The M&A LAWYER

November/December 2021 ▪ Volume 25 ▪ Issue 10

BUYERS BEWARE: DOJ CHALLENGE TO BOOK PUBLISHERS MERGER HIGHLIGHTS MONOPSONY CONCERNS IN M&A

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In another example of more aggressive antitrust enforcement under the Biden Administration, on November 6, 2021, the U.S. Department of Justice ("DOJ") filed a complaint in federal court seeking to block Penguin Random House LLC's $2.175 billion acquisition of Simon & Schuster, two of the so-called "Big Five" book publishing companies. Notable among merger challenges, the DOJ's Complaint is not centered around claimed harm to downstream customers, but rather authors who seek to have their books published and how much those authors are paid for their works. The DOJ alleges that the transaction should be blocked because it will significantly reduce bidding competition for authors' works.

Buyer power ("monopsony," in antitrust parlance) has long been a consideration in antitrust merger reviews, but historically it has been more of a theoretical than practical concern for enforcers. Analytically, these transactions are evaluated in much the same way as mergers between competing sellers, as described in the U.S. antitrust agencies' *Horizontal Merger Guidelines*. Consider, for example, the distinction between the potential anticompetitive effects arising from mergers of competing buyers (*e.g.*, charging *lower* prices to suppliers) versus competing sellers (*e.g.*, charging *higher* prices to final consumers). A critical difference is that mergers among competing buyers do not necessarily result in direct anticompetitive effects for customers or consumers. Indeed, many merging parties tout the same reductions in costs from *suppliers* as an efficiency that will ultimately benefit *consumers*. Due to that complexity, over the past few decades, antitrust authorities have focused their resources on transactions that have a more direct nexus to potentially anticompetitive downstream effects, such as higher prices, on customers.

That approach changed with the Biden

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Administration. The White House and leadership at both the Federal Trade Commission ("FTC") and the DOJ have emphasized that anticompetitive effects from consolidation can extend beyond direct effects on downstream customers. This summer, President Biden released an executive order on competition outlining 72 initiatives to combat "excessive" corporate consolidation and increase competition across the U.S. economy, using a mix of regulation, deregulation, and aggressive antitrust enforcement.[1] The Order focuses particular scrutiny on labor markets, as well as concentration in the agricultural, healthcare, and tech industries. The Chair of the FTC also has been outspoken on the subject, recently advocating for the FTC to "take a holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers."[2] The DOJ had operated under acting leadership until the President's nominee to lead the Antitrust Division, Jonathan Kanter, was confirmed in November. In a recent press release, the acting head of the DOJ indicated that the agency was conducting a review to ensure that government merger guidelines are "appropriately skeptical of harmful mergers."[3]

The DOJ's Challenge to Penguin/Simon & Schuster

The DOJ's challenge to the proposed Penguin/Simon & Schuster transaction reflects those pro-enforcement views of the Biden Administration. The Complaint alleges that Penguin's acquisition of Simon & Schuster will substantially lessen competition in two upstream markets: (i) the acquisition of U.S. publishing rights to books from authors, and (ii) the acquisition of the U.S. publishing rights to anticipated top-selling books. According to the DOJ, book publishers compete to acquire publishing rights from authors, typically by offering advance payments and royalties as well as better editorial, marketing, and other services that are critical to the success of a book. Penguin and Simon & Schuster are two of the Big Five U.S. book publishers. Penguin is the largest of the Big Five, and Simon & Schuster is the fourth-largest. The Complaint alleges that the combined firm would control close to half of the U.S. book publishing market for anticipated top-selling books.

The DOJ argues the transaction will harm competition in two ways:

The M&A Lawyer
West LegalEdcenter
610 Opperman Drive
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(ISSN#: 1093-3255)

First, by eliminating head-to-head competition between Penguin and Simon & Schuster, the DOJ alleges the transaction will allow the combined firm to "pay less and extract more" from authors—and, in particular, from "bestselling authors and celebrities" who command higher advance payments and fees. The Complaint cites several instances of that head-to-head competition, which allegedly resulted in higher payments to authors. Smaller publishers will be unable to fill this gap, according to the DOJ, because they lack the resources to pay the high advances and provide the "unique" services needed to secure publishing rights to anticipated top-selling books.

While the Complaint focuses on the harm to authors by making it harder for authors to earn a living by writing books, resulting in reduced quantity of variety of books published, the DOJ also asserts that the merger will "ultimately" harm consumers. The DOJ claims that "[b]y harming authors, the merger is also likely to harm consumers." Notably, however, the Complaint does not provide detail on how such harm would occur or allege that the transaction would affect the prices charged for books.

Second, the Complaint alleges that further consolidation in the book publishing industry will facilitate coordination among the remaining four major publishers. The "coordinated effects" theory of harm is common in many merger challenges. In partial support of its allegations, the DOJ references the government's 2012 complaint alleging that the Big Five publishers conspired with Apple to raise the price of e-books. The Complaint notes that the Second Circuit affirmed a decision by the district judge that Apple and the publishers had engaged in a "price-fixing conspiracy." The DOJ asserts that the past coordination demonstrates that the industry would be conducive to further coordinated behavior.

In response to the DOJ's concerns, on September 20 (about 45 days before the DOJ filed its Complaint), Penguin's CEO announced that it would allow competitive bidding between Penguin and Simon & Schuster imprints post-transaction, thereby preserving competition for authors' works. The DOJ, however, dismissed this proposal in its Complaint by calling it an "unenforceable promise" that "defies economic sense." Although there are exceptions, recent DOJ and FTC practice favors structural remedies, such as divestitures, and rejects conduct remedies that require ongoing commitment by the merging parties. For example, the FTC rejected a similar non-structural remedy earlier this year as part of its ongoing challenge to the proposed Illumina/GRAIL transaction, currently pending in FTC administrative court. The DOJ also rejected a proposed conduct remedy in its challenge to the 2019 AT&T/Time Warner transaction, though the DOJ lost its case in federal court.

It is notable that the DOJ's press release announcing the Penguin/Simon & Schuster challenge included a strong statement by Attorney General Merrick Garland that the Complaint "is the latest demonstration of the Justice Department's commitment to pursuing economic opportunity and fairness through antitrust enforcement." This case is a clear signal that the Biden Administration is willing to push the antitrust envelope, litigating non-traditional harms involving alleged upstream effects in labor markets. The DOJ brought this high-profile case despite arguments by the merging parties that the transaction will result in significant cost savings (improving efficiency rather than leading to a reduction in books and amounts paid to authors) and that the combined firm will continue to compete with other publishers, including newer entrants like Amazon.

Practical Takeaways for M&A Advisors

Penguin/Simon & Schuster is one of the first merger challenges of the Biden Administration's DOJ. Companies and their M&A advisors should take away four key points from this challenge.

1. Expect a renewed focus on labor markets in merger reviews. Buyer power, particularly for labor (employees), has been a priority of the Biden Administration. In fact, President Biden's recent Executive Order directed the antitrust agencies to consider a transaction's impact of "monopoly and monopsony—especially as those issues arise in labor markets." The Penguin/Simon & Schuster Complaint demonstrates that the DOJ's interest in those issues is not merely academic. Any pre-signing antitrust due diligence should include an assessment of potential buyer power, including over both upstream suppliers of input materials as well as employees/labor. In addition, M&A advisors should be careful about how these issues are described in company documents, including materials prepared by or for the Board and senior management. Those documents carry substantial weight during agency merger reviews and may have to be produced early in an investigation, potentially as part of the parties' initial HSR filings.

2. The DOJ is not afraid to pursue non-traditional theories. Penguin/Simon & Schuster does not fit the mold of traditional merger challenges, in several respects. As noted, the DOJ's Complaint focuses on harm to suppliers (authors), rather than a more traditional antitrust focus on downstream effects (consumers). In addition, the transaction leaves four of the "Big Five" book publishers, plus Amazon and over a dozen smaller publishers. That level of concentration is in line with transactions not challenged by the antitrust agencies in the past, including in recent administrations. The current challenge, which defines antitrust markets in a way that discounts non-Big Five competitors and rejects Penguin's proposed remedy, confirms that the Biden Administration is willing to move away from traditional cases and embrace more aggressive antitrust theories of harm in litigation.

3. Antitrust agencies remain unwilling to credit conduct remedies. As noted, the DOJ did not credit Penguin's proposed conduct remedy, which would allow competitive bidding between the merging parties' imprints post-transaction. Although there have been exceptions, the U.S. antitrust agencies increasingly favor structural remedies—*i.e.*, divestitures of assets. The Biden Administration has now challenged at least two transactions in which the merging parties proposed non-structural "fixes" (Illumina/GRAIL, Penguin/Simon & Schuster). Litigating the proposed remedy is a common strategy for merging parties. Penguin has indicated publicly that it is "committed to keeping [Simon & Schuster's] imprints as separate, external bidders from [Penguin] imprints in auctions post-closing, just as they do today, even if they are the only ones left in an auction (up to an advance level well in excess of $1 million)."

Merging parties should assume that the agencies would continue to have a strong preference for structural divestitures. Standalone conduct remedies will be viewed with skepticism, but they might still be accepted during merger investigations (*i.e.*, thereby helping to avoid litigation) in narrow circumstances in which (1) a divestiture is not possible, (2) when accompanied by strong evidence of efficiencies, (3) when a conduct remedy completely cures the potential anticompetitive harm, and (4) the government can effectively enforce the remedy.

4. Pointing to claims of strong downstream competition (and to Amazon) is not an automatic panacea for monopsony issues. The DOJ's Complaint suggests that the agencies will not assign much, if any, significance to evidence of strong competition *downstream* to mitigate *monopsony* concerns *upstream*. The Agencies' *Horizontal Merger Guidelines* state that "the Agencies [do not] evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell." However, this is easier said than done, especially in litigation. It might be difficult for the government to decouple alleged upstream harms from the reality of downstream effects as it seeks to prove its case in court.

