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Expert Analysis

FTC Indicates Interest in Enforcement Aimed at Consummated Mergers

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Last month, outgoing Federal Trade Commission (FTC) Bureau of Competition Director Bruce Hoffman stated that the Commission remains focused on reconsidering responses to past transactions, and is assessing the potential of retrospective merger enforcement. See *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms: Hearing Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 116th Cong. (2019). Enforcement-focused merger reconsideration has re-emerged as a talking point both within the FTC and in the broader public discourse, particularly in the technology sector. In February, the FTC created a task force charged with, among other things, the investigation of past technology sector mergers and consideration of enforcement actions to unwind those transactions. Additionally, in April, the FTC discussed merger retrospectives at length, noting the need for more formal review processes of past mergers. While the FTC has taken steps to unwind smaller, nonreportable mergers, it has yet to publicly take any concrete steps towards action to unwind the larger consummated mergers that were the subject of these discussions.

There may be legal grounds (albeit without robust precedent) for federal antitrust agencies to bring enforcement actions aimed at large mergers that did not receive regulatory scrutiny at the time of the transaction, but structural and procedural issues inherent in unwinding established mergers make the prospect of significant regulatory action unlikely. Nevertheless, any increase in retroactive enforcement of large mergers would mark a break in past practice and may have significant implications for the future of merger review.

Agency Review Of Completed Transactions

Regulator-driven review and reconsideration of completed transactions follows naturally from the antitrust authorities' mandate to prevent business combinations that have a negative impact on the competitive landscape. Both the Department of Justice (DOJ) and the FTC engage in some form of ex-post review of completed mergers.

The antitrust agencies draw a distinction between reviewing completed transactions to inform future courses of action and reviewing closed mergers with an eye towards enforcement. The recent focus on "merger retrospectives" at the FTC has been driven by concerns regarding the information available to the agency at the time of the merger. At hearings conducted by the FTC in April, Commissioner Slaughter stated that

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retrospectives have the ability to "test the usefulness of models and other tools of analysis to inform future merger investigations." Rebecca Kelly Slaughter, Remarks, *Merger Retrospective Lessons from Mr. Rogers, Hearings on Competition and Consumer Protection in the 21st Century: Merger Retrospectives* (April 12, 2019).

These abstract reviews can be contrasted with enforcement-focused scrutiny of specific mergers the agencies chose not to challenge when they occurred. Enforcement-focused reviews allow the agencies to reconsider prior inaction with the benefit of hindsight. Closed transactions that are challenged and found to be anticompetitive after the fact are subject to various forms of relief, generally divestiture or unwinding.

Both the FTC and DOJ "have the authority to challenge consummated mergers." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (4th ed. 2013). Section 7 of the Clayton Act is the statutory vehicle through which the enforcement agencies generally challenge consummated mergers. The Act's language is broad; it expressly forbids acquisitions and mergers that "tend to create a monopoly," 15 U.S.C. §18, and does not limit challenges to any specific time in the life cycle of a transaction.

From the enforcer's perspective, one of the major benefits of post-transaction merger review is the ability to use hindsight to determine whether a business combination was anticompetitive when entered into. The FTC or DOJ can challenge mergers that were consummated with full government compliance if subsequent developments indicate that the entities' pre-acquisition assessment understated the competitive harm or exaggerated the market benefits resulting from a merger. Additionally, compliance with pre-merger reporting requirements such as the Hart-Scott-Rodino (HSR) Act does not guarantee that a merger the government permitted will not be challenged later if the combination's result is clearly anticompetitive. See, e.g., *Chicago Bridge & Iron Co.*, No. 9300, 2005 WL 120878 (F.T.C. Jan. 5, 2005).

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Since 2001, the FTC has challenged thirty-three consummated mergers, only four of which were HSR reportable, and the DOJ has brought fourteen challenges, only one of which was HSR reportable. While this represents only a small fraction of work the performed by the agencies, these post-consummation challenges occur frequently enough that the recent attention given to ex post enforcement, while more robust, is not wholly unprecedented. For example, the current Commission recently issued its first order in early November unwinding a consummated merger, indicating that this style of enforcement is likely to continue. See *In the Matter of Otto Bock HealthCare North America*, No. 9378 (F.T.C. Nov. 6, 2019) (merger was not HSR reportable).

Recent Focus

Reconsideration of past mergers has emerged as a prominent topic in the political and legal antitrust landscape. The growth in interest in retrospective review appears to be the result of heightened scrutiny of general industry consolidation, the visibility of large transactions in the technology sector, and public dissatisfaction with regulator responses to the changing nature of the economy. In response to this recent discourse, the FTC has announced a renewed interest in consideration of enforcement actions for closed transactions.

In particular, calls for greater scrutiny of past mergers have developed around the 2020 election cycle. For example, earlier this year Sen. Elizabeth Warren specifically called for regulators to reverse mergers in the technology sector, noting Amazon's acquisitions of Whole Foods and Zappos, Facebook's acquisitions of WhatsApp and Instagram, and Google's acquisition of Waze. See Elizabeth Warren, *Here's How We Can Break Up Big Tech*, Medium (March 8, 2019). Similarly, a large group of state attorneys general have announced investigations into recently conducted large mergers, citing federal inaction as a motivation. See John

McKinnon & Brent Kendall, *States to Move Forward With Antitrust Probe of Big Tech Firms*, Wall Street Journal (Aug. 19, 2019). Calls for greater regulatory intervention in existing corporate structures is not limited to technology. The FTC's and DOJ's power to unwind mergers has been evoked in criticisms of consolidation in the finance, media, airlines, and telecommunications industries. See Tim Wu, *Be Afraid of Economic 'Bigness*,' N.Y. Times (Nov. 10, 2018). This increase in attention has resulted in the FTC and DOJ appearing before Congress recently to justify their merger review process and explain future courses of action.

