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An unpredictable national and global geopolitical environment does not foster the most certain environment for M&A, but with corporate cash reserves and private capital dry powder at historic highs, credit available at low and even negative rates, and shareholder activists' relentless efforts to drive greater shareholder returns, we expect that companies will continue to look to M&A as a faster route to obtain talent, technology and innovation and stimulate growth in 2020.

A DECADE OF INCREMENTAL CHANGE IN U.S. MERGER ENFORCEMENT

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There have been numerous events over the last decade that have brought antitrust merger enforcement under the national spotlight: a change in political party in the White House, a country rebounding from the 2008 financial crisis, and a resurgence of populist antitrust academics. Despite these events, the last decade did not usher in a momentous change to antitrust merger review.

In 2010, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") (together the "Agencies") issued updated Horizontal Merger Guidelines ("Guidelines"). The updated guidelines reflected the Agencies' modern approach to merger review and laid out a more flexible approach to the use of analytical tools and direct evidence of potential anticompetitive harm. Since the Agencies issued the 2010 Guidelines, they largely have been successful when challenging transactions. The few times that the Agencies were unsuccessful can best be characterized as instances of straying beyond the traditional horizontal merger challenge.

In the current political environment, there are continued calls for more aggressive enforcement, particularly in technology markets, and it is reasonable to expect the Agencies to take a more aggressive approach heading into the next decade. However, despite such calls, the Agencies' unsuccessful challenges from the last decade leave a cautionary legacy going forward. Instead of monumental challenges that stray far from the core principles of the Guidelines and established case law, expect modest incremental changes in the years ahead. This article highlights the key developments in merger enforcement over the last decade and previews what we can expect in the coming years.

2010 Horizontal Merger Guidelines

In August 2010, the FTC and the DOJ released a revised version of the Guidelines.[1] The updated Guidelines were the culmination of a years-long effort to revise the prior Guidelines to more accurately reflect modern antitrust thinking. Despite being the first major revision of the Guidelines in nearly 20 years, the new Guidelines were not a complete overhaul of merger principles. Instead, the Agencies updated the Guidelines to better reflect the current state of merger review, including, for example, a focus on effects rather than rigid structural presumptions. The revisions identified a flexible list of analytical steps for merger evaluation, a diminished emphasis on market definition and market shares and a focus on direct evidence of competitive effects, and an expanded discussion of how to identify potentially harmful mergers that involve differentiated products.[2]

The updated Guidelines kicked off a decade that would see the Agencies win nearly every "classic" horizontal merger challenge and seek to expand the scope of merger enforcement.

Agency Challenges

Even prior to the issuance of the 2010 Guidelines, the Agencies had successfully challenged a number of transactions and their successes in the 2010's may best be considered a continuation of Agency early successes.

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Since 2010, the Agencies challenged 30 transactions that resulted in a court opinion. Of those challenges, the Agencies lost only three times.[3] Importantly, in each of these unsuccessful challenges addressed below, the challenge was not a "straightforward" challenge to a transaction among current competitors reportable to the Agencies under the HSR Act.

LabCorp/Westcliff

In May 2010, Westcliff Medical Laboratories, Inc. ("Westcliff") filed a Chapter 11 bankruptcy action. At the same time, Westcliff announced that Laboratory Corporation of America's ("LabCorp") planned to acquire the company for $57.5 million, subject to approval by the U.S. Bankruptcy Court for the Central District of California, which was granted in June 2010. The FTC became aware of the transaction the day before the bankruptcy court's ruling and began a lengthy investigation. In December 2010, the FTC challenged LabCorp's acquisition of Westcliff.[4]

In its complaint, the FTC alleged that LabCorp and Westcliff were competitors in the clinical laboratory testing service market in Southern California and that the transaction would result in increased prices both through unilateral and coordinated effects. Further, the FTC rejected the parties' failing firm defense and alleged that Westcliff's bankruptcy filing was a specific condition that had been imposed as part of the purchase agreement and not reflective of its profitability. The FTC argued that immunity granted under the failing firm defense was improper because there were several firms willing to purchase Westcliff and that LabCorp acted as a "stalking horse bidder" during the bankruptcy auction.

