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Metes and Bounds: The Limits of Judicial Reformation of Product Markets

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Courts typically reject merger challenges brought under Section 7 of the Clayton Act when the Department of Justice ("DOJ") or the Federal Trade Commission ("FTC") (collectively, the "government") fails to proffer a cognizable relevant product market. But in three recent cases, courts have considered the extent to which they may adjust the "metes and bounds"[2] of the government's deficient market and proceed to analyze the transaction's competitive effects in an adjusted market. Parties considering transactions with potential antitrust risk, including transactions in dynamic industries such as media and technology, should continue to monitor this issue, as product market definition in such industries can pose particularly complicated questions of fact.

I. Burden to Define a Cognizable Relevant Market

Under Section 7, the government must show that the proposed transaction "will substantially lessen competition 'within the area of effective competition'"—otherwise known as a relevant market.[3] Thus, defining a cognizable relevant market is a "necessary predicate" to proving a Section 7 violation.[4] A relevant market has two parts: (i) a product market, which consists of the products and services that compete with each other, and (ii) a geographic market, which reflects the geographic area in which that competition takes place.[5]

Because the plaintiff "bears the burden of proof and persuasion in defining the relevant market,"[6] courts reject Section 7 claims when the government fails to satisfy this burden.[7] The same is true under Section 13(b) of the Federal Trade Commission Act,[8] which provides the

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2 In *Times-Picayune Pub. Co. v. United States*, the Supreme Court used the phrase "metes and bounds" in the context of defining a relevant antitrust market. 345 U.S. 594, 611 (1953). Since then, courts have used the phrase in the context of defining both product and geographic markets. While courts have explained that geographic markets are not always susceptible to precise definition by metes and bounds, *see, e.g.*, *Curly's Dairy, Inc. v. Dairy Co-op. Ass'n*, 202 F. Supp. 481, 484 (D. Or. 1962), courts have used the phrase in the product market context with regard to the contours and participants of the relevant product market. *See, e.g.*, *Bio-Rad Labs., Inc. v. 10X Genomics, Inc.*, No. 19-cv-12533, 2020 WL 5100291, at *9 (D. Mass. Aug. 31, 2020) (considering whether the claimant "sufficiently allege[d] the 'metes and bounds' of the market as being defined by particular technological processes"); *SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089, 1115 (E.D. Pa. 1976) (explaining that "[a]n inquiry as to the metes and bounds of the relevant product market is necessitated by the phrase 'any part of the trade or commerce' in section two of the Sherman Act."). That is how the phrase "metes and bounds" is used here.

3 *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957).

4 *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

5 *See id.*

6 *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (citation omitted).

7 *See, e.g., United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1175 (N.D. Cal. 2004) (declining to enjoin proposed transaction when the DOJ "failed to meet [its] predicative burden" to "prove[] the relevant market"); *United States v. Sungard Data Sys.*, 172 F. Supp. 2d 172, 193 (D.D.C. 2001) (declining to enjoin proposed transaction because "the Court cannot accept the government's overly narrow and static definition of the product market").

8 *See, e.g., FTC v. Freeman Hosp.*, 69 F.3d 260, 268 n.12 (8th Cir. 1995) (explaining that it is "essential that the FTC identify a credible relevant market before a preliminary injunction may issue"); *see also FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999).

standard that the FTC must meet to obtain a preliminary injunction[9] pending an investigation of the transaction.[10] Indeed, without a cognizable relevant market, a court cannot evaluate how a proposed transaction may impact competition in that market.[11]

II. Reformation of the Government's Deficient Product Markets

Recently, three courts have considered the extent to which they may adjust the metes and bounds of the government's deficient market and proceed to analyze the transaction's competitive effects within an adjusted market. In both *Evonik* and *United States v. Energy Solutions, Inc.*,[12] the courts made minor adjustments to the metes and bounds of product markets actually alleged by the government and proceeded to analyze whether the proposed transactions were likely to substantially lessen competition in those alternative markets—markets to which the defendants had notice of the participants and competitive dynamics. But in *United States v. Sabre Corp.*,[13] the DOJ went a step further, suggesting—unsuccessfully—that even if its proffered product market was deficient, the court could find a Section 7 violation based on alleged harm to competition in an entirely new product market never alleged in the case and to which the defendants had no notice.

a. Evonik

In *Evonik*, the FTC sought to preliminarily enjoin a merger between Evonik and PeroxyChem, rival producers of hydrogen peroxide, on the ground that the proposed transaction was likely to substantially lessen competition for standard, specialty, and pre-electronics grade hydrogen peroxide within the Pacific Northwest and the Southern and Central United States.[14] According to the FTC, these three grades of hydrogen peroxide could be aggregated into a single product market, which it called the "non-electronics hydrogen peroxide" market, because *suppliers*—not purchasers—of these products could substitute them for one another nearly universally, easily, and profitably.[15]