The FTC appears to be listening to the public, and has indicated that it intends to devote resources towards review of completed transactions with a focus on the technology sector. In February of this year, the FTC announced a task force that grew out of the Commission's Hearings on Competition and Consumer Protection in the 21st Century. The task force would, among other things, conduct "reviews of consummated technology mergers" in order to ensure a competitive market. See *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets*, Federal Trade Commission (Feb. 26, 2019). More recently, the FTC has confirmed that it is actively conducting reviews of larger mergers that it failed to scrutinize in the past. See *FTC Testifies before Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights on Competition in Digital Technology Markets*, Federal Trade Commission (Sept. 24, 2019). In an interview on October 29th, outgoing FTC Bureau of Competition Director Bruce Hoffman noted that the Commission's task force had completed fact gathering and had begun an "active investigate stage." See Bryan Koenig, *Outgoing FTC Antitrust Head Talks Qualcomm, Tech Scrutiny*, Law 360 (Oct. 29, 2019). Nevertheless, the FTC has yet to announce any official action aimed at reversing the large mergers that in part inspired the task force.

Possible Outcomes

Significant ex-post action against large and established mergers would represent a marked break from past FTC practice, and therefore seems very unlikely to occur for two reasons. First, the vast majority of prior post-consummation merger challenges have targeted smaller transactions. Second, the FTC has historically challenged only recently consummated mergers. These historical trends are rooted in structural challenges that are inherent in ex-post enforcement, such as the difficulty of breaking up now-integrated companies and the disruption to markets that would occur as a result of unwinding large corporations.

While the FTC's recent statements indicate a focus on large, market-defining mergers, historically, the antitrust agencies' post-consummation challenges have mostly targeted smaller transactions. Since the 2000 amendments to the HSR filing thresholds, the FTC has only challenged three mergers that passed through the HSR requirements without challenge. See *In the Matter of Tops Markets* (2010) (deal value of $85 million), *In the Matter of Airgas* (2001) (deal value of $90 million), *In the Matter of Chicago Bridge & Iron Company N.V.* (2008) (deal value of $84 million). Meanwhile, the tech mergers attracting attention from politicians and the press are significantly larger. For example, Google's acquisition of Waze (on the low end of the aforementioned technology mergers) had a deal value of just under $1 billion. Should the FTC actively consider enforcement of these mergers, the Commission would be in largely uncharted territory.

The FTC has also historically shied away from investigating closed transactions that occurred more than two years in the past. Indeed, many of the closed transactions investigated by the FTC occurred only a few months after closing. Twenty-one of the thirty-three consummated mergers challenged by the FTC between 2001 and 2019 occurred within two years of the deal closing. Similarly, only three of the fourteen DOJ challenges occurred more than two years after closing. The *only* HSR reportable merger to be challenged more than two years after closing faced seven years of litigation over FTC-mandated divestitures. See *Chi. Bridge & Iron Co. N.V. v. FTC*, 515 F.3d 447 (5th Cir. 2008).

Regulator reluctance to challenge highly valued, old mergers

is understandable—structural remedies can have enormously disruptive effects to the marketplace and promise years of high-stakes litigation. Unlike challenges of prospective or recent mergers, attempts to unwind large mergers that occurred in the past present numerous problems for enforcement remedies. Regulators assessing old mergers are faced with determining, among other things, how to unwind an acquisition that has long since become fully integrated with a corporation, whether to measure the output of the acquired company according to present value or the value at the time of acquisition, and how divestiture or unwinding will impact the larger industry that has grown around the post-merger landscape.

For example, in *Evanston Nw. Healthcare*, the FTC challenged a merger worth $234 million that had closed four years prior. 2007 WL 2286195 (F.T.C. Aug. 6, 2007). After an FTC administrative law judge ordered divestiture, the merged corporation appealed to the full Commission, which reversed the divestiture order. Although merger was found unlawful, the Commission determined that because "a long time has elapsed between the closing of the merger and the conclusion of the litigation" divestiture or unwinding would be "much more difficult, with a greater risk of unforeseen costs and failure." Id. at *78. Therefore, the Commission settled on behavioral rather than structure remedies. Despite the recent saber-rattling, regulators and courts would likely have even greater trepidations when considering the reversal of mergers many times the size of the one challenged in *Evanston*, especially since they have had close to a decade to create entrenched market positions. Instead, it is more likely that the agencies will continue to target closed mergers like Otto Bock's

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acquisition of Freedom Innovations. That deal, which the FTC recently ordered unwound in a unanimous opinion on November 6th, fit both of the criteria described above—it fell under the HSR threshold, and was initially challenged three months after the merger closed. *In the Matter of Otto Bock HealthCare North America*, No. 9378 (F.T.C. Nov. 6, 2019).

Conclusion

Despite the lack of historical precedent for post-consummation challenges of industry-defining mergers, calls for regulatory action have persisted. A political focus on the perceived problems within consolidated industries and criticism of the antitrust agencies' handling of merger review is likely to continue at least through the 2020 election cycle. Consequently, the FTC has continued to propose expansions of its merger review process, and has gestured towards new paradigms for post-consummation enforcement.

This should be weighed against the lack of precedent for similar merger challenges to consummated mergers such as the ones currently being criticized. The technology sector mergers specifically referenced by politicians and the media are both significantly larger and significantly older than the closed mergers that regulators have historically sought to challenge retroactively. Additionally, regulators would face both legal and practical challenges in seeking to unwind established mergers that have defined their industries. Therefore, major attempts to retroactively challenge larger mergers appear unlikely at the moment.