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Key Insights for Dealmakers Confronting Washington's Aggressive Approach to Merger Reviews

- Courtroom losses have not deterred the Department of Justice and Federal Trade Commission from challenging mergers based on novel interpretations of the antitrust laws, and we expect the agencies to continue to scrutinize deals aggressively.
- With time, however, the losses may undercut the agencies' tough rhetoric and embolden companies. Already, the losses appear to have softened the regulators' hostility toward remedies such as divestitures.
- Even if the courts do not accept the government's reading of the law, the agencies may be able to stretch out the timeline for approvals, particularly where other jurisdictions must sign off.

As part of the Biden administration's avowedly aggressive approach to antitrust enforcement, it has challenged a number of high-profile mergers in court over the past two and a half years. While the track record of the Department of Justice (DOJ) and Federal Trade Commission (FTC) in court has been poor — just one win versus seven outcomes that count as losses — the antitrust agencies insist that they will continue to challenge mergers and push the limits of decades-old antitrust principles. That willingness to press novel antitrust theories has implications for M&A. Below we provide eight key takeaways for dealmakers.

1. The U.S. antitrust agencies will continue their aggressive merger enforcement.

Under the Biden administration, the antitrust agencies have moved on several fronts to police mergers more assertively: expanding notification requirements to gain insight into more deals, proposing updates to their merger guidelines to reflect novel theories of antitrust harm, and challenging more transactions in court. They aim to discourage M&A and make it easier to challenge transactions that they consider problematic.

While the agencies have suffered several high-profile losses in merger litigations, they appear to remain resolute, touting the number of abandoned transactions as evidence that their approach is succeeding. At a minimum, dealmakers should expect that more transactions will receive antitrust scrutiny, with extended investigations becoming more frequent and burdensome. Many deals that would have been waved through in prior administrations are likely to face questions.

2. Certain types of transactions are more likely to draw agency scrutiny.

The agencies' proposed changes to their merger guidelines — the statement of principles and standards that guide their approach to reviews —

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would set low bars for what constitutes an anticompetitive merger. But, as a practical matter, the agencies do not have the resources to oppose every transaction and will have to be selective about bringing challenges. They are more likely to focus on transactions where they can press novel theories of harm alongside traditional horizontal and vertical theories. High-profile and high-value deals are also likely to garner the agencies' attention, as are those in industries of particular interest to the agencies, such as Big Tech, digital platforms, pharmaceuticals and healthcare.

3. While the agencies may win some incremental legal gains in court, novel theories can also backfire and result in bad precedents for them.

Regulators have suggested that their courtroom losses nevertheless enabled the government to achieve incremental gains in the form of judges' acknowledgments, minor extensions of the law, or solidification of more novel theories.

However, losses can also produce case law that limits regulators' ability to pursue those theories in the future. For example, over the last decade, rulings against the agencies in cases where they challenged vertical mergers have made future vertical merger challenges more difficult.

With time, it is likely that the courts' adherence to precedent and willingness to curb the agencies' efforts to rewrite antitrust principles will ultimately embolden companies and weaken the deterrent effect of the agencies' pro-enforcement stance.

4. The parties must be prepared to go the distance.

Agency losses diminish the credibility of enforcers' saber-rattling and demonstrate that difficult deals can still eventually close. To maximize the chance of success, however, parties should build enough time into merger agreements to allow for extended reviews and potential challenges, particularly where the deal must be approved in multiple jurisdictions.

Where a challenge is anticipated, it is critical to develop a credible litigation strategy early in the process, and the parties to the transaction must proactively evaluate all potential theories of harm that the government might assert under the new merger guidelines and be prepared to tackle them head on. (In an article last year, "Boards and M&A: Playing, and Winning, the Game of Regulatory Risk," we discussed in more detail how to address the risk of delay or a challenge in merger agreements.)

5. Parties should be ready to propose remedies and "litigate the fix."

Biden FTC and DOJ antitrust leaders have expressed skepticism and even outright hostility toward merger remedies. Indeed, the DOJ did not enter into a single merger consent decree outside of litigation for over two years — a common form of resolution in the past. But this resistance should not deter parties from proposing remedies to mitigate potential harm to competition, because "remedies self-help" can be a useful tool in litigation: Some of the DOJ and FTC losses have come where the merging parties cited their proposed remedies in defense

1W-7L: Biden Administration Antitrust Challenge Record

Losses

Cases where the DOJ or FTC has litigated to block a merger since January 2021 and either lost a ruling or settled during litigation on terms close to what the parties had proposed earlier. Note: Some losses have been appealed.