United States District Judge Timothy Kelly rejected the FTC's proposed product market, reasoning that the FTC "failed to meet its burden of showing that supply-side substitution across" standard, specialty, and pre-electronics grade hydrogen peroxide was universal, easy, or profitable.[16] On this basis, the defendants argued that the FTC's claim could not succeed and that the court need not analyze the case further, asserting that "[t]he FTC could have pleaded or argued

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9 To obtain a preliminary injunction under Section 13(b), *see* 15 U.S.C. § 53(b), the FTC must show a "reasonable probability" or "appreciable danger" that the proposed transaction may substantially lessen competition within a relevant market. *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 290 (D.D.C. 2020) (citation omitted) ("*Evonik*").

10 In *FTC v. Whole Foods Market*, D.C. Circuit Judge Janice Rogers Brown suggested that because the FTC "might need to seek such relief [under Section 13(b)] before it has settled on the scope of the . . . markets implicated by a merger," the FTC's claim at this preliminary stage "will not depend, in every case, on a threshold matter of market definition." 548 F.3d 1028, 1036-37 (D.C. Cir. 2008) (Brown, J. concurring). But more recently, the FTC, such as in *Evonik* discussed more fully below, has appeared to accept that it must define a cognizable relevant market to obtain a preliminary injunction under Section 13(b), bringing Section 13(b) litigation in closer conformance with litigation on the merits under Section 7.

11 *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016) ("'Without a well-defined relevant market,' an examination of the merger's competitive effects would be 'without context or meaning.'" (quoting *Freeman Hosp.*, 69 F.3d at 268).

12 265 F. Supp. 3d 415 (D. Del. 2017) ("*Energy Solutions*").

13 452 F. Supp. 3d 97 (D. Del. 2020) ("*Sabre*").

14 *See Evonik*, 436 F. Supp. 3d at 292.

15 *See id.* at 292, 294-99.

16 *Id.* at 294.

alternative markets . . . but it did not," and that "'it's not the Court's job to go around and try to find that correct market.'"[17]

Although Judge Kelly stated that this argument was "not without support," and the FTC conceded that it bore "the burden to prove a relevant product market when it seeks a preliminary injunction,"[18] Judge Kelly held that the FTC's failure to define a cognizable product market did not necessarily defeat its claim based on the record in that case.[19] Judge Kelly stated that even if "the relevant product market is not 'as broad[] as the Government chooses to define it,' the record may still contain evidence of an alternative relevant product market in which to analyze the merger's competitive effects."[20] To support this conclusion, Judge Kelly cited Justice Harlan's concurrence in *Brown Shoe*, which stated that "[t]he duty rests with the District Court . . . to determine what is the appropriate market on an appraisal of the relevant economic considerations."[21]

In Judge Kelly's view, the record contained sufficient evidence to permit him to consider two narrower markets: (i) standard grade hydrogen peroxide; and (ii) hydrogen peroxide formulated for specific end uses, both of which were contained within the aggregated "non-electronics" hydrogen peroxide market that the FTC alleged in its complaint.[22] But after adjusting the metes and bounds of the FTC's proffered product market and considering the evidence in these two narrower markets, Judge Kelly found only one of the two narrower markets to be a cognizable relevant product market.[23] And even so, Judge Kelly held that the FTC failed to proffer a cognizable geographic market to correspond to that product market, thereby defeating the FTC's claim.[24]

b. *Energy Solutions*

In *Energy Solutions*, the DOJ sought to enjoin Energy Solutions, a waste-management services provider for generators of nuclear waste, from acquiring Waste Control Specialists LLC, an operator of radioactive waste disposal facilities.[25] The DOJ alleged that the proposed transaction would substantially lessen competition for disposal of low-level radioactive waste ("LLRW") in four relevant product markets: operational and decommissioning markets for higher-activity LLRW, and operational and decommissioning markets for lower-activity LLRW.[26]

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17 *Id.* at 299-300 (quoting Mahr Hrg. Tr. at 2402:8-13).

18 *Id.* at 300. Thus, the FTC did not contend that it could succeed under the Section 13(b) preliminary injunction standard without a threshold showing as to market definition. *See Whole Foods Mkt., Inc.*, 548 F.3d at 1036-37 (Brown, J. concurring). Indeed, Judge Kelly acknowledged Judge Brown's *Whole Foods* concurrence, noting that Judge Brown has "gone so far as to suggest that a plaintiff 'may' prove a Section 7 violation even *without* meeting its prima facie burden to 'defin[e] a market and show[] undue concentration in that market.'" *Evonik*, 436 F. Supp. 3d at 311 n.27. In doing so, Judge Kelly reiterated that "[t]he FTC's threshold failure to define a relevant market hamstrings its ability to show (and the Court's ability to evaluate) a likely and substantial lessening of competition." *Id.*

19 *See Evonik*, 436 F.3d at 300.

