WILMERHALE

More Bite, Less Bark: Merger Enforcement at the FTC in the Trump Administration

OCTOBER 4, 2018

Since the beginning of the Trump Administration, the Antitrust Division of the Department of Justice (DOJ) has captured headlines for its aggressive public stance regarding merger enforcement. Actions attracting attention include the DOJ's challenge of AT&T's proposed acquisition of Time Warner and repeated declarations from antitrust leadership raising objections to behavioral remedies for anticompetitive mergers, even in vertical transactions.

The Federal Trade Commission (FTC), which shares with the DOJ responsibility for enforcing the federal antitrust laws, has taken a more "speak softly and carry a big stick" approach to merger enforcement. Indeed, although it has not received nearly as much press attention as the DOJ, since January 2017, the FTC has brought nearly twice as many merger enforcement actions: 30 versus 16 for the DOJ. The FTC also continues to win in court. For instance, just last month, a federal district court granted the FTC's request for a preliminary injunction against Tronox's proposed acquisition of Cristal.[1]

These data, and statements by FTC officials, show that companies in industries for which the FTC has primary enforcement responsibility—including pharmaceuticals, supermarkets, medical devices, semiconductors, energy and others—must be aware that the FTC is not necessarily a more hospitable forum for deal reviews. As to vertical mergers, for example, the FTC has stated that it strongly favors structural relief and that behavioral remedies may only be accepted in exceptional cases.

This alert summarizes key FTC merger enforcement actions and statements made by FTC leadership since January 2017 and identifies some key implications for future transactions.

FTC Merger Enforcement in the Trump Administration: Highlights

Since January 2017, the FTC has brought enforcement actions in a wide variety of industries, including oil pipelines, gas stations, grocery products, chemicals, rocket and missile systems, fantasy sports, and software. In addition, the FTC continues to have a particular interest in pharmaceuticals and healthcare transactions, as indicated by the 10 enforcement actions in these areas, including a recent merger challenge to Grifols S.A.'s acquisition of Biotest US.[2]

In recent speeches, the director of the Bureau of Competition, Bruce Hoffman, highlighted a handful of particularly significant merger enforcement actions. Those cases demonstrate the FTC's focus on innovation and nascent competition, its tendency to define narrow markets around products that compete especially closely in a broader sector, and its skepticism that buyer power could ever rebut an overwhelming presumption that a merger to duopoly or monopoly will lessen competition.

- *CDK and Auto/Mate*. CDK and Auto/Mate supply dealer management systems (DMS) software to car dealerships. Car dealerships use DMS software to manage nearly every aspect of their business.[3] The top two DMS software providers, CDK and Reynolds, had about a 70% share of the DMS software market. Dealertrack, Autosoft and Auto/Mate also had competitive DMS offerings. The FTC challenged CDK's proposed acquisition of Auto/Mate even though Auto/Mate had only a 6% share of the DMS software market.[4] According to the FTC, "Auto/Mate appeared to be on the cusp of becoming a much more important and vibrant competitor."[5] The FTC viewed the transaction as part of an emerging trend of large technology firms acquiring nascent competitors to keep them from emerging as full-fledged rivals.[6]
- *DraftKings/FanDuel*. DraftKings and FanDuel are the two largest providers of daily fantasy sports in the United States.[7] The FTC sued to block the companies' merger, alleging that it would result in a near-monopoly in the market for daily fantasy sports.[8] The FTC rejected arguments that the market should be broader than daily fantasy sports and should include other types of fantasy sport activities and other forms of entertainment.[9] The FTC's challenge was largely based on evidence showing not only intense price competition between DraftKings and FanDuel, but also competition to innovate with new fantasy gaming features.[10]
- *Otto Bock/Freedom Innovations*. Otto Bock and Freedom Innovations are the two leading suppliers of microprocessor prosthetic knees.[11] The FTC sued to unwind Otto Bock's consummated acquisition of Freedom Innovations.[12] The FTC limited the relevant market to microprocessor prosthetic knees because "[c]ompared to other products, microprocessor prosthetic knees reduce the risk of falling, cause less pain, and promote the health and function of the sound limb."[13] The FTC challenged the transaction because, among other things, it was concerned that the merger would eliminate innovation competition, because "[m]uch of the competition between Otto Bock and Freedom took the form of developing new and better products."[14] The lawsuit against Otto Bock is pending in an FTC administrative proceeding.
- *Sanford/Mid Dakota Clinic*. The FTC's challenge of Sanford's proposed acquisition of Mid Dakota Clinic continues a series of challenges to proposed acquisitions of physician groups and hospitals. The FTC alleged that the transaction would be a merger to near monopoly in adult primary care services, pediatric services, obstetrics and gynecology services, and general surgery physician services in Bismarck and Mandan, North Dakota.[15] The US District Court for the District of North Dakota issued a preliminary injunction blocking the transaction, which the parties have appealed to the Eighth Circuit.[16] The parties argued that the presence of a powerful buyer, Blue Cross Blue Shield of North Dakota, precluded the possibility of anticompetitive effects.[17] The transaction raises the