Penguin and Simon & Schuster released a joint statement in response to the Complaint in which they stated that the publishing industry is and will remain highly competitive following the transaction. The companies indicate that they "compete with many other publishers including large trade publishers, newer entrants like Amazon, and a range of mid-size and smaller publishers all capable of competing for future titles from established and emerging titles." The Complaint attempts to diminish the significance of that competition, including from Amazon—one of several "Big Tech" firms that have been subject to scrutiny by the Biden Administration for its alleged market power. Threading that needle (among others) could prove challenging for the government during the litigation.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]*See* Michael A. Gleason & Lauren Miller Forbes, Executive Order Signals New Era in Antitrust Enforcement and Merger Review, 25 The M&A Lawyer 7, 1 (July/Aug. 2021).

[2]Memo from Federal Trade Comm'n Chair Lina M. Khan to Commission Staff and Commissioners re Vision and Priorities for the FTC of Sept. 22, 2021, *available at* https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

[3]Press Release, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), *available at* https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

THE EU ANTI-SUBSIDY REGULATION: IMPLICATIONS FOR M&A

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The European Union is readying revolutionary new powers for the European Commission ("the Commission") to combat distortions of competition resulting from subsidies from non-EU governments. The new regime, laid out in a proposed regulation ("the Anti-Subsidy Regulation") published in May 2021,[1] could be in effect as soon as mid-2023. The regulation includes new mandatory notification and approval requirements triggered by certain acquisitions, mergers and joint ventures that will apply alongside the existing EU and national merger control and foreign direct investment screening regimes.

The Anti-Subsidy Regulation addresses concerns that non-EU State-owned enterprises ("SOEs") could use foreign subsidies to tilt the competitive playing field. According to the impact assessment accompanying the Anti-Subsidy Regulation,[2] subsidized companies may overpay for acquisitions of EU businesses, crowding out potentially more efficient bidders and risking serious long-term harm to the functioning of the EU market. Case studies cited in the impact assessment focus on acquisitions by Chinese buyers. But the new notification requirements will likely impact mainly European and other western multinationals, who are most likely to participate in transactions triggering the regulation's thresholds.

Multinationals doing business in the EU or considering joint ventures with EU businesses will need to create new compliance systems to identify and quantify all governmental "financial contributions" they receive outside the EU over rolling three-year periods. They will also need to revise their transaction processes and documentation to take account of the new notification and approval requirements. Many groups will need to start this process well in advance of the regulation's effectiveness, depending on their activities.

Background

The Anti-Subsidy Regulation follows a June 2020 white paper on levelling the playing field as regards foreign subsidies ("the White Paper").[3] The White Paper was in turn inspired by criticism that the Commission's February 2019 prohibition of the proposed Siemens/Alstom merger failed to take account of competitive distortions caused by subsidies received by a Chinese competitor.

The regulation will create a unique hybrid of trade and antitrust tools, filling a hole in the EU's current toolkit. The Commission's trade defense rules offer no protection when non-EU subsidies distort investment decisions, market operations or pricing policies in beneficiaries' European operations, facilitate the acquisition of EU companies, or distort bidding in European public procurement. Conversely, the Commission's powers to review and approve State aid do not apply to subsidies granted outside the EU.

The Anti-Subsidy Regulation will give the Commission new powers—modeled on the Commission's traditional powers to investigate cartels and other antitrust offences—to investigate and redress distortions of competition by companies benefiting from "financial contributions" that arguably increase their profitability and thereby affect their competitive behavior in the EU. Presumably, these *ex officio* investigations will prioritize non-EU SOEs.

But the regulation will also impose new *ex ante* notification obligations—modeled on the EU Merger Regulation ("EUMR")—in relation to certain M&A transactions. As discussed in more detail below, the notification thresholds are based on a combination of revenue (or "turnover") and "financial contributions" received by group members from non-EU governments and entities "attributable" to non-EU governments.

The regulation will also impose a new requirement supplementing existing public procurement rules. Lead bidders will have to notify "financial contributions" received by themselves and their main suppliers and sub-contractors over the prior three years for all tenders valued at over €250 million (regardless of the amount of financial contributions received). The Commission's review may delay awards for up to 200 days.

The Anti-Subsidy Regulation joins a crowded EU legislative docket, including the Data Governance Act, Digital Services Act, Digital Market Act, AI Regulation and (soon) Data Act. But the Anti-

Subsidy Regulation has so far proved less controversial among EU stakeholders than some of these other measures and is expected to be approved by the end of 2022, in which case it would apply as from mid-2023.

Financial Contributions

The Anti-Subsidy Regulation distinguishes between three related concepts: "financial contributions," "foreign subsidies" and "distortions on the internal market." The Commission can only impose redressive measures or require commitments as a condition of approval where it finds that a "financial contribution" qualifies as a "foreign subsidy" that is likely to distort the EU internal market.

Multinationals' notification requirements are based on the financial contributions received by them and other transaction parties. "Financial contributions" are defined very broadly as "(i) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling; (ii) the foregoing of revenue that is otherwise due; or (iii) the provision of goods or services or the purchase of goods and services," whether provided by government authorities or public or private entities whose actions can be attributed to a non-EU country.

Notably, the definition of "financial contributions" includes many forms of government interaction that involve no subsidy, such as government contracts awarded pursuant to competitive tenders. Financial contributions also include support that may involve a subsidy but one that would be authorized under EU State aid rules, such as incentives for R&D or support of under-developed regions. The definition also catches purely local subsidies, such as a tax holiday granted by local authorities to encourage companies to locate a new office building or factory in their jurisdiction.

Based on this definition, many if not most multinationals receive financial contributions, especially considering the support granted to businesses worldwide during the COVID-19 pandemic. But identifying and quantifying these contributions is likely to be a complex exercise, especially for groups operating in many jurisdictions and/or sectors.

Notification Thresholds

The Anti-Subsidy Regulation's mandatory notification obligations, similar to the EUMR, apply to one group's, or "undertaking's," acquisition of sole control of another, the merger of two or more previously independent undertakings or parts of undertakings or the creation of a "full function" joint venture (generally defined as a joint venture with its own personnel, assets and market presence, as opposed to a joint venture formed to provide goods or services to its parents).

In the case of an acquisition or merger, concentrations will be notifiable if the target or at least one of the merging parties generates EU turnover of at least €500 million and the parties concerned received aggregate financial contributions in the three prior years of over €50 million. While the €50 million financial contribution threshold is quite low (especially considering the broad definition and rolling three-year period), the €500 million EU revenue threshold is double the comparable EUMR threshold. The thresholds seem to be designed to catch only acquisitions of (or mergers with) large European businesses. However, €500 million threshold has been criticized as too high, and the final figure seems likely to be significantly lower.

Moreover, the Commission will have the right to require notification of any transaction not meeting the thresholds if it suspects that the acquirers may have benefitted from foreign subsidies in the three years prior to the concentration, so long as it does so before the transaction's implementation. This flexibility may be inspired by the Commission's controversial decision to accept (and even encourage) Member State referrals of transactions below the EUMR thresholds, regardless of whether the transaction in question meets Member State review thresholds.

Full-function joint ventures will be notifiable if the joint venture itself or one of its parent groups generates aggregate EU turnover of at least €500 million and the joint venture and its parent groups received aggregate financial contributions in the three prior years over €50 million. As with the EUMR, the Anti-Subsidy Regulation will catch many joint ventures with little or no connection to the EU. Indeed, since the financial contribution threshold applies to the joint venture and its parent groups together, a single party could satisfy the turnover and financial contribution thresholds.

Unless the joint venture thresholds are modified in the legislative process, virtually any full-function joint venture, regardless of its geographic scope, could trigger notification if one parent is a multinational group with significant European revenues. Similarly, many joint acquisitions—a common practice of private equity groups and other financial investors, such as pension funds—will also trigger notification even where targets are not active in the EU.

Procedure

The Anti-Subsidy Regulation's notification process and timetable closely resemble the EUMR process, with an initial 25 working day review period followed by an in-depth 90 working day review period starting from the date of formal notification. Notified transactions cannot be closed while the review is pending.

Should the Commission find that the acquisition is facilitated by a foreign subsidy and distorts the Single Market, it could either accept commitments by the notifying party that effectively remedy the distortion or prohibit the acquisition after its in-depth review (contrary to the EUMR, remedy offers in the preliminary review period are not allowed). Commitments can include providing fair and non-discriminatory access to infrastructure; reducing capacity or market presence; refraining from making certain investments; licensing intellectual property rights on fair, reasonable and non-discriminatory terms; publishing R&D results; divesting assets; dissolving concentrations; and/or repaying the subsidies (with interest). Some of these measures could apparently reduce output and/or increase prices and thus run counter to generally accepted principles in merger remedies. On the other hand, the Commission could allow a transaction that would otherwise be prohibited based on a balancing of negative and positive effects (an option that is not available under the EUMR).

In contrast to the well-established criteria for evaluating the antitrust effects of concentrations in traditional merger review, the Commission will be ploughing new ground as it assesses the distortive effects of foreign subsidies in the M&A context. The Commission will no doubt draw on its experience assessing EU State aid, but analyzing potential distortions in the EU from dozens, or hundreds, of financial contributions in multiple sectors all over the world will present very different challenges compared to analyzing the effect of a single aid or aid scheme in the EU. Presumably, the Commission is working on guidelines so as to be ready to apply the regulation as early as 2023.

Similarly, the Commission is presumably working on implementing measures elaborating on the notification process and information required. Based on experience under the EUMR, it is likely that notifying parties will be expected to submit one or more draft notifications and answer questions from the case team before making the formal filing. These pre-notification discussions can and often do take as long or longer than the official review process.