During the pendency of the administrative proceeding, the FTC sought a preliminary injunction in district court to prevent the parties from closing. The court ruled in favor of the parties for numerous reasons. Among them, the court found that the FTC's market definition was too narrow. The court determined the parties' share of a properly defined marked was less than the FTC alleged because there were 16 additional companies that provided clinical laboratory services in Southern California. Taking it a step further, the court found that the FTC's geographic market also was too narrow and should have included the entire state of California. The court also found that Westcliff had not constrained LabCorp's competitive behavior and that LabCorp's customers did not switch to Westcliff. Ultimately, the FTC withdrew its challenge of the proposed acquisition.

The FTC's challenge of LabCorp's acquisition of Westcliff in 2010, while unsuccessful, embodied numerous central enforcement themes that remained constant throughout the decade. The FTC's interest in LabCorp's acquisition represented continued attention by the Agencies of the various facets of the healthcare sector. Also, the challenge was part of a trend of heightened scrutiny by the Agencies to investigate and challenge non HSR-reportable and consummated transactions following the financial crises. The FTC's challenge signaled that transactions approved by a bankruptcy court may not be immune from antitrust scrutiny, even where the transaction is non-HSR reportable.

STERIS/Synergy

In October 2014, STERIS Corporation announced its proposed $1.9 billion acquisition of Synergy Health. The transaction combined two providers of infection prevention and other sterilization products and services. In May 2015, the FTC filed a complaint in federal district court for a preliminary injunction pending the outcome of an administrative trial. The complaint alleged that the proposed acquisition would violate the antitrust laws by significantly reducing future competition in regional markets for sterilization of products using radiation.[5] Under an "actual potential competition" theory, the FTC alleged that Synergy abandoned its plans to enter the U.S. market with X-ray sterilization technology solely because of the proposed acquisition. In response, the parties argued that the proposed acquisition should be allowed to proceed as long as there was no reduction in "pre-existing substantial competition" and that the actual potential competition theory had been seldom adopted by courts.

In deciding whether to issue a preliminary injunction, the district court "assumed the validity" of the actual potential competition theory and directed the parties to answer the question: "but for the merger, is it probable that Synergy would have entered the U.S. market by building one or more x-ray sterilization facilities in the U.S. in a reasonable period of time?"[6]

At trial, STERIS and Synergy successfully disputed the FTC's allegations, arguing that Synergy's abandoned plans to enter the U.S. X-ray market were due to legitimate business considerations. The court concluded that the "evidence unequivocally show[ed]" that Synergy was justified in terminating its X-ray project when it did, and that the FTC failed to carry its burden of proving that the company would have entered the U.S. contract sterilization market by building one or more X-ray facilities in the U.S. within a reasonable period of time.[7] Because the court found that the FTC failed to show by a preponderance of the evidence it would likely succeed on the merits of its claim, the court denied the FTC's request for a preliminary injunction. Soon thereafter, the FTC announced that it would not appeal the court's decision.

The 2010 Guidelines define "horizontal mergers" as including "mergers and acquisitions involving actual or *potential* competitors" (emphasis added). Further, the 2010 Guidelines note that in evaluating evidence of direct competition, the agencies will "consider whether the merging firms have been, or likely will become absent the merger, substantial head-to-head competitors."[8] In *STERIS*, while the court "assumed the validity" of the FTC's actual potential competition theory the FTC was unable to meet its evidentiary burden. Of course, the FTC's loss is not the end of the actual potential competition theory, but it demonstrates that the Agencies are likely to face higher hurdles in cases involving non-traditional theories of anticompetitive harm.

AT&T/Time Warner

In November 2017, the DOJ filed a complaint challenging AT&T's proposed acquisition of Time Warner.[9] The DOJ's challenge became the first litigation related to a vertical merger by the Agencies in 40 years: in 1977, a court prohibited the DOJ from requesting that a paper manufacturer divest two paper distributors it had purchased 10 years prior.[10] The DOJ also was unsuccessful in challenging the 1977 vertical transaction.