20 *Id.*

21 *Id.* (quoting *Brown Shoe*, 370 U.S. at 368).

22 *See id.* at 300.

23 *See id.* at 303.

24 *See id.* at 309, 311.

25 *See* 265 F. Supp. 3d at 421.

26 *Id.* at 436.

In reviewing the evidence, United States District Judge Sue Robinson determined that while "[t]here are some differences between decommissioning and operational waste"—including how companies bid for the disposal and the waste volumes generated—those distinctions did "not warrant treating them as separate markets, because the disposal options are essentially the same."[27] Accordingly, while Judge Robinson agreed with the general contours of the markets that the DOJ alleged, she rejected the DOJ's proposed sub-segmentation of the markets.[28] But like in *Evonik*, Judge Robinson stated that her "decision to not further sub-divide the markets" alleged "d[id] not end the analysis, as the government ha[d] produced sufficient evidence establishing" the existence of alternative relevant product markets.[29] And as in *Evonik*, Judge Robinson found those alternative markets by merely adjusting the metes and bounds of the four product markets that the DOJ alleged in its complaint, reasoning that the evidence supported two combined markets for higher-activity and lower-activity LLRW rather than four subdivided ones.[30] Because Judge Robinson ultimately found that the DOJ established that the transaction was substantially likely to lessen competition in these combined markets, she enjoined it under Section 7.[31]

c. Sabre

In *Sabre*, the DOJ sought to enjoin Sabre, a supplier of global airline distribution system services used to connect large numbers of travel suppliers to a large number of travel agencies, from acquiring Farelogix, which provides airlines with IT solutions that facilitate airlines in distributing content (e.g., tickets and ancillary products and services) to customers.[32] The DOJ alleged that Sabre's proposed acquisition of Farelogix would substantially lessen competition in a product market for "booking services" sold to travel agents, while the defendants argued, among other things, that "booking services" was not a cognizable relevant product market because—even assuming that the parties were horizontal competitors, as the DOJ contended—"booking services" was not an economically significant, standalone product that either company actually sold.[33] Agreeing with defendants, United States District Judge Leonard Stark held that the DOJ failed to meet its burden to prove a cognizable relevant product market because, among many other dispositive reasons, the DOJ's "booking services" market did "not accurately correspond to what actually is transacted in a market relevant to the proposed transaction."[34]

Nevertheless, the DOJ argued that even if its "booking services" market was deficient, "[t]he Court [wa]s not limited to considering the markets that the Government alleged."[35] Indeed, the DOJ argued that the court could find a Section 7 violation "if the Court f[ou]nd[] harm in *any* relevant market based on the evidence presented," suggesting that the court could adjust a deficient product market beyond mere metes and bounds and, instead, fashion an entirely new market to which defendants (unlike the defendants in *Evonik* and *Energy Solutions*) had no notice.[36] Rejecting this argument, Judge Stark reasoned that "it would be wrong for the Court to . . .

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27 *Id.* at 436-37.
28 *Id.*
29 *Id.* at 437.
30 *See id.* at 436.
31 *See id.* at 446.
32 *Sabre*, 452 F. Supp. 3d at 109, 113.
33 *See, e.g.*, *id.* at 140.
34 *Id.* at 139.
35 *Id.* at 142 n.20.
36 *Id.* (emphasis added).

'unilaterally change the defective market allegations . . . to save [Plaintiff's] case' under the circumstances here, which include that both parties (and the Court) have already devoted enormous resources to the case the government chose to bring."[37] Judge Stark found further support in prior Sherman Act cases[38] in which courts prohibited plaintiffs from changing the product markets alleged in the complaint.[39] Given the DOJ's deficient market definition and many other evidentiary and legal failures, Judge Stark entered judgment for the defendants.[40]

III. Implications for Section 7 Defendants

Parties considering transactions with potential antitrust risk should continue to monitor the extent to which courts find that the government may establish Section 7 claims when the government's proffered product market is deficient, particularly in light of the sweeping approach that the DOJ (unsuccessfully) urged in *Sabre*. Indeed, this issue may be particularly relevant to transactions in dynamic industries such as media and technology.

