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Heightened Antitrust Scrutiny Continued in FY2018

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standard, which he believes has adversely impacted wages, suppliers, quality of services, income inequality, economic dynamism, and democracy itself. Lynn advocated for the abandonment of the consumer welfare standard for three reasons: (1) that the philosophy "warps" how the law is applied and does not explicitly bring income distribution into the antitrust analysis; (2) that the consumer welfare standard was intended to promote particular outcomes that are limited to efficiencies; and (3) that consumer welfare "continues to blind antitrust professionals both to the magnitude and nature of America's antimonopoly problem and to many of the tools we can use to fight the problem."[4]

Even assuming, however (as is likely to be the case), that the consumer welfare standard remains the operative test of competitive harm, the antitrust agencies are reevaluated whether they are striking the right balance regarding the effects of concentration, including the extent to which labor concerns, such as stagnating wages and rising income inequality, may be affected.

In fact, the FTC held a series of public hearings during the Fall and Winter of 2018 "to examine whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy."[5] One of the main areas discussed was the evaluation of the competitive effects of corporate acquisitions and mergers, including, "of particular interest":

(a) the economic and legal analysis of vertical and conglomerate mergers;

(b) whether the doctrine of potential competition is sufficient to identify and analyze the competitive effects (if any) associated with the acquisition of a firm that may be a nascent competitive threat;

(c) the analysis of acquisitions and holding of a non-controlling ownership interest in competing companies;

(d) the identification and evaluation of the exercise of monopsony power and buyer-power as arising from consolidation;

(e) the identification and evaluation of differentiated but potentially competing technologies, and of disruptive or generational changes in technology, and how such technologies affect competitive effects analysis; and

(f) empirical validation of the analytical tools used to evaluate acquisitions and mergers (e.g., models of upward pricing pressure, gross upward pricing pressure, net innovative pressure, critical loss analysis, compensating marginal cost reduction, merger simulation, natural experiments, and empirical estimation of demand systems).[6]

Also included as a separate topic was the analysis of monopsony power in labor markets.

The 2018 election results, if anything, kept alive the debate and focus on increased—rather than decreased—antitrust enforcement. Regardless of whether the pending Senate bills pass, antitrust

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[4] Testimony of Barry C. Lynn, *Hearing on The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?*, Before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights (Dec. 13, 2017), *available at* https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf, p. 82.

[5] Press Release, Fed. Trade Comm'n, *Hearings on Competition and Consumer Protection in the 21st Century* (June 20, 2018), *available at* https://www.ftc.gov/policy/hearings-competition-consumer-protection.

[6] *Id.* at 4.

enforcement is likely to remain vigorous. As discussed further below, the agencies have conducted more extensive scrutiny of vertical transactions, as illustrated by the DOJ's challenge of the *AT&T/Time Warner* transaction. The DOJ's investigation of the *CVS/Aetna* transaction[7] also included vertical considerations. In addition, the DOJ has expressed concerns over using behavioral remedies to resolve competitive concerns, even for vertical mergers. AAG Makan Delrahim has said that behavioral remedies are "fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market."[8] Such regulatory schemes "require centralized decisions instead of a free market process. They also set static rules devoid of the dynamic realities of the market."[9] In addition, such remedies are challenging to enforce, presuming "that the Justice Department should serve as a roving ombudsman of the affairs of business[;] even if we wanted to do that, we often don't have the skills or the tools to do so effectively."[10] The FTC, however, has shown a continued receptivity to considering behavioral remedies in vertical transactions.

Both agencies—but the FTC in particular—have focused on innovation and nascent competition in their investigations and challenges.[11] Health care remains a key industry for agency scrutiny and challenge. Narrow market definitions and unilateral effects theories are pervasive in enforcement actions.