The notification forms will presumably require notifying parties to provide detailed information on the financial contributions received by all parties concerned to enable the Commission to assess their potential effects in the EU. Again based on experience under the EUMR, a "simplified procedure" involving a streamlined notification form may be available for transactions meeting certain criteria. For example, a shorter form may be available where the financial contributions received by the parties are below certain value thresholds or are do not include the types of contribution considered most likely to distort competition. EUMR experience shows, however, that even simplified procedures can be time consuming and costly.

Action Items

The Anti-Subsidy Regulation will require significant efforts by multinationals, in particular to identify and quantify their financial contributions and to update their transaction processes and documentation. As mentioned, many if not most large multinationals are likely to receive financial contributions meeting the notification thresholds, especially in view of the significant support granted by governments all over the world during the pandemic.

Multinationals will need to design and implement new compliance programs to identify interactions with governments and government-related entities in all jurisdictions in which they do business, determine which of these qualify as financial contributions and quantify them. Unlike revenues, company accounting systems do not track financial contributions, so new reporting systems will need to be designed and implemented from scratch. Once potentially relevant interactions are identified, determining which qualify as financial contributions will involve a legal analysis drawing on experience with EU State aid law. Multinationals' new compliance programs will thus be complex and potentially time consuming. The time required will vary depending on the complexity of multinationals' operations and the number of jurisdictions in which they do business. Assuming the Anti-Subsidy Regulation applies as from early 2023, these efforts will likely need to be launched in early to mid-2022.

Large private equity firms and other financial investors will face special challenges, for several reasons. Their portfolio companies may operate in a wider variety of sectors than most multinationals, so identifying government interactions that may qualify as financial constitutions may require a broader range of expertise. Financial investors often have relatively thin and decentralized management and reporting structures compared to other multinationals, so updating these structures to comply with the regulation will require more significant changes. The members of financial investors' groups also change frequently owing to their practice of buying and selling companies. Private equity funds and other financial investors also likely receive financial contributions at multiple levels. In addition to receiving financial contributions at the portfolio company level, for example, limited partners commonly include governments, sovereign wealth funds, funds managing the pensions of public-sector employees and government-controlled financial institutions.

Multinationals will also need to review their transaction procedures and documentation. Current due diligence procedures will need to be revised to include the extent to which transaction counterparties receive financial contributions, which may involve significant delays if those counterparties have not implemented procedures to identify and quantify their financial contributions.

Standard transaction documents, which contain detailed obligations relating to filing merger and foreign investment notifications and obtaining approvals, will need to be revised to contemplate potential Anti-Subsidy Regulation filings as well. Standard merger agreements allocate regulatory approval risk and may require parties to accept certain obligations to obtain approvals, often through divestitures. These will need to be adapted to contemplate the types of commitments potentially required under the Anti-Subsidy Regulation. Related changes will be required to other provisions, including conditions precedent, representations and warranties and termination provisions.

The most onerous aspects of the Anti-Subsidy Regulation for M&A transaction parties derive from the definition of "financial contribution" and the thresholds applicable to full-function joint ventures. These aspects have so far not been a main focus of debate in the legislative process. Multinationals, in particular European-based multinationals who are most likely to trigger the notification thresholds, may consider advocating for changes to tighten these provisions and reduce the regulation's burden. Assuming the final regulation contains a notification requirement, however, these changes will not eliminate the need to prioritize the development of new compliance procedures.

Key Takeaways

Of the Anti-Subsidy Regulation's three main elements—*ex officio* investigative powers, mandatory notification and approval of certain concentrations, and notification of information on financial contributions in connection with certain public tenders—the new merger control regime will likely have the greatest impact for the largest number of multinational groups. Many if not most large multinational groups receive non-EU financial contributions well in excess of €50 million over three years, especially considering the massive assistance provided by governments worldwide to support companies during the COVID-19 pandemic.

While no notifications will be required until 2023 at the earliest, the regulation's impact will be felt long before. Whether or not a future transaction triggers a notification requirement, multinationals will need to develop and implement new programs long before then. The Commission's impact assessment significantly underestimates the resulting burden on business, as it focuses on the cost of collecting information for notifiable acquisitions, disregarding the compliance burden of identifying and quantifying financial contributions where no notification is required (as well as the notifications of potentially large numbers of non-EU joint ventures).

Preparing for the new notification requirements will require planning and significant efforts beginning well in advance of effectiveness. Multinationals, especially groups active in a large number of jurisdictions and/or sectors, would be well advised to take stock soon and plan accordingly. The best time to intervene to support common-sense changes in the legislative process is now.

ENDNOTES:

[1] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1982. *See* Jay Modrall, " 'Anti-Subsidy' Regulation: New EU Regulatory Hurdle

On the Horizon," *The M&A Lawyer*, Vol. 25, Issue 6, June 2021.

[2] https://ec.europa.eu/competition/international/overview/impact_assessment_report.pdf.

[3] https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf.

FTC RESURRECTS UNILATERAL PREAPPROVAL IN MERGER INVESTIGATION SETTLEMENTS TO HALT FUTURE "ANTICOMPETITIVE" M&A AND INTRODUCES CHANGES TO SECOND REQUEST REVIEWS

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The Federal Trade Commission ("FTC") revived a long-abandoned policy requiring that Commission orders settling FTC merger investigations include a "prior approval" clause that grants the FTC the unilateral authority to approve (or deny) certain future transactions for a minimum of 10 years. The FTC voted in July to restore the prior approval policy, and in October issued new guidance, in addition to its first merger settlement including a prior approval provision. In announcing the policy, the FTC stated its view that "too many deals that should have died in the boardroom get proposed because merging parties are willing to take the risk that they can 'get their deal done' with minimal divestitures." The FTC's dissenting commissioners, in a stinging and wide-ranging dissent, have called the effort a part of "the majority's desire to chill deal activity."

Although prior approval may affect a small absolute number of transactions, companies with a deal subject to a thorough FTC review need to consider the impact of prior approval on their M&A pipeline. Dealmakers also should pay close attention to how the FTC implements the policy, with a particular focus on the scope of prior approval clauses and whether the FTC exercises reasonable judgment in allowing deals without antitrust concerns to proceed. In the absence of restraint, expect more merger litigation with the FTC. It may cause some to reevaluate whether to pursue certain deals.

In September 2021, the FTC also announced several procedural changes to merger review. The goal was to make the FTC's investigation "more streamlined and more rigorous," stating the agency's "unduly narrow approach to merger review may have created blind spots and enabled unlawful consolidation."[1] Those changes are detailed below.

1. What Is the FTC's New "Prior Approval" Policy?

At the end of an FTC investigation into the competitive impact of a merger, the agency may (i) take no action (allowing the parties to close), (ii) challenge the transaction (through its administrative process and, if necessary, seek a federal court injunction against the parties' closing), or (iii) implement a settlement that permits the transaction to close subject to a divestiture or behavioral remedy. The merging parties may agree to a settlement with the FTC or contest the FTC's challenge in court, which may include "litigating the fix." In the latter context, parties sign a contingent divestiture agreement with a divestiture buyer and argue to the court that their prepackaged remedy solves the concerns that are the subject of the FTC's complaint.

Going forward, FTC merger settlements will include language that requires the buyer to notify the FTC of certain future transactions prior to closing those transactions, and that grants the FTC authority to reject a planned transaction at its sole determination.[2]

- All divestiture orders will include prior approval provisions for every relevant market in which the FTC alleges harm, for a minimum of 10 years ("Prior Approval").
- The FTC likely will seek a potentially broader prior approval order for parties that abandon a transaction *after* the agency files a complaint.
- The FTC is less likely to seek prior approval where parties abandon their transaction before the FTC expends significant resources (*i.e.*, prior to substantial compliance with a second request, the lengthy discovery request through which the FTC seeks information from the parties to inform its investigation).
- The FTC may seek prior approval orders that cover product and geographic markets beyond those affected by the proposed transaction, including related, adjacent, and/or complementary markets. As explained below, by going beyond the market at issue, prior approval could increase the burden and risks for companies subject to the requirement.

All divestiture buyers will need to consent to prior approval for any future resale of the divested business, for a minimum of 10 years, a requirement not included in the FTC's previous policy.

Although not implied by the FTC's policy statement, one should expect there may be some room to negotiate the scope of the Prior Approval.

2. Why Is the FTC Changing Its Policy Now?

The change is another step in the efforts of the current FTC to utilize more demanding standards, aggressive enforcement, and new tools to block or deter mergers. The FTC withdrew its prior policy of requiring prior approval clauses in 1995, citing the success of the Hart-Scott-Rodino Act ("HSR") premerger notification program at adequately protecting the public interest in merger enforcement. The current FTC claims Prior Approval is necessary to prevent "facially anticompetitive deals," preserve Commission resources, and detect deals below HSR reporting thresholds.

In a strongly worded dissent, the dissenting commissioners held little back, calling parts of the Commission's prior approval policy "bonkers crazy."[3] The dissent argued the new policy abrogates the HSR Act, discourages procompetitive transactions, will stifle economic growth, and will result in more, rather than less, strain on Commission resources. Given the level of opposition, the Commission's new prior approval policy may not have a long life if the Commission's political makeup changes.

3. Will the Prior Approval Policy Affect My Transaction?

Both the Department of Justice Antitrust Division ("DOJ") and the FTC review mergers, but only the FTC has adopted a prior approval policy (so far). The DOJ typically requires parties to agree to provide it with prior notice of future transactions valued below the HSR threshold if in the same market that is the subject of the settlement. But here, the burden remains with the DOJ to obtain a federal court injunction to block a transaction, unlike the FTC's prior approval requirement in which the merging parties have to convince the Commission to grant approval.

The FTC's Prior Approval policy could affect only a small number of transactions. The DOJ and the FTC receive premerger filings for approximately 2,100 transactions a year.[4] Roughly 2% to 4% of those transactions result in a second request investigation (roughly half by the DOJ and half by the FTC), and not all of those investigations result in settlements. Therefore, Prior Approval is not likely to be a concern in the large majority of transactions filed with the U.S. agencies.