Specifically, cases in such industries may be particularly ripe for the government to suggest that if its proffered market is deficient, the court should nonetheless find a new, unpled product market in which to consider the transaction's competitive effects. That is because defining a cognizable product market requires a "fact-intensive inquiry" based on "the actual dynamics of the market rather than a rote application of any formula,"[41] and in challenging transactions in technological and innovative industries, the government has faced difficulty in showing that its proffered product markets are factually correct.

For example, in *Oracle*, the district court denied the DOJ's attempt to enjoin a proposed merger of two software manufacturers, reasoning that the "equivocal and vague evidence presented" did not support the DOJ's proposed product market of certain high-function software, which did not correspond to commercial realities of how the products at issue were bought and sold and wrongly excluded other products from the proposed relevant market.[42] Similarly, in *Sungard*, the district court denied the DOJ's attempt to enjoin SunGard, a supplier of information technology, from acquiring another supplier of computer services, reasoning that because of "the rapidly evolving computer technology, the Court cannot accept the government's overly narrow

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37 *Id.*

38 As Judge Stark noted, "there is no meaningful distinction between Section 1 Sherman Act claims and a Section 7 Clayton Act merger challenge" for purposes of analyzing relevant markets. *Id.* at 137-38 n.15 (citing cases establishing that the same market definition principles apply under both the Sherman Act and Section 7).

39 *See id.* at 142 n.20 (citing D.I. 235 at 18-20.) Those cases included: *Continental Trend Resources v. OXY USA Inc.*, 44 F.3d 1465, 1481 n.19 (10th Cir. 1995), *vacated on other grounds*, 517 U.S. 1216 (1996) (affirming the district court's finding that the plaintiffs were "saddled with their Complaint as filed in this Court" when they "later attempted to redefine the relevant market"); *Pastore v. Bell Tel. Co. of Pa.*, 24 F.3d 508, 512-13 n.5 (3d Cir. 1994) ("hold[ing] plaintiffs to their own contention" regarding the relevant market); *Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 568, 582, 584 (N.D. Miss. 2004) ("refusing to countenance" the claimants' attempt to "alter their proposed market definitions" when they "[n]ever sought leave to amend their pleadings"); *W. Parcel Exp. v. United Parcel Serv. of Am., Inc.*, 65 F. Supp. 2d 1052, 1059 (N.D. Cal. 1998) (explaining that "[Plaintiff's] efforts to redefine and narrow its alleged relevant market" from the market alleged in its complaint "may be procedurally improper").

40 Because the parties in *Sabre* ultimately abandoned the proposed transaction, on appeal, the Third Circuit held that the dispute was moot, and thus vacated the district court's decision. *See* 2020 WL 4915824, at *1 (3d Cir. July 20, 2020). But in doing so, the Third Circuit stated that its decision "should not be construed as detracting from the persuasive force of the District Court's decision, should courts and litigants find its reasoning persuasive." *Id.*

41 *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004).

42 331 F. Supp. 2d at 1158-61.

and static definition of the product market."[43] And most recently, as explained above, Judge Stark denied the DOJ's attempt to enjoin Sabre, which operates a transaction platform that connects a large number of travel suppliers to a large number of travel agencies, from acquiring Farelogix, which provides a suite of IT solutions to airlines. Judge Stark reasoned, in part, that "as a factual matter," the DOJ's proposed "booking services" product market suffered from several flaws, including that it did "not accurately correspond to what actually is transacted in a market relevant to the proposed transaction."[44]

Although market definition is a key issue in many cases, the difficulty that the government has faced in establishing cognizable product markets in innovative industries may be further compounded by their dynamic nature. As one court has observed, "[i]n technologically dynamic markets, . . . entrenchment may be temporary, because innovation may alter the field altogether. Rapid technological change leads to markets in which firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product advancements" in time.[45] In such industries, the lines of demarcation between competing and adjacent products can thus be more fluid and, in turn, more difficult to define using the traditional tests of supply and demand substitutability. And when these lines blur, the government may seek to test the extent to which courts will adjust deficient product markets, including by urging courts to adjust those deficient product markets beyond mere metes and bounds, as the DOJ suggested unsuccessfully in *Sabre*.

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Although courts reject Section 7 challenges when the government's proffered product market is deficient, at least two courts, based on the particular factual record, have adjusted the metes and bounds of those markets and proceeded to analyze the transaction's competitive effects in an adjusted market. Parties considering transactions with potential antitrust risks should continue to monitor developments on this issue, including the possibility that the DOJ and the FTC urge courts to save their cases by unilaterally inventing product markets anew to which defendants have no notice.

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43 172 F. Supp. 2d at 193.

44 *Sabre*, 452 F. Supp. 3d at 139.

45 *United States v. Microsoft Corp.*, 253 F.3d 34, 49-50 (D.C. Cir. 2001) (internal citations and quotation omitted).