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[7] For FY 2019, the DOJ announced the conditional approval of this transaction. Press Release, U.S. Dep't of Justice, *Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Businesses to Proceed with Merger* (Oct. 10, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d. The DOJ required CVS to divest Aetna's Medicare Part D prescription drug plan business for individuals to WellCare Health Plans, Inc., an experienced health insurer focused on government-sponsored health plans, including Medicare Part D individual prescription drug plans, in order to proceed with its acquisition. CVS, the nation's largest retail pharmacy chain, and Aetna, the nation's third-largest health insurance company, competed in the sale of Medicare Part D prescription drug plans, combined serving 6.8 million members nationwide. The DOJ found that the combination would have resulted in anticompetitive effects, including increased prices, inferior service, and decreased innovation in 16 Medicare Part D plan regions covering 22 states. The divestiture is nationwide, however, to provide WellCare the business assets and national scale that the DOJ believed WellCare needed to replicate the competition that would be lost as a result of the merger. Aetna must also provide WellCare with (1) the opportunity to hire employees who are currently associated with the business and (2) the data related to its plans, including its contracts with brokers and pharmacies. This information will enable WellCare to negotiate with brokers and retail pharmacies on the same footing as Aetna. The divestiture will allow WellCare to enhance its existing business so that it can compete vigorously post-acquisition. The DOJ also considered whether the merger would raise the cost of (1) CVS/Caremark's PBM services or (2) retail pharmacy services to Aetna's health insurance rivals (vertical theories). The DOJ indicated that it had determined that the merger was unlikely to cause CVS to increase costs to Aetna's health insurance rivals due to competition from other PBMs and retail pharmacies. In addition, the DOJ stated that the evidence showed that CVS was unlikely to be able to profitably raise its PBM or retail pharmacy costs post-merger because it would lose customers and Aetna would not be able to offset those losses by capturing additional health insurance customers.

[8] Makan Delrahim, Assistant Attorney General of the Antitrust Division, Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar. *See also* Improving the Antitrust Consensus, Remarks of Assistant Attorney General Makan Delrahim Delivered at the New York State Bar Association (Jan. 25, 2018), *available at* https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-makan-delrahim-delivered-new-york-state-bar.

[9] *Id.*

[10] *Id.*

[11] *See, e.g.*, discussions herein of *CDK/Auto/Mate* and *Ottobock/Freedom.*

Transaction parties should be cognizant of the current antitrust environment when planning for agency review of their transaction. The parties should identify not only current overlapping operations that may raise issues under traditional horizontal merger theories, but also other possible areas of inquiry, including vertical merger issues and the elimination of potential competition as a result of the transaction. Transaction parties should also have a clear understanding of what remedies they will be prepared to offer if, at the end of the investigation, the agency remains concerned about the transaction, and whether they are prepared to litigate if these concerns cannot be resolved. Although the long-term implications of the hearings and the focus on antitrust enforcement have a greater impact than on specific transactions alone, parties should not ignore their effect on the timing and scope of review of transactions or the potential outcome at the end of the investigation.

1-I. Agency Merger Enforcement Activities

A. FTC

At the beginning of FY2018, the FTC had one litigation challenge still pending before the Eighth Circuit. During FY2018, the FTC brought two new preliminary injunction ("PI") challenges in federal district court—both of which the FTC won. The FTC also authorized its staff to bring two additional PI cases, but in both of these cases, the transaction parties abandoned the transactions before the filing of the complaints, thereby negating the need to bring the suits. The FTC also brought an action challenging a consummated merger, which remained pending at the end of FY2018. Outside of litigation, the FTC obtained nine consent decrees in nonconsummated transactions. In addition, the parties abandoned one transaction in response to the FTC having issued a second request.

1. *FTC Litigation Challenges*

a. *FTC and North Dakota Attorney General Win Injunction in Clinic Merger*

On June 22, 2017, the FTC and the North Dakota Attorney General filed a complaint in the U.S. District Court of North Dakota seeking a PI to block Sanford Health's proposed acquisition of Mid Dakota Clinic, Inc.[12] Sanford Health owns more than 40 hospitals and 250 clinics; Mid Dakota Clinic has eight facilities, primarily in Bismarck, North Dakota. The complaint alleges that the deal would significantly reduce competition for adult primary care physician services, pediatric services, OB/GYN services, and general surgery physician services in the greater Bismarck and Mandan metropolitan areas. The case alleges that the transaction parties are each other's closest rivals. The transaction would create a physician group with a 75% to 85% share of physicians providing the various services in the greater Bismarck and Mandan metropolitan areas, and the only group offering surgical services in those areas.