The DOJ's complaint outlined concerns that the vertical integration of Time Warner's content with AT&T's video distribution channels would enable AT&T to increase prices for rival video distributors and result in higher prices for consumers. The DOJ's complaint came after the parties and the DOJ were unable to come to an agreement during remedy negotiations: the parties sought a remedy similar to the one used in the Comcast/NBC Universal merger and the DOJ insisted that AT&T divest CNN's parent company, Turner Broadcasting.[11]

In a strongly worded opinion, District Court Judge Leon was unpersuaded by the DOJ's theory and evidence. Even though the DOJ was unsuccessful at prohibiting AT&T's acquisition of Time Warner, the litigation may be indicative of some aspects of the future of vertical merger control. For example, the DOJ's theory that post-merger Time Warner would be capable of increased bargaining leverage when negotiating with other video distributors that compete with AT&T was based on the Nash bargaining model, which District Court Judge Leon found to be a viable theory of harm, even though he was ultimately unpersuaded that the transaction would cause harm based on the real-world evidence presented during trial.[12]

Unlike in the horizontal merger context using the Guidelines, when analyzing a proposed vertical merger, the Agencies must make a fact-specific showing that the proposed merger is "likely to be anticompetitive" because there is no presumption of harm based on market concentration.[13] With AT&T/Time Warner, the DOJ sought to greatly expand the scope of merger enforcement beyond the tradition horizontal transaction. The DOJ's lack of success suggests prudence may be in or-

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der when it next considers whether to challenge to a vertical transaction.

Recent Enforcement

Below we discuss additional trends in recent enforcement, which also signal what merging parties can expect in the early part of the next decade.

Role of State Attorneys General

In addition to the federal Agencies, state attorneys general ("state AGs") also have investigatory and enforcement powers. Until recently, limited resources often led to state AGs working in partnership with the Agencies during merger challenges and following the Agencies lead on whether to pursue an action. However, in recent years, state AGs have played an increased role in high-profile merger enforcement, either in tandem with the Agencies or independent of them.

One notable example of a state AG taking a more prominent role occurred in June 2017, when the California Attorney General sued to block the proposed acquisition of two petroleum terminals by Valero Energy Corporation even though the FTC chose to not challenge the proposed transaction.[14] In response to the AG's lawsuit, the parties agreed to not make any changes to the terminals' operations, staff, or contracts until a trial on the merits. The court gave limited precedential weight to the fact that the FTC had not challenged the acquisition and found that the state had "raised serious questions regarding whether the proposed transactions will have anticompetitive effects." Based on the court's ruling and before a full trial, the parties abandoned the transaction.

The California AG's lawsuit that prevented Valero's acquisition is part of a growing trend of increased AG merger enforcement that some believe is a justified a response to perceived lax antitrust enforcement at the federal level. For example, in June 2019, the New York state AG and the California AG led a coalition of 10 state AGs (including D.C.) in challenging the T-Mobile/Sprint merger.[15] The states filed the complaint before the DOJ or the Federal Communications Commission had completed their review of the proposed merger. In July 2019, the DOJ and five state AGs entered into a settlement with the merging parties that required a divestiture of Sprint's prepaid business, including Boost Mobile, Virgin Mobile, and Sprint prepaid, to Dish Network Corporation.[16] The remaining State AGs still have a pending lawsuit against T-Mobile/Sprint to block the proposed transaction.

Despite being increasingly independent, state AGs also have continued to work in tandem with the Agencies. However, expect the trend of increased scrutiny at the state level to continue.

Focus on Technology Companies

Both the DOJ and FTC have responded to calls for increased attention to technology companies, with a focus on digital platforms, zero-price markets, and the value of data. Academics and activists, and more recently Congress, other government officials, and even members of the tech industry, have pushed for increased antitrust scrutiny of technology companies, including calls to break up the biggest players in the industry.