Microsoft/Activision Blizzard
(cloud gaming, consoles and multi-game content library)

- District court denied the FTC's request for an injunction and the FTC has appealed. FTC returned the administrative case to adjudication following defeat in the district court. The transaction closed after receiving approval from regulators in the U.K. and EU.

ASSA ABLOY/Spectrum Brands
(door locks)

- DOJ settled mid-trial, accepting a divestiture that Assay Abloy had earlier proposed as a remedy, withthe addition of several other oversight provisions.

Meta/Within
(virtual reality dedicated fitness applications)

- District court denied the FTC's request for an injunction, finding that the FTC had failed to meet its burden of proof. But the judge largely affirmed the FTC's potential competition precedent.

Booz Allen/EverWatch
(signals intelligence modeling and simulation for a single customer)

- District court denied the DOJ's request for an injunction, finding that the DOJ's proposed market defined as a single contract where the parties were the only bidders, was overly narrow.

UnitedHealth/Change Health
(medical claims processing)

- District court denied DOJ's request for an injunction, holding that a divestiture resolved horizontal concerns and a firewall to protect competitors' competitively valuable data would not reduce innovation.

U.S. Sugar/Imperial Sugar
(sugar refining)

- District court denied an injunction, saying that DOJ's proposed product and geographic markets were too narrow.

Illumina/GRAIL
(Research, development and commercialization of multi-cancer early detection tests)

- FTC administrative law judge ruled against the agency, finding that Illumina did not have the incentive to foreclose rivals. The FTC commissioners overturned the administrative law judge, and their decision has been appealed by the companies. The EU recently ordered Illumina to divest GRAIL, which the parties are challenging in the European Court of Justice.

Win

Penguin Random House/Simon & Schuster
(publishing of top-selling books)

- District court enjoined the transaction, agreeing that the merger would eliminate head-to-head competition in the market for top-selling books.

of the merger — *e.g.*, divestitures of business units or other contractual and commercial commitments — and judges agreed that the remedies would address antitrust concerns.

From an early stage, the parties to a transaction should evaluate the potential for remedies to resolve competition concerns and consider how they fit into the defense of the merger.

6. Recent agency losses may soften hostility toward remedies.

The courtroom losses appear to have softened the agencies' resistance to remedies. Over the past six months, the agencies have entered into several merger settlements, including the first settlement by the DOJ under President Biden. The agencies may see extracting remedies as an alternative way to claim victory without the risk of a merger trial. Dealmakers should therefore still consider engaging with the agencies about remedies throughout the investigation process and during litigation.

7. The agencies may continue to use timing as a lever and try to kill deals with process.

Challenging a deal in court is not the only lever the U.S. antitrust agencies have to try to stop a deal. They can also rely on the timing of other jurisdictions' reviews. Foreign antitrust reviews — particularly those in the U.K. and EU — can extend well past the U.S. statutory deadlines for the government to act, and those regulators can impose a global bar on closing a deal while their investigation is pending.

This can provide the U.S. agencies with more time to investigate, prepare for litigation and commence a challenge in court. Without sufficient cushion in the deal's outside date, these delays can force the abandonment of a deal. Prospective dealmakers need to provide for these scenarios in their merger agreements, including flexibility to extend outside dates.

8. Winning in federal court may not be the end of the matter.

An agency loss in federal court on a preliminary injunction motion historically meant the end of the challenge. However, the agencies now appear more willing to appeal, even where a transaction has closed, and despite the agencies' poor track record when attempting to reverse a district court.

The potential for delay is particularly significant in actions where the FTC initiated the challenge in its in-house administrative court. If it subsequently loses in district court, the case is returned to the FTC administrative court and its subsequent decision will ultimately go to the FTC commissioners before it can be appealed to the U.S. Circuit Court of Appeals. That process that can take two years or more.

In addition, even if the parties succeed in defending the transaction in the U.S., a foreign regulator, like the U.K.'s Competitions and Markets Authority or the European Commission, could nevertheless block the deal. Closing despite an adverse decision from those regulators, or while a proceeding is pending in a circuit court or the FTC's administrative court, could expose the parties to significant fines and, potentially, the costs of unwinding the transaction later. Managing this potential threat must be considered when deciding how to work with and litigate against regulators in the U.S. and abroad.

Conclusion

In sum, notwithstanding the Biden administration's failure to prevail in court where it has embraced novel theories and attempted to rewrite case law, prospective dealmakers should expect the pro-enforcement stance to continue, which means more transactions are likely to receive scrutiny and investigations will take longer and be more burdensome.

That said, difficult deals are still getting through the regulators and are being approved in court, so dealmakers should not be deterred so long as they plan from the outset, establish a credible litigation strategy and prepare to litigate if challenged by the agencies.

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