An administrative trial on the merger was set to begin on November 28, 2017. On October 6, 2017, the transaction parties moved to postpone commencement of the administrative hearing in the proceeding to January 30, 2018 and to stay all prehearing deadlines for two months. The transaction parties argued that if, after all appeals in the injunction proceeding were exhausted, they would be enjoined from consummating the acquisition, they would abandon the transaction. On the other hand, the parties indicated that if the district court

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[12] Complaint, *FTC v. Sanford Health*, No. 1:17-cv-00133-DLH-CSM (W.D.N.D. June 23, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/1710019sanfordfedcomplaint.pdf. The FTC also commenced a challenge in its administrative court.

denied an injunction, they would move to have the case withdrawn from adjudication or to dismiss the administrative hearing. Therefore, under either scenario, deferring commencement of the administrative hearing would be likely to avoid expenditure of resources by all parties.[13]

A four-day trial began on October 30, 2017 before Magistrate Judge Alice Senechal of the district court in Bismarck. In total, over 1,600 exhibits and 16 testifying witnesses were entered into evidence. According to the FTC, Sanford employs 36 primary care physicians and Mid Dakota employs 23. CHI, Sanford's closest competitor, employs five primary care physicians and has been reliant on Mid Dakota for additional physicians. In pediatrics, Mid Dakota and Sanford would have 20 physicians, while CHI would have none on an outpatient basis; there are 15 OB/GYNs between Sanford and Mid Dakota, with a few others unaffiliated; and 10 general surgeons at Sanford and Mid Dakota, with none at CHI.

Sanford and Mid Dakota argued that Blue Cross Blue Shield of North Dakota ("Blue Cross") would be a "powerful buyer" that would be able to restrain rate increases. Blue Cross arguably sets rates on a uniform basis statewide. Moreover, the transaction parties argued that Blue Cross is still North Dakota's leading health insurance firm, despite having lost a large contract for North Dakota public employees to Sanford's health insurance division, and, therefore, would continue to set its own prices. Finally, the transaction parties argued that the combined entity would be able to do more for patients in the community.

On November 3, 2017, the administrative law judge ("ALJ") granted an extension of the evidentiary hearing in the administrative proceeding until December 12, 2017.[14] On November 14, 2017, the FTC and the transaction parties jointly moved to postpone commencement of the administrative proceeding to January 17, 2018, which the ALJ granted on November 21, 2017.[15]

On December 13, 2017, Judge Senechal issued an order preliminarily enjoining the merger until an administrative trial before the FTC is complete.[16] On December 15, 2017, the transaction parties filed their notice of appeal of the PI to the Eighth Circuit.[17] On December 21, 2017, the ALJ continued the commencement of the administrative proceeding until 21 days after the Eighth Circuit rendered its judgment on the appeal.[18]

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[13] Unopposed Expedited Motion for Further Continuance of Administrative Proceedings Pending Appeal of Order, *In the Matter of Sanford Health and Mid Dakota Clinic, P.C.*, FTC Docket No. 9376 (Dec. 18, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/sanford_589083.pdf.

[14] Order Granting 14-Day Continuance, *In the Matter of Sanford Health and Mid Dakota Clinic, P.C.*, FTC Docket No. 9376 (Nov. 3, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/docket_no_9376_sanford_mid_dakota_order_granting_14-day_continuance_11-3-17.pdf.

[15] Order Granting Further Continuance of Administrative Proceedings, *In the Matter of Sanford Health and Mid Dakota Clinic, P.C.*, FTC Docket No. 9376 (Nov. 21, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/9376_sanford_mid_dakota_order_granting_further_continuance_11212017.pdf.

[16] Memorandum of Decision, Findings of Fact, Conclusions of Law; and Order, *Fed. Trade Comm'n v. Sanford Health*, No. 1:17-cv-00133 (D.N.D. Dec. 15, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/1710019_sanfordpiorder.pdf.