The FTC has taken numerous steps to study, maintain, and take action as necessary in the technology markets—both in the merger and conduct contexts. As a next step after the Hearings on Competition and Consumer Protection in the 21st Century, the FTC created the Technology Task Force in February 2019.[17] The task force will monitor and take action as necessary in the tech industry. The FTC used the successful 2002 Merger Litigation Task Force, which reinvigorated the hospital merger enforcement program and focused attention on proposed transactions in retail industries, as a model for the Technology Task Force.

In addition, in July 2019, the DOJ announced a broad investigation into digital platforms, including how the platforms "have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers."[18] In November 2019, Assistant Attorney General Delrahim

gave a speech recognizing that there could be numerous antitrust issues in digital markets and that "[d]ata can offer important clues about market structure and competitive dynamics."[19] In the speech, AAG Delrahim outlined that data may be a non-price factor of competition that requires antitrust scrutiny and that data should be characterized as a consideration paid by consumers when examining zero-price products.

State AGs have also become involved in the calls to action to address potential antitrust issues in technology markets, with the Texas and Iowa AGs leading a coalition of 43 state AGs in submitting proposals for increased merger enforcement in technology markets as part of the FTC's request for public comments for its public hearings on Competition and Consumer Protection in the 21st Century.[20]

Nascent Competition

At the close of the decade, the Agencies have challenged several transactions that involve a dominant firm acquiring an allegedly nascent competitor. These challenges have been relatively rare, but may be a result of recent criticism of the Agencies' lax enforcement of instances of dominant firms acquiring potential rivals before the rival can become a meaningful competitive threat. This trend is related to the increased focus on tech markets, described above, given the speed at which these markets function.

In August 2019, the DOJ challenged Sabre Corporation's planned $360 million acquisition of Farelogix, a transaction involving two companies that provide booking services to airlines.[21] In its complaint, the DOJ alleged that the proposed transaction would allow Sabre, the largest booking services provider, to "eliminate a disruptive competitor that has introduced new technology to the travel industry and is poised to grow significantly." DOJ alleged that prior to the transaction, Farelogix "injected much-needed competition and innovation into stagnant booking services markets."

Even more recently, in December 2019, the FTC challenged Illumina Inc.'s acquisition of Pacific Biosciences of California ("PacBio"), alleging that the transaction is Illumina's attempt to unlawfully maintain its monopoly in the U.S. market for next-generation DNA sequencing systems "by extinguishing PacBio as a nascent competitive threat."[22]

Overall, much will be learned from these challenges involving nascent competition concerning the blueprint for the Agencies' approach moving forward. This will include understanding the appropriate line between enforcement regarding "nascent" and "potential" competition that can be drawn under the Guidelines.

Looking Forward to the Next Decade

Despite calls for more aggressive enforcement, the last 10 years offer cautionary examples. Where the Agencies have sought to push the boundary, be it by expanding merger challenges into vertical transactions or seeking to block a transaction based on potential competition, they have faced resistance from courts and ultimately been unsuccessful. Expect that any changes to antitrust enforcement, at least in the coming years, to be modest and focused on incrementally expanding current legal precedent. Where the Agencies have been unsuccessful (*e.g.*, in challenging vertical transactions), merging parties should expect the Agencies to look for "the right case" to make precedent or even issue Guidelines that set forth their views on vertical merger analysis.

Even if the coming decade does not bring momentous changes to the antitrust laws, businesses should expect that the Agencies will continue to be active and seek to broaden the reach of their enforcement powers. Indeed, transactions that may have received clearance during the last decade may face increased scrutiny going forward. As the last few years have shown, that scrutiny may not just come from the federal Agencies, but also from state AGs that have decided to take a more prominent role in antitrust enforcement.

ENDNOTES:

[1]Federal Trade Commission and U.S. Department

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of Justice Issue Revised Horizontal Merger Guidelines, (Aug. 19, 2010), https://www.ftc.gov/news-events/press-releases/2010/08/federal-trade-commission-us-department-justice-issue-revised.