> question whether "a powerful buyer effectively eliminate[s] the threat of competitive harms from a merger to monopoly." The FTC answered that question with an "unequivocal[] no." "Power buyers can matter, but it's very unlikely that any buyer, no matter how powerful, can offset the anticompetitive effects of a merger to monopoly."[18]

In addition, the FTC has continued to enforce mergers involving "cross-ownership"; that is, where one of the merging parties already owns a significant equity stake in a competitor to the merged firm.[19] Cross-ownership must be distinguished from "common ownership," where an institutional investor holds significant equity stakes in firms that compete with one another, but the institutional investor does not actually compete with any of the firms in which it holds shares. FTC Commissioner Phillips believes that there is currently no evidence that common ownership substantially lessens competition in violation of the antitrust laws, while "cross-ownership remains a traditional viable antitrust theory."[20] But it is not clear whether a majority of the FTC would agree with Commissioner Phillips.

The FTC Strongly Prefers Structural Relief in Vertical Merger Cases, but There May Be Room for Behavioral Remedies

Behavioral remedies restrict the merged firms' conduct to address competitive concerns, but do not require the merging parties to divest any assets or businesses. Structural remedies, on the other hand, require the parties to divest assets or businesses. Common behavioral remedies include nondiscrimination provisions, information firewalls and arbitration provisions. Behavioral remedies have typically been used to remedy concerns with vertical mergers, where the merging parties are not horizontal competitors. Vertical mergers often generate substantial efficiencies, and the goal of a behavioral remedy is to eliminate anticompetitive effects while preserving the procompetitive efficiencies generated by the transaction.

The new DOJ leadership has been vocal in raising very substantial concerns about ever accepting behavioral remedies,[21] arguing among other things that "Congress did not call for illegal mergers to be regulated, it called for them to be prohibited."[22] By contrast, FTC leadership has taken a more nuanced and open stance regarding behavioral remedies. In a 2018 speech, Bruce Hoffman observed that "[f]irst and foremost, it's important to remember that the FTC prefers structural remedies to structural problems, even with vertical mergers."[23] And he made clear that "no one should be surprised if the FTC requires structural relief" for a vertical merger that is likely to substantially lessen competition.[24]

At the same time, however, Hoffman appeared to give more credence to arguments that justify a behavioral remedy than his counterparts at the DOJ.[25] He stated, "Due to the elimination of double-marginalization and the resulting downward pressure on prices, vertical mergers come with a more built-in likelihood of improving competition than horizontal mergers."[26] Indeed, "empirical work has tended to show that vertical mergers (and vertical restraints) are typically procompetitive." And, although the FTC prefers structural relief, "in some cases [the FTC believes] that a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration."[27]

Key Implications From FTC Merger Enforcement in the Trump Administration

- The enforcement data suggest that the FTC is not less aggressive than the DOJ in its approach to merger reviews, especially for typical horizontal mergers.
- The FTC may be more amenable to behavioral relief than the DOJ in vertical mergers, but to avoid structural relief, parties will at least need to show that a divestiture would substantially eliminate procompetitive efficiencies generated by the transaction and make a very strong showing that a behavioral remedy will be effective to resolve competitive concerns and be workable.
- The FTC reviews transactions for innovation concerns and may seek enforcement on acquisitions of nascent competitors if the evidence indicates that one of the merging parties may become a significant competitive threat in the near future.
- The FTC tends to define narrow markets and is skeptical of claims that the merging parties that are particularly close in competitive space compete in the same market with firms that offer more distant substitutes.
- The FTC is skeptical of arguments claiming that powerful buyers will counteract the anticompetitive effects of transactions, especially when only one or two competitors will remain post-transaction.
- The FTC continues to be concerned about lessening of competition due to cross-ownership, but may be less concerned about common ownership.
- The FTC continues to investigate and challenge consummated transactions that are not HSR reportable.

---

1. Memorandum Opinion, *FTC v. Tronox Limited*, Case No. 1:18-cv-01622 (TNM) (D.D.C. Sept. 12, 2012), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv1622-108.

2. In the Matter of Grifols, S.A., www.ftc.gov/enforcement/cases-proceedings/181-0081/grifols-sa-grifols-shared-services-north-america-inc-matter.