[17] *Id.*

[18] Order Granting Further Continuance of Administrative Proceedings, *In the Matter of Sanford Health and*

b. FTC Successfully Challenges Tronox-Cristal Merger

On December 5, 2017, the FTC brought an administrative action challenging Tronox Ltd.'s $2.2 billion acquisition of chemical mining and processing company, National Titanium Dioxide Company Limited ("Cristal"). The FTC's complaint alleged that the transaction would combine the two largest producers of titanium dioxide, a pigment, would create a dominant firm, and that, without a remedy, the acquisition would allow Tronox "and the other top supplier, Chemours Company, to control the vast majority of chloride titanium dioxide sales in the North American market."[19] Chloride process titanium dioxide is used to color a broad range of materials: Although white pigment can be made through either a chloride or sulfate process, the bulk of titanium dioxide in the United States and Canada is produced using the chloride process, due to its ability to yield brighter and more durable coatings. The FTC concluded that sulfate process titanium dioxide is not an adequate substitute for the product that Tronox and Cristal offer.

The FTC alleges that, if the deal were to be consummated, the four remaining suppliers in the market would find it easier to coordinate on pricing and production and opined that it was unlikely that there would be new entry. The agency cited in support the Third Circuit's October 2017 decision in a private antitrust suit brought by Valspar Corp. against DuPont, accusing DuPont of conspiring to fix the price of the pigment. Although the Third Circuit did not revive the suit, the FTC points to the opinion's reference to the industry as "an oligopoly . . . dominated by a handful of firms . . . [with] substantial barriers to entry" as supportive of its suit and that "[t]he evidence supporting the FTC's complaint shows that the proposed merger would make that situation even worse. . . ."[20]

The defendants countered with a statement that the deal is "highly synergistic" and would enhance competition in the industry. Tronox asserts that the FTC is drawing the product market too narrowly by omitting sulfate process titanium dioxide from the relevant market, and making the geographic market too narrow in excluding Mexico and global imports from Europe and Asia. Tronox also indicated that it would close the transaction, claiming that the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act") had expired.[21] The FTC rebutted with a statement that the companies had agreed to give the Commission 10 business days' notice before consummating the transaction.[22] Given the right to challenge a merger outside of the HSR Act waiting period, however, this point of contention is not dispositive.

Mid Dakota Clinic, P.C., FTC Docket No. 9376 (Dec. 21, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/sanford_mid_dakota_order_granting_further_continuance_12212017.pdf.

[19] Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed Merger of Major Titanium Dioxide Companies* (Dec. 5, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-proposed-merger-major-titanium-dioxide-companies.

[20] *Id.*; *cf. Valspar Corp. v. E.I. DuPont De Nemours and Co.*, 873 F.3d 185 (3d Cir. 2017).

[21] Charles McConnell, *Tronox boss says company will fight "unmerited" FTC lawsuit*, GCR (Dec. 7, 2017), *available at* https://globalcompetitionreview.com/article/usa/1151471/tronox-boss-says-company-will-fight-%E2%80%9Cunmerited%E2%80%9D-ftc-lawsuit.

[22] Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed Merger of Major Titanium Dioxide Companies* (Dec. 5, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-proposed-merger-major-titanium-dioxide-companies.

In its Answer as well, Tronox denied that there is a "North American chloride TiO2" market, both on the basis that the market is global, and that it includes TiO2 produced using both the chloride and sulfate processes.[23] Tronox also denied that there are significant barriers to entry, that expansion or repositioning are unlikely, or that global trade flows would not counteract any purported attempt to raise prices in a particular region anticompetitively. Tronox also indicated that the acquisition would generate significant cognizable efficiencies.

Although the Commission authorized the FTC staff to bring a PI action to block the consummation of the transaction, the staff did not do so, and did not need to do so as long as the European Commission ("EC") had not approved the transaction. The issue that this presented the transaction parties is one of timing. The transaction agreement provided for a termination date of May 21, 2018. As the ALJ recognized at a pretrial conference on December 20, 2017, the administrative law proceeding would not be finished by that date.[24]

On January 23, 2018, Tronox brought a declaratory judgment action in the Northern District of Mississippi (where Tronox has its largest manufacturing facility), accusing the FTC of delaying to file the PI action so as to "run out the clock instead of resolving the legality of the Tronox-Cristal transaction on the merits."[25] Tronox requested that the court (1) require the FTC to bring its federal court complaint in time to litigate the merits of the case, or (2) enjoin the FTC from trying to block the acquisition. Alternatively, Tronox requested that the court "give Tronox its day in court, conduct the trial that ordinarily occurs, and declare that the FTC has no right under Section 13(b) of the FTC Act to enjoin the transaction."[26] On March 1, 2018, the transaction parties reached an agreement to extend the termination date until March 31, 2019.[27] On March 7, 2018, Tronox voluntarily dismissed its case because the extension of the termination date until March 31, 2019 negated the need for the court's action.

