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Antitrust agencies signal intensified scrutiny of proposed mergers

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DOJ and FTC leaders recently discussed several key merger enforcement initiatives, which reflect a continued focus on aggressive policing of proposed transactions. Agency leaders appear less willing to accept negotiated remedies and more willing to litigate. In support of expanded litigation efforts to challenge proposed transactions, the DOJ and FTC indicated they would develop revised horizontal and vertical merger guidelines.

DOJ and the FTC signal increased skepticism toward settlements and greater appetite for litigated challenges to proposed mergers

Skepticism toward merger settlements

During the course of the 2022 ABA Antitrust Law Spring Meeting in Washington, D.C. (the Spring Meeting), the leadership of the Federal Trade Commission (FTC) and the Antitrust Division (the Division) of the U.S. Department of Justice (DOJ) continued to signal their ambition to more aggressively police proposed mergers. In remarks at the Spring Meeting's capstone Enforcers Roundtable, FTC Chair Lina Khan and the DOJ's Assistant Attorney General (AAG) for Antitrust Jonathan Kanter underscored the implications of this agenda for mergers. AAG Kanter declared that DOJ will use every tool in its arsenal to take on anticompetitive conduct. He insisted that DOJ is returning to "first principles"—the text and purpose of the antitrust laws. In a shift from prior DOJ practice, AAG Kanter stated that even structural remedies (e.g., divestitures) will be disfavored fixes to mergers the Division identifies as anticompetitive, a view that he has shared repeatedly in recent weeks.[1] In separate remarks, Principal Deputy AAG Doha Mekki stated that DOJ will likely reject proposed settlements more often because historically many settlements have failed in maintaining competition. Indeed, in recent weeks, Cargotec and Konecranes abandoned a proposed merger after DOJ rejected the parties' settlement proposal as insufficient to address concerns about eliminating competition for shipping container handling equipment. To the extent that DOJ will accept settlement proposals, Principal Deputy AAG Mekki emphasized that DOJ prefers structural rather than behavioral remedies to avoid the need for DOJ to act as a regulator and oversee firms' ongoing post-merger conduct.

Greater appetite for litigated merger challenges

DOJ officials further explained that mergers are squarely in the Division's sights for closer scrutiny and potential litigation. Principal Deputy AAG Mekki stated that the public should expect to see "a lot more" merger litigation moving forward. In particular, she stated that the Division will seek quicker access to courts, and is now willing to file complaints to enjoin mergers *prior to* merging parties' certification of compliance with Second Requests. Principal Deputy AAG Mekki stated that, in the Division's view, in certain transactions the competitive issues are sufficiently clear such that lengthy periods of information gathering are not necessary. To this end, she noted that the Division now has two Deputy Assistant Attorneys General responsible for litigation for the first time in its recent history and is prepared to litigate more frequently.

FTC Chair Khan echoed the call for an agenda laser-focused on protecting competition and highlighted the ways in which this focus would shape merger enforcement. She highlighted recent FTC merger challenges that resulted in abandoned transactions,[2] hailed the use of prior approval conditions in merger settlements requiring the buyer to clear future deals—of any size—with the antitrust agencies for a period of years, and pointed to the ongoing agency review of the merger guidelines (more on this below).

Changes to the HSR process

These developments suggest a hardening attitude toward merger enforcement among agency leadership. In response to a question as to whether *any* mergers may be competitively neutral or pro-competitive, Holly Vedova, Director of the FTC's Bureau of Competition, conceded only that it could be the case that some "unique" transactions with "true synergies" may exist, but that the FTC's focus was on harm resulting from mergers. In order to help the agencies spot anticompetitive mergers more easily, the FTC is contemplating ways to make its review of mergers during the initial 30-day waiting period more effective. For example, Chair Khan noted that consideration was being given to changes to the HSR form that would allow for the collection of information that is "more probative" of whether a proposed deal is unlawful upfront.

The more aggressive approach to merger enforcement was not without its critics. FTC Commissioner Noah Phillips critiqued as "nihilism" the view that mergers have no procompetitive value and, therefore, that the proper use of the merger review process was as a "tax" on merging parties. He observed that recent FTC practice appeared to be using the HSR process as a tool to "throw sand in the gears" of M&A activity, even without a view that a particular merger will produce competitive harm. He provided two concrete examples: (1) the FTC's increased use of "close at your own risk" letters, which he viewed as designed to deter mergers by introducing added uncertainty into the deal process; and (2) the apparently indefinite suspension of grants of early termination of the HSR waiting period, which he viewed as an effort simply to raise the cost of mergers across the board.

Enforcers turn to seldom-used statutory provision in an effort to expand available enforcement tools

Beyond the unmistakable signals that mergers will be receiving added scrutiny, enforcers made clear that they would be looking to an additional—and until now rarely used—statutory provision to provide an additional route to challenge mergers that the agencies view as problematic. Principal Deputy AAG Mekki stated that the Division will consider bringing cases against proposed mergers, in appropriate circumstances, under the "tend to create a monopoly" clause of Section 7 of the Clayton Act. This position is consistent with AAG Kanter's statement at the Enforcers Summit on April 4 that enforcers can use this provision to challenge mergers for the sole reason that the merger would increase market concentration and, thus, introduce the *potential* for monopolization.[3] The implicit suggestion here is that this change may give the Division greater leeway to challenge mergers.

Debate continues as to the contours of anticipated revisions to the vertical and horizontal merger guidelines

The period for public comment on the joint DOJ and FTC request for information related to their reevaluation of the merger guidelines runs until April 21, 2022. During the Spring Meeting, potential revisions to the guidelines were a frequent topic. Although the enforcement officials were somewhat guarded in their statements given the fact that the public comment period was still open, Principal Deputy AAG Mekki stated that any merger guidelines must be rooted in the antitrust laws promulgated by Congress and as interpreted by the courts. She expressed concern that the current merger guidelines have deviated from the text of the statutes and the case law. She further stated that there has been significant industry consolidation in recent years and new merger guidelines must reflect these changed market realities, presumably by making further consolidation more difficult.

FTC Commissioner Rebecca Slaughter expressed her view that the current guidelines—and agency merger enforcement more generally—was overly concerned with avoiding over-enforcement and not sufficiently concerned about the risks of under-enforcement. She thus wanted the guidelines to be clear about which deals were anticompetitive so as to stop them in their incipiency. Economist panelists called for revisions to the econometric screens and presumptions used in the guidelines, citing further empirical work completed since the guidelines were last updated. Former AAG Makan Delrahim noted that any revision to the guidelines must be carefully grounded in empirical evidence and case law. He noted that the Clayton Act itself had neither a burden-shifting framework nor presumptions in its text and so the agencies

should be careful not to overreach in the guidelines in a way that would be subject to challenge before the courts, including the Supreme Court.

There was general consensus that a unified set of guidelines covering horizontal and vertical mergers would be clear and easier for the public and practitioners to understand. Commentators, including enforcers, also generally seemed to agree that the revised guidelines should permit the agencies to show anticompetitive harm using direct evidence, without resort to market share analysis.

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[1] Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section (January 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york; Assistant Attorney General Jonathan Kanter Delivers Keynote at CRA Conference (March 31, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference. AAG Kanter's most recent comments on this point at the April 4th Enforcers Summit were covered in a previous Davis Polk client update.

[2] Notably, some of the most significant abandoned mergers in recent months were vertical deals.

[3] Covered in a previous Davis Polk client update.