3. Administrative Complaint, In the Matter of CDK Global and Auto/Mate, ¶ 1 (March 20, 2018), www.ftc.gov/system/files/documents/cases/docket_no_9382.

4. D. Bruce Hoffman, Competition Policy and the Tech Industry – What's at stake?, at 5 (April 12, 2018), www.ftc.gov/system/files/documents/public_statements/1375444/ccia_speech_final_april30.]

5. *Id*. at 9.

6. *Id*. at 8.

7. Complaint, *Federal Trade Commission v. DraftKings, Inc.*, ¶ 1 (July 10, 2017), available at www.ftc.gov/system/files/documents/cases/d09375_draftkings_federal_complaint_6-19-17.pdf.

8. *Id.*

9. D. Bruce Hoffman, It Only Takes Two to Tango: Reflections on Six Months at the FTC, at 5

(February 2, 2018), www.ftc.gov/system/files/documents/public_statements/1318363/hoffman_gcr_live_feb_201

10. *Id*.; Complaint, *supra* note 7, at ¶ 63.

11. Press Release, FTC Challenges Consummated Merger of Companies That Make Microprocessor Prosthetic Knees (December 20, 2017), www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-consummated-merger-companies-make-microprocessor.

12. *Id.*

13. *Id.*

14. Hoffman, *supra* note 9, at 6.

15. Press Release, FTC and State Attorney General Challenge Physician Group Acquisition in North Dakota (June 22, 2017), www.ftc.gov/news-events/press-releases/2017/06/ftc-state-attorney-general-challenge-physician-group-acquisition.

16. *Federal Trade Commission v. Sanford Health*, Case No. 1:17-cv-133, Dkt. 140 (D.N.D. Dec. 15, 2017), available at www.ftc.gov/system/files/documents/cases/1710019_sanfordpiorder.pdf.

17. *Id*. at 2.

18. Hoffman, *supra* note 9, at 5.

19. A good example is the FTC's most recent merger challenge to Grifols' acquisition of Biotest US, which held 41% of the stock of ADMA Biologics, Inc. (ADMA). Grifols, ADMA and another company, Saol Therapeutics, were the only suppliers of hepatitis B immune globulin in the United States. To obtain FTC approval, Grifols agreed not to acquire the ADMA stock as part of the transaction. See Press Release, FTC Requires Grifols S.A. to Divest Assets as Condition of Acquiring Biotest US Corporation (August 1, 2018), www.ftc.gov/news-events/press-releases/2018/08/ftc-requires-grifols-sa-divest-assets-condition-acquiring-biotest. The FTC also challenged Red Ventures' acquisition of Bankrate based on cross-ownership concerns. There, two investors that owned 34% of Red Ventures also owned 100% of "A Place for Mom," which competed with one of Bankrate's businesses, Caring.com, in the market for third-party paid referral services for senior living facility operators. Red Ventures agreed to divest Caring.com to obtain FTC approval of the transaction. See *In the Matter of Red Ventures Holdco, LP and Bankrate, Inc.*, Analysis of Agreement Containing Consent Orders to Aid Public Comment (November 3, 2017), www.ftc.gov/system/files/documents/cases/1710196_red_ventures_bankrate_analysis.pdf.

20. Noah Joshua Phillips, Taking Stock: Assessing Common Ownership, at 1-2 (June 1, 2018), www.ftc.gov/system/files/documents/public_statements/1382461/phillips_-_taking_stock_6-1-18_0.pdf.

21. Makan Delrahim, Remarks at the Antitrust Division's Second Roundtable on Competition and Deregulation, at 2 (April 26, 2018), www.justice.gov/opa/speech/file/1057841/download.

22. *Id*. at 3.

23. D. Bruce Hoffman, Vertical Merger Enforcement at the FTC, at 1 (January 10, 2018), www.ftc.gov/system/files/documents/public_statements. *Id*. at 7.

24. *Id*. at 8.

25. *But see* Makan Delrahim, Antitrust and Deregulation, at 8 (November 16, 2017) ("In certain instances where an unlawful vertical transaction generates significant efficiencies that cannot be achieved without the merger or through a structural remedy, then there's a place for considering a behavioral remedy if it will completely cure the anticompetitive harms. It's a high standard to meet."), www.justice.gov/opa/speech/file/1012086/download.

26. Hoffman, *supra* note 23, at 3.

27. *Id*. at 8.

Authors

Hartmut Schneider

PARTNER

Vice Chair, Antitrust and Competition Practice

hartmut.schneider@wilmerhale.com

+1 202 663 6948

Leon B. Greenfield

PARTNER

leon.greenfield@wilmerhale.com

+1 202 663 6972