A trial before the ALJ occurred during May and June 2018, followed by post-trial briefing. Closing arguments occurred on September 18, 2018. Under the FTC's rules, an initial decision from the ALJ was due November 20, 2018, absent extension by the court.

Before the ALJ issued his decision, the EC approved the deal, conditioned on the sale of a business supplying chloride-process titanium dioxide pigments used for paper laminates.[28]

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[23] Answer ¶ 5, Fed. Trade Comm'n, *In the Matter of Tronox Ltd.*, FTC Docket No. 9377 (Dec. 8, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/588992.pdf.

[24] Pretrial Conf. Tr. 77–78, *In the Matter of Tronox* (Dec. 20, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/180223ordergrantingjointmotion589754.pdf. Tronox indicated that the administrative proceedings will not be completed until late 2018. On February 23, 2018, the ALJ issued an order granting a joint motion to revise the scheduling order.

[25] Emergency Compl. for Declaratory J. ¶ 3, *Tronox Ltd. v. Fed. Trade Comm'n*, C.A. No. 18-cv-10-SA-RP (N.D. Miss. Jan. 23, 2018), *available at* http://investor.tronox.com/static-files/ee05e431-f2a3-4bef-9a02-e04178261dd2.

[26] *Id.* at ¶ 5.

[27] The transaction parties subsequently extended the date until March 31, 2019. Press Release, Tronox, *Tronox Announces Extension to Cristal TiO2 Acquisition Agreement* (Mar. 1, 2018), *available at* http://investor.tronox.com/news-releases/news-release-details/tronox-announces-extension-cristal-tio2-acquisition-agreement.

[28] Press Release, Tronox, *Tronox Receives European Commission Conditional Approval of Proposed Cristal*

Since the EC approval was the only remaining hurdle to closing, the parties could have closed as early as July 16, 2018. The FTC reacted to the EC's decision by filing in district court on July 10, 2018 an action to enjoin the closing pending the ALJ's decision.[29]

The PI case was assigned to Judge Trevor McFadden. On July 13, 2018, Judge McFadden scheduled a limited two-day trial with live witness testimony to commence on August 7, 2018. The FTC presented two witnesses who testified that buyers in North America source titanium dioxide on a regional basis and that the chloride-processed product is significantly superior to the sulfate-based product. The witnesses also testified that it would be extremely cost and time prohibitive for customers to switch their products, and that such a transition would take years. The product bought by North American customers is in slurry form, which contains 25% water, making it economically infeasible to transport across long distances over extended periods of time.

On September 5, 2018, the district court granted the FTC its PI.[30] On the substantive issues, Judge McFadden found that the FTC had successfully established as the cognizable antitrust market the sale of chloride-process titanium dioxide in North America. The FTC raised "serious, substantial, and difficult questions about the merger's possible anticompetitive effects" and "presented credible evidence that the merger will create a highly concentrated market in which producers face greater incentives to engage in strategic output withholding."[31] Although there are six major producers of titanium dioxide, Chemours and the combined Tronox-Cristal would control almost three-quarters of global titanium dioxide supply. The court also stated that the evidence in the case "[p]oints to [i]ncentives for and a [h]istory of [s]trategic [o]utput [w]ithholding." The court also rejected the imposition of a hold-separate order for the Ashtabula, Ohio plant instead of the PI.

On December 17, 2018, the ALJ issued his decision finding that the proposed merger may substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. The court also issued an order enjoining the merger.

c. *Parties Abandon Wilhelmsen's Proposed Acquisition of Drew Marine Group After FTC Wins PI*

On February 23, 2018, the FTC issued an administrative complaint charging that Wilhelm Wilhelmsen's ("Wilhelmsen") proposed acquisition of Drew Marine Group, Inc. ("Drew") would significantly reduce competition in the market for marine water treatment chemicals

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Acquisition (July 4, 2018), *available at* http://investor.tronox.com/node/11911/pdf. The transaction had already been approved in Australia, China, Colombia, New Zealand, Saudi Arabia, South Korea, and Turkey.