4. What Are the Consequences of Prior Approval?

Although the absolute number of transactions affected is likely to be small, the policy might have outsized consequences for companies subject to Prior Approval, depending on how the FTC implements the policy. If merging parties are unwilling to accept an FTC settlement (or there is no settlement offered), the FTC typically must obtain a federal court injunction to block the deal by proving that the transaction will harm competition. Going forward, the FTC will claim that Prior Approval grants it the unilateral right to approve or deny a future transaction subject to the order without resorting to federal court or its own administrative process. The FTC also likely will assert that merging parties have no legal recourse if it does not grant its approval.

The FTC also would not be bound by the timing rules of the HSR Act, which delays closing only for a certain period of time after the parties have complied with the FTC's second request. As a result, Prior Approval creates new uncertainty as to timing and closing of future deals subject to its terms.

The FTC may face fewer objections if it largely limits the scope of Prior Approval to the product and geographic markets at issue in the matter before it, and if it applies historic agency standards and merger law to its review of transactions subject to Prior Approval. If the FTC exercises restraint, there might be little difference in outcomes for transactions that would anyway be reportable under the HSR Act.

Alternatively, if the FTC broadly imposes Prior Approval requirements, subjects those transactions to a higher burden for clearance, and/or takes substantially longer in its reviews, more companies may litigate mergers with the FTC than agree to a Prior Approval settlement. There also could be disputes with the agency about whether the preapproval agreement actually applies to a new proposed merger, and some may challenge the FTC's authority to force prior approval settlements.

5. Should We Expect Expansive FTC Prior Approval Requirements?

The FTC warns that it may seek Prior Approval for future transactions involving product or geographic markets *beyond* the scope of the markets in which the FTC alleges harm from the initial transaction. The FTC says it will consider whether to seek that more expansive Prior Approval based on the following non-exhaustive list of factors: whether (i) the current transaction is substantially similar to a prior transaction the FTC challenged, (ii) the relevant market is already concentrated or has seen significant consolidation, (iii) the transaction significantly would have increased concentration, (iv) one of the parties had market power, (v) either party has a history of acquisitions in the same or related markets, or (vi) the transaction would have created anticompetitive market dynamics. Those stated considerations may not be much of a roadmap because they are similar to the factors that the FTC considers when deciding whether or not to challenge or seek a remedy in a merger, and therefore may apply to nearly all deals in which the FTC would seek a divestiture and order.

6. How Long Will Prior Approval Orders Last?

A minimum of 10 years, although the FTC will consider longer periods.

7. Has the FTC Invoked Its Prior Approval Policy in Any Deals Yet?

Yes. On the same day as it announced the policy, the FTC entered into a settlement with DaVita, allowing its acquisition of the University of Utah's dialysis clinics to proceed subject to an FTC order with a Prior Approval obligation.[5] DaVita, a "particularly acquisitive company" according to the FTC, must obtain FTC approval before acquiring any new ownership in a dialysis clinic for the next 10 years, anywhere in Utah, a geographic market broader than the City of Provo market alleged in the FTC's complaint. In a concurring statement, Republican Commissioner Wilson cautioned that her vote in favor of the prior approval provision "should not be construed as support for the liberal use of prior approval provisions foreshadowed" by the FTC's Democratic majority.[6]

Since the DaVita settlement, the FTC has included Prior Approval requirements in several merger settlements. For example, the FTC's settlement with Price Chopper related to its acquisition of Tops Market requires divestiture of 12 Tops supermarkets to C&S Wholesale Grocers and a Prior Approval provision.[7] The Prior Approval provision requires that Price Chopper obtain FTC approval before any future acquisition of a supermarket location in the counties in upstate New York and Vermont where the divested stores are located.[8] The FTC's prior approval extends to acquisition of any business that has even one store in any of those counties.

In another example, the FTC entered into a merger settlement with ANI Pharmaceuticals, Inc. and Novitium Pharma LLC that requires the parties to seek prior approval from the FTC for future acquisitions for the two relevant pharmaceutical products as well as two additional drug products because although the parties do not currently compete for the sale of these two products, one of the parties is a current competitor and the other "owns an unexecuted option to acquire a similar product."[9]

8. Will Prior Approval Apply if the Parties Abandon Their Transaction?

The FTC says it will be less likely to seek Prior Approval if the parties abandon their transaction during the FTC's investigation and before the parties have substantially complied with the agency's second request.[10] Although that part of the policy is not likely to affect a large number of transactions, it creates a new risk for companies to consider when making an HSR filing for any deal. Indeed, as the dissenting commissioners stated: "God forbid we should do our job of analyzing deals notified pursuant to the HSR Act."[11]

In contrast, the FTC says it may seek Prior Approval, again based on the six factors above, in cases where the parties abandon a transaction after the FTC initiates or threatens litigation.[12] Parties that abandon a transaction are not likely to consent voluntarily to an FTC order with prior approval, but the FTC could initiate litigation in its administrative court to attempt to obtain an order with prior approval. For nine years in the 1980s and 1990s, the FTC litigated its attempt to impose a prior approval requirement on Coca-Cola after Coca-Cola abandoned its bid to acquire the Dr Pepper Company.[13] Citing "grounds that future Coca-Cola acquisitions of branded concentrate firms could raise competitive concerns given the conditions in the soft-drink market," the FTC issued a complaint alleging that Coca Cola's proposed, but abandoned, acquisition of Dr Pepper violated the antitrust laws and sought an order requiring prior approval for certain future transactions. The FTC abandoned that effort in 1995 when it withdrew its prior approval policy.[14]

In a statement dissenting to the withdrawal of the 1995 prior approval policy (and in reference to the *Coca-Cola* case), Commissioner Wilson expressed concern about a "vindictive approach" against a party that would have the "temerity to exercise its legal rights and litigate."[15]

9. What Does the FTC's New Policy Say About Buyers of Divested Businesses or Assets?

The FTC also will require the buyers of divested businesses or assets to agree to prior approval for any future sale of those assets, *for a minimum of 10 years*.[16] According to the agency, "this will ensure that the divested assets are not later sold to an unsuitable firm that would contravene the purpose of the Commission's order."[17] The FTC has in some past transactions required divestiture buyers to agree to prior approval terms; now the FTC intends to require all buyers to do so.

For example, in the Price Chopper/Tops transaction, the divestiture buyer, C&S Wholesale Grocers, is prohibited from selling the acquired stores for three years, except to a buyer that has been approved by the FTC, and it must obtain prior approval from the FTC before selling an acquired store to a buyer that operates one or more supermarkets in the same county for an additional seven-year period.

The 10-year obligation will present a new twist in parties' efforts to identify suitable divestiture buyers, as now a buyer may be required to hold divested assets for at least a decade if unable to obtain FTC approval for the resale of that business. It may also undercut the value of the divestiture sale or discourage buyers that see an opportunity to acquire the business, improve its operations or add value by combining it with another business, and then resell it to a third party at a higher value.

10. What Changes Did the FTC Recently Make to Merger Review?

In September, the FTC announced changes to its merger review process, which it says are designed to address an increase in filings under the HSR Act, ensure its merger reviews are "more comprehensive and analytically rigorous," provide "heightened scrutiny to a broader range of relevant market realities," and to "better identify and challenge the deals that will illegally harm competition."[18] The most significant changes include:

- Expanding the scope of its merger investigations beyond those facets that typically associated with the consumer welfare standard, which is the long-standing global consensus standard in antitrust reviews to determine whether harm occurs from a merger. In a nutshell, under the consumer welfare standard, antitrust enforcers intervene in markets or acquisitions only if the conduct harms consumers in a relevant market. The FTC has begun reviewing additional facets of market competition, such as "how a proposed merger will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete." While the announcement did not elaborate on specific inquiries or how the agency will evaluate information it receives from those queries, there are public reports that FTC requests have include questions about unionization, and environmental, social, and governance ("ESG") issues.

- Requiring a company to provide what it calls "foundational information" before making modifications to a second request, which parties regularly seek to ease the burden of compliance or limit the scope of the investigation. This information includes identifying and describing the "business responsibilities of employees and agents responsible for relevant lines of business, as well as those employees responsible for negotiating, analyzing, or recommending the transaction." The FTC will also require information on how a company maintains responsive data.

- Requiring "information about how [a company] intends to use e-discovery tools before it applies those tools to identify responsive materials," aligning with the DOJ's more demanding approach.

- Rejecting "partial privilege logs" (or abbreviated logs of document withheld on a claim of privilege), which aligns with the DOJ's approach.

- The FTC will expand internal access to second requests and other requests for information to all commissioners and relevant agency offices. Access was previously given only at the Chair's discretion and direction.

In addition, the FTC announced plans to revise its Model Second Request to reflect the changes above. The Model Second Request is a template form for second requests issued by the agency. That document provides parties with guidance about the types of information and materials the agency requests as well as a basis for negotiations on the scope of a second request.

Overall, these modifications to merger review will likely increase the parties' burden for complying with FTC merger investigations, both in terms of cost and time. The parties will need to gather additional information before collecting and reviewing materials it believes to be responsive to the FTC's inquiries. Moreover, the FTC is likely to request submission of information on topics not previously required in second requests, including labor and ESG issues.

Conclusion

How the FTC implements Prior Approval will determine its real impact. If the FTC exercises restraint by limiting the scope of Prior Approval, applying historic agency guidance and merger law, and completing reviews expeditiously, then the outcome under Prior Approval may not differ meaningfully for transactions that would have been subject to HSR review anyhow. If the FTC adopts a more aggressive stance, more merger litigation is likely, and it may cause some to reevaluate whether to pursue certain deals.

Although Prior Approval may affect a small number of companies and transactions in absolute terms, it could have outsized consequences for the M&A strategies of companies subject to it. Companies evaluating a transaction that may result in an FTC settlement need to consider not just the antitrust risk of the deal at hand, but also the potential impact that a 10-year (or more) preapproval clause may have on the company's M&A pipeline and the sequencing of those deals.