[2]Jones Day Commentary, "What You Need to Know About the Revisions to the Merger Guidelines," (Apr. 2010), https://www.jonesday.com/en/insights/2010/04/what-you-need-to-know-about-the-revisions-to-the-merger-guidelines.

[3]This numerical representation does not include loses by the Agencies that were overturned on appeal. For example, the lower court rulings allowing the Advocate/NorthShore and PinnacleHealth/Penn State Hershey mergers were overturned on appeal.

[4]FTC Challenges LabCorp's Acquisition of Rival Clinical Laboratory Testing Company, (Dec. 1, 2010), https://www.ftc.gov/news-events/press-releases/2010/12/ftc-challenges-labcorps-acquisition-rival-clinical-laboratory.

[5]FTC Challenges Merger of Companies That Provide Sterilization Services to Manufacturers, (May 29, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-challenges-merger-companies-provide-sterilization-services.

[6]Scheduling Order, Steris, No. 1:15-cv-01080-DAP (N.D. Ohio Aug. 20, 2015), https://www.ftc.gov/system/files/documents/cases/150820ecfschedulingorder.pdf

[7]Opinion, *FTC v. STERIS Corporation*, et al., No. 1:15-cv-1080 (N.D. Ohio).

[8]*See* U.S. Dep't of Justice & the Fed. Trade Comm'n, Horizontal Merger Guidelines, at § 2.1.4 (Aug. 19, 2010), http://ftc.gov/os/2010/08/100819hmg.pdf.

[9]Complaint*, United States v. AT&T, Inc.*, No. 17-2511 (2017), https://www.justice.gov/atr/case-document/file/1012916/download.

[10]*United States v. Hammermill Paper Co.*, 429 F. Supp. 1271 (W.D. Pa. 1977).

[11]The DOJ raised similar concerns about video content programming and distribution associated with the 2011 vertical merger of Comcast and NBC Universal, but ultimately approved the proposed joint venture between the parties with certain conditions. The so-called behavioral remedy included mandatory licensing of NBC Universal's content to online video distributors on reasonable terms, arbitration of licensing disputes, and a prohibition on discrimination against the transmission of online video distributors' traffic on Comcast's networks.

[12]*United States v. AT&T, Inc.*, No. 18-5214, 2019 WL 921544, at *7 (D.C. Cir. Feb. 26, 2019).

[13]*United States v. AT&T, Inc.*, No. 18-5214, 2019 WL 921544, at *2 (D.C. Cir. Feb. 26, 2019).

[14]Order re Motion for Preliminary Injunction, *State of California v. Valero Energy Corp.*, No. C 17-03786 WHA, at 5 (N.D. Cal. August 23, 2017).

[15]*State of New York et al. v. Deutsche Telekom AG et al.*, No. 1:19-cv-05434-VM, (S.D.N.Y. filed Jun. 25, 2019). Since the complaint was filed, various state AGs have joined and dropped out of the lawsuit.

[16]Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (Jul. 26, 2019), https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package.

[17]FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets, Fed. Trade Comm'n (Feb. 26, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology.

[18]DOJ Press Release, Justice Department Reviewing the Practices of Market-Leading Online Platforms (Jul. 23, 2019), https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms.

[19]Prepared Statement for Assistant Attorney General Makan Delrahim, Challenges to Antitrust in a Changing Economy (Nov. 8, 2019), https://www.justice.gov/opa/speech/file/1217071/download.

[20]Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century: Public Comments of 43 State Attorneys General, National Association of Attorneys General (Jun. 11, 2019), https://www.doj.state.wi.us/sites/default/files/news-media/6.12.19_FTC_Comments_Submission.pdf.

[21]Justice Department Sues to Block Sabre's Acquisition of Farelogix, U.S. Dep't of Justice (Aug. 20, 2019), https://www.justice.gov/opa/pr/justice-department-sues-block-sabres-acquisition-farelogix.

[22]FTC Challenges Illumina's Proposed Acquisition of PacBio, Fed. Trade Comm'n (Dec. 17, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio.

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