[29] Complaint, *FTC v. Tronox Ltd.*, No. 1:18-cv-01622 (D. Deck) (D.D.C. July 10, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/001_2018-07-10_complaint_tronox.pdf.

[30] Order, *FTC v. Tronox Ltd.*, No. 1:18-cv-01622 (D.D.C. Sept. 5, 2018), ECF No. 106. *See also Press Release, Fed. Trade Comm'n, Statement by FTC Bureau of Competition Director Bruce Hoffman on the Court Granting a Preliminary Injunction in the Tronox/Cristal Matter* (Sept. 5, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/09/statement-ftc-bureau-competition-director-bruce-hoffman-court.

[31] Memorandum Opinion at 27, 48, *FTC v. Tronox Ltd.*, No. 1:18-cv-01622 (D.D.C. Sept. 12, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/tronox_pi_opinion_redacted.pdf.

and services used by global fleets.[32] These chemicals and services are used by various types of vessels to maintain critical onboard equipment. The FTC also authorized the staff to seek a PI in the United States District Court for the District of Columbia.[33]

Wilhelmsen and Drew are, respectively, the largest and second-largest suppliers of water treatment chemicals and services to global fleets. The FTC alleges that they are each other's closest competitors, combined controlling at least 60% of the global "market," with the next closest competitor having less than 5% of the market. The fringe competitors purportedly face significant disadvantages when competing for global fleet business. The FTC also alleged that local and regional suppliers have "very modest overall sales." The FTC dismissed as well the potential for entry or expansion on the scale needed to counteract the acquisition's anticompetitive effects.

The transaction parties argued that the market for the chemicals sold by both companies is highly competitive, with many sellers competing against Wilhelmsen and Drew. The merger will enable those existing competitors to expand their footprints to replace Drew and encourage new competitors to enter since barriers to entry are low. The FTC has gerrymandered the market to carve out "Global Fleets" from the larger market for maritime vessels and offshore platforms in which the two companies actually compete. Furthermore, the transaction parties argued that the merger would allow the combined company to reduce costs and pass the savings on to customers.[34]

At trial, the FTC's expert economist argued that the savings from the merger were more likely to derive from reduced fixed costs related to manufacturing and warehousing rather than variable costs, and, therefore, would be more likely to increase profits than lower short-run prices for consumers.

On July 21, 2018, Judge Tanya Chutkan granted the FTC's request for a PI.[35] Wilhelmsen announced the next day that it would abandon the transaction and pay a $20 million termination fee.[36]

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[32] Press Release, Fed. Trade Comm'n, *FTC Challenges Wilhelmsen Maritime Services' Proposed Acquisition of Competitor Drew Marine Group* (Feb. 23, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/02/ftc-challenges-wilhelmsen-maritime-services-proposed-acquisition. The FTC indicated that it cooperated with staff of the antitrust agencies in Singapore and the UK. The FTC amended its complaint on March 5, 2018 to correct the name of the party that would be acquiring the target, Wilh. Wilhelmsen Holding ASA.

[33] Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, *FTC v. Wilhelmsen*, No. 18-cv-00414-TSC (D.D.C. May 8, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/1710161wilhelmsenpimotion.pdf. In May 2018, the Competition and Consumer Commissioner of Singapore found that the transaction would substantially lessen competition in the market for the supply of marine water treatment chemicals and services and indicated that the parties would need to make adequate commitments to address the concerns or face a more stringent review.

[34] Respondents' Answer to Amended Complaint, *In the Matter of Wilh. Wilhelmsen Holding ASA*, FTC Docket No. 9380 (Mar. 16, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/0316182respondentsanswer590070.pdf.

[35] Order, *FTC v. Wilhelmsen*, No. 18-cv-00414-TSC (D.D.C. July 21, 2018), ECF No. 90.