Prior Approval might have its greatest effect on parties that have been making or are considering serial acquisitions, businesses in industries expecting further consolidation or subject to repeated M&A transactions, companies with significant market positions, and buyers acquiring targets that the FTC may see as critical future competitors.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]Federal Trade Commission, Bureau of Competition, Blog Post, "Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave," (Sept. 28, 2021), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined.

[2]*See* Federal Trade Commission, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[3]*See* Federal Trade Commission, Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Philips (Oct. 2021) at 6, *available at* https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

[4]Federal Trade Commission & U.S. Dep't Of Justice, Antitrust Div., Hart-Scott-Rodina Annual Report Fiscal Year 2020 (Oct. 2021) at 1, *available at* https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf.

[5]Order to Maintain Assets, In the Matter of DaVita Inc. and Total Renal Care, Inc. (Oct. 25, 2021) at 12-13, *available at* https://www.ftc.gov/system/files/documents/cases/davita_oma_9_24_final.pdf.

[6]Federal Trade Commission, Concurring Statement of Commissioner Christine S. Wilson In the Matter of DaVita Inc., and Total Renal Care, Inc. (Oct. 2021) at 2, *available at* https://www.ftc.gov/system/files/documents/public_statements/1597906/concurring_statement_of_commissioner_christine_s_wilson_in_the_matter_of_davita_inc_and_total_renal.pdf.

[7]In the Matter of Price Chopper/Tops Markets, Press Release (Nov. 9, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/11/ftc-requires-northeast-supermarkets-price-chopper-to-sell-12-stores.

[8]In the Matter of Price Chopper / Tops Markets, Docket No. C-4753, Order to Maintain Assets, (Nov. 8, 2021) at 13, *available at* https://www.ftc.gov/system/files/documents/cases/2110002pricechoppertopsoma.pdf.

[9]*See e.g.*, In the Matter of ANI / Novitium, Press Release (Nov. 10, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/11/ftc-requires-generic-drug-marketers-ani-pharmaceuticals-inc.; see also In the Matter of ANI / Novitium, Docket No. C-4754, Order to Maintain Assets (Nov. 10, 2021), *available at* https://www.ftc.gov/system/files/documents/cases/2110101c4754aninovitiumoma.pdf.

[10]*See* Federal Trade Commission, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 2021) at 2, *available at* https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[11]Federal Trade Commission, Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Philips (Oct. 2021) at 4, *available at* https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

[12]*See* Federal Trade Commission, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 2021) at 2, *available at* https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[13]*See The Coca-Cola Co.*, Docket 9207, Press Release (May 18, 1995), *available at* https://www.ftc.gov/news-events/press-releases/1995/05/coca-co

la-company.

[14]*See* Federal Trade Commission, Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases (Aug. 3, 1995), *available at* https://www.ftc.gov/system/files/documents/public_statements/410471/frnpriorapproval.pdf.

[15]Federal Trade Commission, Oral Remarks of Commissioner Christine S. Wilson (Jul. 21, 2021) at 8-9, *available at* https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf.

[16]*See* Federal Trade Commission, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 2021) at 3, *available at* https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[17]*Id.*

[18]Federal Trade Commission, Bureau of Competition, Blog Post, "Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave," (Sept. 28, 2021), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined.

STOCKHOLDER NOMINEES BARRED FOR NONCOMPLIANCE WITH "CLEAR DAY" ADVANCE NOTICE BYLAW

By Andre G. Bouchard, Jaren Janghorbani, Laura C. Turano, Krishna Veeraraghavan and Steven J. Williams

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In *Rosenbaum v. CytoDyn Inc.*,[1] the Delaware Court of Chancery, in an opinion by Vice Chancellor Slights, upheld a board's decision to exclude stockholder nominees from being considered at CytoDyn's annual meeting based on deficiencies in the stockholders' notice required by the company's advance notice bylaw. The court found that the board had not engaged in any manipulative or inequitable conduct in rejecting the nominees. Even though the board waited almost one month before notifying the stockholders of deficiencies in their nomination notice, the court emphasized that the stockholders had not submitted their notice until close to the deadline, which left no time to fix the deficiencies, and that the bylaw did not in any event require the board to engage in an iterative process with the proponent to fix deficiencies.

Background

Plaintiff stockholders of CytoDyn provided advance notice of their nominations to CytoDyn's board the day before the advance notice deadline in CytoDyn's "commonplace" advance notice bylaw. One month after the deadline, the board sent a deficiency letter to the plaintiffs regarding the disclosures in their nomination notice. The deficiencies identified by the board included the plaintiffs' failure to disclose (i) the identity of a limited liability company formed by one of the plaintiffs (who was also a nominee) to fund the proxy contest, as well as the limited liability company's donors, and (ii) the plaintiffs' support of an acquisition by CytoDyn that had been previously considered and rejected by the board, pursuant to which CytoDyn would acquire a company with ties to two of plaintiffs' nominees and employ one of the nominees who also had patent disputes with CytoDyn. Plaintiffs attempted to address the deficiencies shortly after their receipt of the deficiency letter, but well after the advance notice deadline. Upon the continued rejection of their nominations by the CytoDyn board, the plaintiffs filed suit in the Court of Chancery, seeking an injunction requiring the board to place the plaintiffs' nominees on the ballot for the CytoDyn annual meeting scheduled for October 2021. The court considered the matter after a trial on a paper record.

Takeaways

The court concluded that the CytoDyn board did not engage in manipulative or inequitable conduct, and therefore, denied the plaintiffs' request for an injunction. Key takeaways from the court's opinion include the following:

Delaware courts continue to give deference to a board's adoption of an advance notice bylaw where the bylaw was adopted on a "clear day" and where its terms are not "overtly unreasonable." In Rosenbaum, the plaintiffs "wisely" did not challenge, and the court did not review, the CytoDyn board's adoption of the advance notice bylaw. The bylaw had been adopted about six years earlier, was not adopted in response to any corporate threat and had terms the court characterized as "commonplace," including that it required timely notice of nominations in a 90 to 120 day window prior to the one-year anniversary of the preceding year's annual meeting. Thus, the Rosenbaum opinion does not change Delaware courts' approach to the review of similarly adopted advance notice bylaws, which, as the court observed, "serve an indisputably legitimate purpose." So, companies thinking of enhancing their advance notice bylaws would be better served to do so on a "clear day," rather than waiting until there is a precipitating event.

Stockholders can obtain equitable relief if they can demonstrate "compelling circumstances" that the board's enforcement of the bylaw is inequitable under Schnell v. Chris-Craft Indus., Inc. The court rejected plaintiffs' argument that enhanced scrutiny under *Blasius* applied—which standard applies to a court's review of board actions taken for the primary purpose of interfering with stockholder voting rights—because there was no evidence of "manipulative conduct" by the board. The court did not, however, automatically apply the business judgment rule, instead invoking *Schnell* and observing that equitable relief might be appropriate if the plaintiffs show that an advance notice bylaw, *as applied in the particular circumstances*, denied stockholders a fair opportunity to nominate director candidates. Indeed, as the court put it, "[a]ny attempt to utilize the corporate machinery and the Delaware Law for the purposes of perpetuating oneself in office by obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest must be denied because those are inequitable purposes, contrary to established principles of corporate democracy."

Here, however, the court found no such compelling circumstances. The nomination notice was deficient on at least the two disclosures discussed above that were responsive to the information required by the advance notice bylaws, either of which according to the court would have justified the board's rejection of the nomination notice. Specifically, according to the court, disclosure of plaintiffs' supporters was "vitally important information" and disclosure of plaintiffs' support of the acquisition was information about a possible future transaction that would be material to stockholders. Further, the board's one-month delay in responding to the nomination notice was not inequitable because the stockholders chose to submit the notice on the eve of an unambiguous deadline with the full understanding that the bylaws did not provide stockholders an opportunity to cure deficiencies later. The court wrote, "[g]iven that Plaintiffs waited until the last minute to submit their Nomination Notice, they were obliged to submit a compliant notice. They did not do so."

Boards should be mindful that the Delaware courts' review of advance notice bylaws depends on the specific circumstances before the court. In upholding the board's decision, the court emphasized that the particular bylaw at issue, unlike many advance notice bylaws, did not set forth a procedure to cure deficiencies beyond the deadline. Under a different bylaw, the board's duties would be evaluated differently. Furthermore, the court observed in dicta that even without an express cure period in the bylaw, it would have been harder for the board to justify silence if the nomination notice had been made with ample time before the deadline to correct deficiencies.

This article is not intended to provide legal advice, and no legal or business decision should be based on its content.

ENDNOTES:

[1]*Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140 (Del. Ch. 2021). *See* https://courts.delaware.gov/Opinions/Download.aspx?id=325470.

DELAWARE SUPREME COURT OVERRULES *GENTILE* CARVE-OUT, HOLDING AN IMPROPER TRANSFER OF ECONOMIC VALUE & VOTING POWER TO A CONTROLLING STOCKHOLDER THROUGH AN EQUITY OVERPAYMENT IS A DERIVATIVE CLAIM

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On September 20, 2021, in a decision authored by Justice Karen L. Valihura, the Delaware Supreme Court sitting *en banc* reversed the denial of defendants' motion to dismiss breach of fiduciary duty claims brought by former stockholders of TerraForm Power, Inc. (the "Company").[1] Plaintiffs alleged that a private placement of stock to the Company's controlling stockholder at a price that undervalued the shares diluted the financial and voting interest of the minority stockholders. The trial court found that the claims were nearly identical to corporate overpayment claims asserted by former stockholders and upheld as "direct"—rather than "derivative"—by the Delaware Supreme Court in *Gentile v. Rossette*.[2] Reversing, the Delaware Supreme Court reaffirmed the "classic" test for distinguishing stockholder "derivative" claims from "direct" claims established in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*[3], and expressly overruled *Gentile* and its carve-out from *Tooley*.

