiliations with selected physicians, outpatient facilities, or other ancillary service providers, antitrust law would generally view such affiliations as procompetitive. In competitive markets, such relationships may increase competition, improve efficiency, and offer new and/or integrated products that may not be possible absent such relationships. If successful, other providers may also develop similar relationships thereby increasing consumer choice and competition.

However, if a hospital possessing market power enters into selective relationships, such relationships may have the effect of reducing competition among physicians, outpatient centers or ancillary services providers. Participation in selective relationships by a dominant hospital may give the network participants an unfair advantage because any potential competitor networks would lack at least one key element – a hospital. Similarly, to the extent that the hospital offered outpatient or ancillary services in competition with one of the "excluded" providers or facilities (e.g., outpatient surgery or diagnostics), an excluded competitor may claim that the hospital's relationship with referral sources was an attempt to drive the excluded facility out of business.

Health care executives that understand the balancing act required of a company with market power, are better able to reap the benefits and avoid the risks. Therefore, we suggest that health care executives familiarize themselves with basic antitrust principles, through conferences or other opportunities to more fully understand antitrust risks, so that they can minimize such risks.