Stockholder "derivative" claims belong to the corporation, but may be asserted by current stockholders (who were also stockholders at the time of the alleged wrongdoing) on behalf of the corporation (subject to various limitations). Claims that are "direct" can be asserted directly by the allegedly injured stockholders themselves. The Delaware Supreme Court held in *Tooley* that the determination "must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"

However, in *Gentile*—decided two years after *Tooley*—the Delaware Supreme Court addressed breach of fiduciary duty claims for the alleged issuance of stock for inadequate value to a controlling stockholder, resulting in the transfer of economic value and voting power from the minority stockholders. The Court held that the claims could be maintained by former stockholders as direct claims.

In this case, the Delaware Court of Chancery noted that "dilution claims" such as those asserted by plaintiffs "are classically derivative, *i.e.*, the quintessence of a claim belonging to an entity: that fiduciaries, acting in a way that breaches their duties, have caused the entity to exchange assets at a loss." The Court explained that plaintiffs' claims thus "neatly fall into the derivative category" under *Tooley* notwithstanding that it was the controlling stockholder that "allegedly cause[d] a corporate overpayment in stock and consequent dilution of the minority interest." But the Court of Chancery concluded that it was "not free" to diverge from the Delaware Supreme Court's decision in *Gentile* where the facts alleged "fit *Gentile*'s transactional paradigm to a T."

The Delaware Supreme Court confirmed that plaintiffs' claims are derivative under *Tooley* "because they allege an overpayment (or overissuance) of shares to the controlling stockholder constituting harm to the corporation for which it has a claim to compel the restoration of the value of the overpayment." The Court explained that "to plead a direct claim under *Tooley*, a stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation," which plaintiffs could not do here.

As to *Gentile*, the Court concluded: "Carving out an exception to the *Tooley* test and allowing for a separate, direct claim in such circumstance presents both practical and doctrinal difficulties." For instance, the Court noted that the presence of a controlling stockholder "should not alter the fact that . . . equity overpayment/dilution claims are normally exclusively derivative because the *Tooley* test does not turn on the identity of the alleged wrongdoer." The Court also highlighted that courts have had difficulty applying *Gentile* in a logically consistent way. Further, the Court noted that *Gentile* could create the problem of double recovery, where stockholders assert direct claims and the corporation asserts its own parallel claims for which the recovery would flow to the stockholders.

ENDNOTES:

[1]*Brookfield Asset Management, Inc. v. Rosson*, 2021 WL 4260639 (Del. Sept. 20, 2021).

[2]*Gentile v. Rossette*, 906 A.2d 91 (Del. 2006).

[3]*Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

UNFORCED ERRORS AND THE DIMINUTION OF THE FTC

By Christine S. Wilson

Christine S. Wilson is a Commissioner in the Federal Trade Commission. The following is edited from remarks that she made on November 9, 2021, at the ABA Antitrust Law Section's 2021 Fall Forum.

I am serving my third stint at the FTC. In law school, I was a law clerk in the Bureau of Competition. I saw firsthand the commitment and talent of the staff under Chairman Janet D. Steiger, perhaps the most beloved FTC leader in FTC history. I returned in 2001 as Chief of Staff to FTC Chairman Timothy J. Muris. And in 2018, I was honored to become a Commissioner.

During my journey from law clerk to Commissioner, I saw the FTC become one of the most respected institutions in America. I watched the agency develop a leading voice internationally. I witnessed the friendship of Democrat Robert Pitofsky and Republican Timothy J. Muris. They shared a vision, forged in the 1989 ABA report on the FTC, that they later implemented as FTC Chairmen. I have seen many other remarkable FTC leaders. But most importantly, I have seen the diligence and expertise of career staff who serve consumers, year after year.

Now we have new leadership. They've declared that everything I witnessed was a failure—a 40-year failed experiment. The Clinton administration, with Anne Bingaman, Joel Klein, Doug Melamed, and Bob Pitofsky—all failures. The Obama administration, with Christine Varney, Bill Baer, Jon Leibowitz, and Edith Ramirez, failures all. My mentor Jim Rill, who rewrote the merger guidelines and sparked the creation of the International Competition Network, is a failure in their eyes.

I disagree. It is the *new* path that is likely to fail. Today, I will discuss four mistakes the Neo-Brandeisians are making that will almost certainly lead to the failure of their agenda . . . I disagree with many of their goals, so their failure won't keep me up at night. Here's what does keep me awake: I fear damage to the economy and grave harm to the institution and FTC community that I love.

Let's turn to the four mistakes.

Mistake 1: Embracing the Mistakes of the Past

The Book of Ecclesiastes teaches there is nothing new under the sun. The Neo- Brandeisians prove this to be true. Instead of devising new solutions for their concerns, they are resurrecting past policy mistakes.

First, the Neo-Brandeisians embrace the interventionist regulatory regimes that once governed our transportation sector. They ignore that the economic woes through the 1970s—amid stagflation—demanded reforms to the bloated regulatory state of that era. On a bipartisan basis, policymakers concluded that these attempts to regulate competition failed. The ICC's regulation of railroads led to mission creep and stunted innovation. The CAB's regulation of airlines caused high prices that denied travel to average Americans. There is widespread acknowledgement today that deregulation brought great benefits to consumers.[1] Even Chair Khan wrote of the CAB in 2012 that "any regulatory regime can degenerate and wind up stifling competition."[2] Yet the Cicilline Report, which Chair Khan co-authored, holds up transportation regulations as a model for Big Tech.

Given the breadth of President Biden's Executive Order, there is little reason to believe this movement will stop with Big Tech. When I note the historical failures, I am told that this time, we'll do it smartly. Forgive me for being dubious.

One way of regulating competition is through rulemaking. And this is the second mistake of the past that our new leadership will embrace.[3] Never mind pushback from Congress in the 1970s and 1980s that nearly led to the agency's demise.[4] Remember, this time we are going to do it smartly.

Third, the Neo-Brandeisians embrace merger policy as it existed into the 1970s. They complain that economic proof and investigations are difficult and costly,[5] and that generalist judges struggle with economic analysis anyway.[6] They ignore that the 2010 Horizontal Merger guidelines have assisted courts in the incorporation of new economic learning while strengthening merger review.[7] They favor the 1968 Guidelines, which recommended challenging deals in which each party has a 5% share.[8] As precedent for the changes, they cite merger cases from the 1960s blocking transactions based on tiny increases in share.[9]

But early merger review was a mess. For example, the standards were unpredictable. Justice Stewart wrote that the "sole consistency . . . in litigation under [Section 7 is that] the Government always wins."[10] And early merger review relied on strict structuralism rather than nuanced economic analysis that examines actual harm to consumers . . . Before we tear down today's frameworks, we should understand *why* we do things the way we do. Without careful assessment, the Neo-Brandeisians are doomed to repeat the mistakes of the past.

Mistake 2: Going It Alone

The Neo-Brandeisians are not only ignoring the past—they also are ignoring Congress and the judiciary. Disregarding the boundaries imposed by our statutory authority and judicial precedent[11] is conveniently characterized as employing all the tools available to the FTC.[12] But these actions are more accurately described as unilaterally charting a course for the FTC which will certainly trigger blowback.

Consider the HSR Act, a Congressional compromise that gave enforcers advance notice of deals and parties the benefit of repose. HSR review now faces death by a thousand cuts. We have hit month nine of a "temporary" and "brief" suspension of early termination.[13] Letters are sent to parties when their waiting periods expire, warning them to close at their own risk. Is the investigation ongoing? Is there a set amount of time the parties should wait? No one knows![14] The new prior approval policy will flip the burden of proof and capture many deals below statutory thresholds. And sprawling investigations covering non-competition concerns exceed our Clayton Act authority.

These policy changes impose a gratuitous tax on merger activity—anticompetitive and procompetitive alike. There are costs to interfering with the market for corporate control, especially as we attempt to rebound from the pandemic. If new leadership wants the HSR Act rewritten, they should persuade Congress to amend it rather than taking matters into their own hands.

The planned rulemaking binge will ignore both Congress and the public. The majority changed our rules of practice to limit stakeholder input and consolidate rulemaking power in the chair's office. In

Commissioner Phillips' words, these changes facilitate more rules, but not better ones.[15] And these rules face significant litigation risk. It's unclear whether the FTC even has substantive competition rulemaking powers. We could ask Congress to clarify this authority—but that would take too long.

Leadership also intends to ignore judicial precedent regarding the scope of Section 5. The majority recently withdrew the bipartisan Section 5 Policy Statement, viewing it as too restrictive.[16] The now-rescinded Bipartisan Section 5 Policy statement enunciated three fundamental principles: (1) the Commission will be guided by the public policy of promoting consumer welfare; (2) conduct will be evaluated considering both likely harm to competition and procompetitive justifications; and (3) a standalone Section 5 case would be less likely when the competitive harm could be addressed by the Sherman and Clayton Acts. When the FTC pushed the limits with standalone Section 5 cases in the 1980s, courts of appeals three times rejected those attempts.[17] This overreach is especially concerning given the Supreme Court's unanimous *AMG* decision—why invite another rebuke? The judiciary will not view kindly the FTC's disregard for statutory language, actual evidence of harm, and the Constitution.

Certain proposals also threaten to ignore state level authority and the work of state attorneys general. For example, Commission leadership supports rulemaking initiatives for non-competes and other unfair contract terms. First, this rhetoric mischaracterized the ability of current antitrust laws to address labor antitrust concerns. But just as importantly, these proposals do not take into account the work of state attorneys general to protect their citizens from illegal non-competes, no-poach, and similar agreements. This idea of FTC rulemaking also does not consider that states function as laboratories of democracy, a phenomenon championed by Louis Brandeis. Louis Brandeis hated big government, and Neo-Brandeisians would do well to remember this aspect of his legacy.

Finally, leadership is ignoring the preference of Congress that we remain bipartisan. Bipartisanship and collegiality historically have set the FTC apart. But this fabric has been shredded, which is detrimental to our mission. The FTC is an independent agency—but it is not an island. We cannot ignore our Congressional appropriators and oversight committees, and we cannot ignore legal precedent.

Mistake 3: Shunning the Agency's Actual Experts

The FTC is filled with dedicated staff. And we consistently rank at or near the top of "Best Places to Work" among mid-sized federal agencies. But current leadership has sidelined and disdained our staff. We've had notable departures, and more are coming. Without good people, we can't achieve our mission.

So why this brain drain? First, the Chair early on forced staff to cancel public appearances. When staff participate in external events, it enhances their expertise and job satisfaction while educating stakeholders about our agenda. But this win-win scenario now violates the rules.

Second, important staff work has been sidelined. Our Office of International Affairs works with global counterparts to promote best practices and minimize conflicting outcomes in investigations. Our Office of Policy Planning engages in key policy initiatives. These staff members are now reviewing merger filings, which is not their competitive advantage. An "all hands on deck" approach is okay when necessary—but I doubt that it is. Merger filings have increased, but DOJ is not facing similar difficulties. I suspect that policy changes are the larger driver of this development.

Third, the Neo-Brandeisians have trashed staff for superficial analysis, mischaracterized the scope of staff's investigations and then labeled those investigations flawed and ineffective, and requested that the Inspector General conduct a review of staff's investigations—not an effective method of rallying the troops.

Fourth, Neo-Brandeisians apparently believe that because government officials can move to the private sector, their decisions are motivated by the interests of future employers. In reality, many staff are sympathetic to the goals of leadership—but, as one staffer lamented to me, leadership hasn't taken the time to ask.

Fifth, staff have become a convenient scapegoat. Exhibit A: politicians are shifting blame for gas price increases to the FTC. Many factors contribute to rising gas prices, including the stated goal of this Administration to transition away from oil and gas. But leadership has embraced the political message that flawed merger review has facilitated collusive practices among gas stations.[18] I worked with Peter Richman, whose shop reviews these mergers, during my tenure as a law clerk. I guarantee that Peter Richman is not letting harmful deals through. (Exhibit B is having the Office of Public Affairs take the blame for publishing the prior approval policy without the dissents of sitting Commissioners.)

Sixth, leadership routinely fails to solicit the advice of our experienced staff. I do not always *agree* with staff, but I *always* benefit from their perspective . . .

Mistake 4: Fostering Confusion and Maximizing Discretion

The fourth mistake of leadership is their choice to foster confusion and maximize discretion. For starters, the FTC repealed the Vertical Merger Guidelines, but DOJ did not. The new guidelines were universally accepted as a significant improvement over the previous non-horizontal guidelines. This divergence is the antithesis of good government and provides ammunition to those who seek to consolidate antitrust enforcement at DOJ.

Even if DOJ rescinds the guidelines, we still do not know how the FTC will analyze vertical mergers. But the majority's statements are concerning. Two leading experts wrote that the majority's description of EDM was "flatly incorrect" and that "the majority appears not to have consulted with their own economists."[19] The experts also described the majority's discussion of efficiencies and statutory text as "baffling. Leadership would have benefited from consulting with staff, but the Neo-Brandeisian arguments are Twitter-tested, so they do not need staff or these experts."

As I mentioned, the majority also rescinded the Section 5 policy statement. I have no better idea than you how this new-found freedom will be employed. Without limiting principles, we can challenge any conduct that three Commissioners find objectionable.

And finally, Commission leadership has made clear its dislike of the consumer welfare standard. This standard works because it is administrable, predictable, and credible. Injecting additional goals will undermine credibility and predictability while leading to subjectivity and politicization. Stakeholders will have little patience for an agency that fails to deliver on the good government principles of transparency, predictability, and accountability.

Conclusion

Some may view these remarks as an attack on Neo-Brandeisians and FTC leadership. That is not my intention. I value the Commission's traditional, collegial approach to decision making. But collegiality doesn't mean acceding to actions that I believe are wrong. And collegiality doesn't mean that I remain silent.

My views are frequently portrayed as part of a partisan story line. But antitrust enforcement traditionally has not been partisan. And I am not opposing change. Antitrust is not meant to be static: as industries and economics evolve, so too does antitrust. I am a big fan of 6(b) studies and merger retrospectives to inform how we refine our approach. But policy shifts must be informed by robust dialogue and due regard for the past.

If my intention is not to attack, then what motivates me? First, I am speaking for those who cannot speak out. So I speak for the dedicated FTC staff. They have been through transitions, and they will do what is asked. They deserve respect, not disdain.

I speak for American consumers. There are millions of people in this country—particularly the most economically vulnerable—who will be harmed if antitrust law stops focusing on increased innovation, low prices, and high quality. And I speak for the antitrust bar. Many of you tell me you're troubled by developments at the FTC—but you fear retaliation if you speak out. For the same reason, I speak for the business community.

And second, I speak out because I am fighting for what I hold dear. I fight for the integrity of the FTC and its staff. The agency is a community of good people united by the shared goal of protecting consumers. We are more than the sum of our parts, and we accomplish so much with so little—I am proud of this "little engine that could."

If the people, the FTC community, and the agency's good work are to endure, we must heed the past and remember that overreach nearly destroyed the agency. I am concerned when those who wield the power do not share this concern. But Chair Khan recently said that when identifying the top 10 threats to the agency, overreach is not on the list.

I fight for the integrity of antitrust, which must be administrable, predictable, and credible, not subjective and politicized. I fight for the rule of law and due process. The ends do not justify the means; process matters, and no one is above the law. I fight for free markets because command and control economies fail. Always.

ENDNOTES:

[1]*See, e.g.,* Trucking Deregulation in the United States Submission by the United States to the Ibero-American Competition Forum (Sept. 2007), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-presentother-international-competition-fora/ibero-trucking.pdf (concluding that "deregulation of the trucking industry . . . has been entirely beneficial for consumers"); Stephen Breyer, Airline Deregulation, Revisited, BLOOMBERG (January, 20 2011), https://www.bloomberg.com/news/articles/2011-01-20/airline-deregulation-revisitedbusinessweek-businessnews-stock-market-and-financial-advice ("Although the board, supported by the airlines, tried to find plausible explanations for high fares, it ultimately failed to do so. For example, were high fares on popular routes needed to support air service to small communities? If so, why should a grandmother flying New York-Los Angeles pay more to help the business traveler flying Utica-Albany pay less? Empirical investigation showed the amount of any such cross-subsidy was tiny and could take the form of a direct government transition payment instead."); US General Accounting Office, Airline Deregulation: Changes in Airfares and Service at Buffalo, New York, Statement of John H Anderson, Jr., Director, Transportation Issues, Resources, Community, and Economic Development Division, GAO/T-RCED-99286 at 1 (September, 20 1999), https://www.gao.gov/assets/t-rced-99-286.pdf (finding that "[o]ver the years, our work has consistently shown that airline deregula-

tion has led to lower fares and better service for most air travelers" and that these benefits are "largely due to increased competition spurred by the entry of new airlines into the industry and established airlines into new markets."). But see Tim Wu, Antitrust via Rulemaking: Competition Catalysts, 16 COLO. TECH L. J. 33, 35 (2005), https://ctlj.colorado.edu/wp-content/uploads/2018/03/3-Wu-1.22.18-FINAL.pdf (citing and explaining away Steven A. Morrison & Clifford Winston, Airline Deregulation and Public Policy, 245 SCIENCE 707, 708 (1989) (finding that increased competition stemming from deregulation had provided travelers and carriers with $14.9 billion of annual benefits)).

[2]Phillip Longman & Lina Khan, Terminal Sickness, WASHINGTON MONTHLY (March/April 2012), https://washingtonmonthly.com/magazine/marchapril-2012/terminal-sickness/ ("To be sure, any regulatory regime can degenerate and wind up stifling competition, and the CAB of the late 1970s did become too procedure bound, ruled, as it came to be, by contending private lawyers rather than technocrats.").

[3]Rohit Chopra & Lina M. Khan, The Case for "Unfair Methods of Competition" Rulemaking, 87 U. OF CHICAGO L. REV. 357, 361 (2020), https://www.ftc.gov/system/files/documents/public_statements/1568663/rohit_chopra_and_lina_m_khan_the_case_for_unfair_methods_of_competition_rulemaking.pdf; Press Release, Fed. Trade Comm'n, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (March 25, 2021), https://www.ftc.gov/news-events/pressreleases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group.

[4]*See* Daniel A. Crane, Debunking Humphrey's Executor, 83 GEO. WASH. L. REV. 1835, 1860 (2015), https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-1835.pdf?_sm_pdc=1&_sm_rid=kTMT5MZQDfZ7snWVV5MjRJZDk57QnT5MN6TVsZN; Alex Propes, Privacy & FTC Rulemaking Authority: A Historical Context, IAB (Nov. 6, 2018), https://www.iab.com/news/privacy-ftcrulemaking-authority-a-historical-context; Jeffrey S. Lubbers, It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking, 83 GEO. WASH. L. REV. 1979, 1989 (2015), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2086&context=facsch_lawrev (discussing the difficulty and rarity of FTC rulemaking after 1980).

[5]Chopra & Khan, supra note 16 at 361 ("In fact, paid expert testimony now is often 'the whole game in an antitrust dispute.' Paid experts are a major expense. Some experts charge over $1,300 an hour, earning more than senior partners at major law firms. Over the last decade, expenditures on expert costs by public enforcers have ballooned. In a system that incentivizes firms to spend top dollar on economists who can use ever-increasing complexity to spin a favorable tale, the eye-popping costs for economic experts can put the government and new market entrants at a significant disadvantage.").

[6]Lina M. Khan, The Ideological Roots of America's Market Power Problem, THE YALE LAW JOURNAL FORUM (June 4, 2018), https://www.yalelawjournal.org/forum/the-ideological-roots-of-americas-market-power-problem ("In today's formulation, the rule of reason serves as a supposed balancing test of harms and benefits. In practice, gauging the effects of particular conduct ends up turning on the 'conflicting testimony of the parties' retained expert economists.' Indeed, as Rebecca Allensworth notes, the evolution and increasing centrality of the rule of reason approach has meant a 'delegation of authority from judges and juries to economists,' who now determine 'the application, and sometimes even content, of antitrust rules.' "); Lina M. Khan, The End of Antitrust History Revisited, 131 HARVARD L. REV. 1655, 1679 (2020), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3793&context=faculty_scholarship ("For example, antitrust adjudication has become highly reliant on technical evidence and complex economic analysis, but generalist judges often lack the expertise to independently assess the arguments before them.").

[7]Carl Shapiro & Howard Shelanski, Judicial Response to the 2010 Horizontal Merger Guidelines, 58 Rev. of INDUSTRIAL ORGANIZATION 51, 53 (2020), https://link.springer.com/article/10.1007/s11151-020-09802-x ("These fears have not been borne out over the past decade. To the contrary, the 2010 Guidelines have continued to be well accepted by the courts and to assist the case law's (slow) incorporation of new economic learning and agency experience in analyzing the impact of mergers on competition. In particular, we find that the richer explanation of how the Agencies use qualita-

tive and quantitative evidence to assess competitive effects has favorably influenced the case law and strengthened merger enforcement.").

[8]U.S. DEP'T. OF JUST., 1968 MERGER GUIDELINES, https://www.justice.gov/archives/atr/1968-merger-guidelines.

[9]*U.S. v. Aluminum Co. of America*, 377 U.S. 271, 84 S. Ct. 1283, 12 L. Ed. 2d 314 (1964) (firm with 27.8% share acquired firm with 1.3% share, with pre-merger 4-firm concentration ratio of 76.0%); *U.S. v. Continental Can Co.*, 378 U.S. 441, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964) (firm with 29.1% share acquired firm with 3.1% share, with pre-merger 4-firm concentration ratio of 63.7); *U. S. v. Von's Grocery Co.*, 384 U.S. 270, 86 S. Ct. 1478, 16 L. Ed. 2d 555 (1966) (firm with 4.7% share acquired firm with 4.2% share, with pre-merger 4-firm concentration ratio of 24.4%); *U. S. v. Pabst Brewing Co.*, 384 U.S. 546, 86 S. Ct. 1665, 16 L. Ed. 2d 765 (1966) (3 markets, where firm with 11% share acquired firm with 13% share, with premerger 4-firm concentration ratio of under 50%; firm with 5.5% share acquired firm with 5.8% share, with premerger 4-firm concentration ratio under 40%; and firm with 3% share acquired firm with 1.5% share, with premerger 4-firm concentration ratio under 30%); *U.S. v. Third Nat. Bank in Nashville*, 390 U.S. 171, 88 S. Ct. 882, 19 L. Ed. 2d 1015 (1968) (firm with 33.6% share acquired firm with 4.8% share, with pre-merger 4-firm concentration ratio of 93.2%); *U. S. v. Phillipsburg Nat. Bank & Trust Co.*, 399 U.S. 350, 90 S. Ct. 2035, 26 L. Ed. 2d 658, 1970 Trade Cas. (CCH) ¶ 73245 (1970) (firm with 11.2% share acquired firm with 8.1% share, with pre-merger 4-firm concentration ratio of 74.7%).

[10]*See U. S. v. Von's Grocery Co.*, 384 U.S. 270, 301, 86 S. Ct. 1478, 16 L. Ed. 2d 555 (1966) (J. Potter dissenting) ("The sole consistency that I can find is that in litigation under [Section 7], the Government always wins.").

[11]*See generally* Letter from Caleb Kruckenberg, Pacific Legal Foundation to Lina M. Khan, Chair, Fed. Trade Comn'n (Nov. 11, 2021), https://www.regulations.gov/comment/FTC-2021-0056-0002 ("[T]he ink is hardly dry on the Supreme Court's unanimous rebuke of the Commission's decades-long practice of imposing massive fines from businesses without any legal authority. . . . Yet the Commission has tried again, this time stretching a different source of authority far beyond the limits enacted by Congress. . . . Rather than face future rebukes from the courts, the Commission should rescind or modify its proposed settlement order to comport with the limits of its authority.") (internal citations omitted).

[12]David McLaughlin, U.S. FTC's Lina Khan Vows Return to Agency's Trustbusting Roots, BLOOMBERG (July 28, 2021) https://www.bloomberg.com/news/articles/2021-07-29/u-s-ftc-s-lina-khan-vows-return-to-agency-s-trustbustingroots (" 'There has been a bit of a missed opportunity, especially over the last few decades, to take full advantage of the institutional tools that Congress granted the agency,' Khan said in a wide-ranging interview.").

[13]Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionarypractice-early.

[14] *See* Holly Vedova, Adjusting merger review to deal with the surge in merger filings, FED. TRADE COMM'N, COMPETITION MATTERS BLOG (Aug. 3, 2021 12:28PM), https://www.ftc.gov/news-events/blogs/competitionmatters/2021/08/adjusting-merger-review-deal-surge-merger-filings ("For deals that we cannot fully investigate within the requisite timelines, we have begun to send standard form letters alerting companies that the FTC's investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful. Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk. Of course, this action should not be construed as a determination that the deal is unlawful, just as the fact that we have not issued such a letter with respect to an HSR filing should not be construed as a determination that a deal is lawful.").

[15]Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement On the Adoption of Revised Section 18 Rulemaking Procedures at 6 (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement__rules_of_practice.pdf.

[16]Statement of the Federal Trade Commission On the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, at 2 (August 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf. *See also* Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc _and_rks_on_section_5_0.pdf ("In our view, the 2015 Statement abrogates the Commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.").

[17]*Boise Cascade Corp. v. F.T.C.*, 637 F.2d 573, 1980-2 Trade Cas. (CCH) ¶ 63323 (9th Cir. 1980); *Official Airline Guides, Inc. v. F. T. C.*, 630 F.2d 920, 1980-2 Trade Cas. (CCH) ¶ 63544 (2d Cir. 1980); *E.I. du Pont de Nemours & Co. v. F.T.C.*, 729 F.2d 128, 1984-1 Trade Cas. (CCH) ¶ 65881 (2d Cir. 1984).

[18]Protecting Americans at the gas pump through aggressive antitrust enforcement, FED. TRADE COMM'N, COMPETITION MATTERS BLOG (Sept. 21, 2021 1054:AM), ("[T]he FTC has typically sought to resolve anticompetitive deals by requiring merging companies to divest fuel stations in overlapping local markets. Chair Khan is concerned that this policy may have increased consolidation more broadly, at the metro, regional, or national level, creating conditions ripe for price coordination and other collusive practices.").

[19]Carl Shapiro & Herbert Hovenkamp, How Will the FTC Evaluate Vertical Mergers?, PROMARKET (Sept. 23, 2021), https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/.

FROM THE EDITOR

A Rising Tides Lifts Even Micro M&A

As the M&A market nears the close of 2021, it's safe to say that the deep chill of the early COVID period has thawed. As of early November, more than $4.9 trillion worth of global deals had been announced year-to-date, rocketing up over 71% from the same period in 2020.

This surge can be seen even in the smallest of M&A sectors—micro deals with transaction values of less than $100 million. The research and advisory firm Aranca recently published the first installment of what it intends to be an ongoing survey of micro M&A activity. The initial survey, "Small Is Powerful—Micro M&A in the U.S. and Europe," which can be found here (https://www.aranca.com/assets/uploads/resources/special-reports/Small_Is-Powerful%E2%80%93Micro-MA_in_the_US_and_Europe.pdf), noted several long-term and shorter-term trends in the sector. Micro M&A declined in annual volume from 2016 to 2020, bottoming out in the latter year. Yet since then there's been an upsurge in activity, putting 2021 on course to come close to matching, if not surpassing, 2019's 6,684 deals and $173.8 billion in volume.

Among Aranca's findings in its survey: roughly $942 billion has been posted in micro M&A activity in the U.S. and Europe over the past five years, with a total of 38,399 deals announced in the segment. On average, 6,500-7,500 micro deals are done annually. One out of every two deals is led by a U.S.-based entity. Historically, deals less than $10 million have accounted for the majority (40.5%) of activity.

Other findings include: The real estate sector has dominated the micro M&A space. And in the first-half of 2021, the trend continued, as the sector accounted for 42.6% of total deals made in the top five micro M&A sectors.

Increased automation requirements across businesses is expected to drive M&A activity further in the IT sector. The pandemic has pushed larger companies to make small, strategic acquisitions to fill essential gaps in their IT needs. "Many companies are not acquiring large enterprises who have a whole suite of services. They're acquiring companies with very specific niches," said Ashwin Ramakrishnan, associate vice president at Aranca. "These are often startups or companies that are two or three years down the line. Larger companies are finding it easier to integrate these kind of smaller companies into their suite of services. That's only going to increase more."

Many more companies now have the confidence to move into expansion strategies again. And doing micro M&A is appealing to larger companies. Aranca found that in the $30 million to $50 million deal tranche, companies with revenues of over $500 million accounted for 18% of total M&A activity in the first half of 2021.

We appear to be on course to make a safe landing to an unusual but healthy year, deal-wise. Next year will have a new set of challenges, particularly regulatory ones (see the various FTC and DOJ articles in this issue), and *The M&A Lawyer* will be here to chronicle them. We wish for all of our readers to have a wonderful holiday season and a happy and healthy New Year. We'll see you early in 2022.

Chris O'Leary

Managing Editor

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