[36] Press Release, Wilhelmsen, *Wilhelmsen abandons acquisition of Drew Marine following United States ruling* (July 22, 2018), *available at* https://www.wilhelmsen.com/media-news-and-events/press-releases/2018/wilhelmsen-abandons-acquisition-of-drew-marine-following-us-ruling/.

d. Parties Abandon J.M. Smucker's Proposed Acquisition of Wesson After FTC Challenges Deal

On March 5, 2018, the FTC filed an administrative complaint charging that J.M. Smucker Co.'s ("JMS") proposed acquisition of Conagra Brands, Inc.'s ("Conagra") Wesson cooking oil business would likely substantially lessen competition or tend to create a monopoly in the markets for canola and vegetable oils, particularly branded canola and vegetable oils sold to grocery stores and other retailers.[37] The complaint alleges that the acquisition would likely increase JMS's negotiating leverage against retailers by eliminating head-to-head competition between JMS's Crisco brand and Conagra's Wesson brand.

In delineating the relevant product market, the FTC rejected other cooking oils as competitive alternatives to canola and vegetable oils, asserting that corn and peanut oils are substantially more expensive and that many consumers perceive them as being of a lower quality and olive oil and various specialty oils are less versatile and are also more expensive. Although store brands constituted a majority of canola and vegetable oil retail sales, the FTC qualified their inclusion in the market, noting its belief that these products "typically are sold at 10 to 20 percent below the price of their branded counterparts."

The FTC also dismissed the ability of other branded canola and vegetable oils, *e.g.*, Mazola and LouAna, to counteract the alleged anticompetitive effects of the proposed acquisition. The FTC believed that building sufficient brand equity to achieve meaningful expansion by these existing firms would require substantial investment and would take several years. Finally, the FTC rejected the parties' efficiencies claims.

The Commission authorized its staff to seek a PI in federal district court to prevent consummation of the merger, pending an August 2018 administrative trial. Before the injunction was brought, however, the transaction parties terminated their transaction and withdrew their HSR Act notifications. The FTC then dismissed the administrative case.

e. Parties Abandon CDK's Proposed Acquisition of Auto/Mate After FTC Files Challenge

On March 20, 2018, the FTC issued an administrative complaint alleging that CDK Global, Inc.'s ("CDK") proposed acquisition of Auto/Mate, Inc. ("Auto/Mate") would reduce competition in Dealer Management System ("DMS") software in the United States.[38] The Commission also authorized its staff to seek a PI in federal court to prevent consummation of the merger. CDK and Auto/Mate notified the FTC later that day that they had abandoned the proposed transaction.

The FTC asserted that new car dealers use DMS software to manage nearly every aspect of their business, including the flow of information between dealers and vehicle manufacturers. CDK and Reynolds & Reynolds ("Reynolds") are currently the two largest providers of DMS

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[37] Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed Acquisition of Conagra's Wesson Cooking Oil Brand by Crisco owner, J.M. Smucker Co.* (Mar. 5, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/03/ftc-challenges-proposed-acquisition-conagras-wesson-cooking-oil.

[38] Press Release, Fed. Trade Comm'n, *FTC Challenges CDK Global, Inc.'s Proposed Acquisition of Competitor Auto/Mate, Inc.* (Mar. 20, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/03/ftc-challenges-cdk-global-incs-proposed-acquisition-competitor.

software in the United States, with smaller Auto/Mate acting as "an innovative disruptive challenger,"[39] "winning business by offering dealers lower prices, flexible contract terms, free software upgrades and training, high quality customer service, and modest fees to integrate third-party applications."[40] As a result, the FTC found that Auto/Mate was a threat to incumbent DMS providers and would become an even more effective competitor in the near future.

The FTC complaint alleges that CDK wanted to keep Auto/Mate out of the hands of a larger, well-financed backer, so it offered a price that was far in excess of its original standalone valuation. Post-acquisition, CDK plans to severely handicap the Auto/Mate DMS platform and remove it as a competitive alternative, which would harm customers who value some of its features.

The alleged market prior to the acquisition was highly concentrated, with CDK and Reynolds having combined control of approximately 70% of DMSJ. Dealertrack, Auto/Mate, and Autosoft are much smaller participants. CDK and Reynolds have similar business models. Post-acquisition, CDK would control approximately 47% of the franchise DMS market, and the Herfindahl—Hirschman Index concentration levels would be above 2,500, with an increase of greater than 200 points.[41] According to the FTC, the acquisition would eliminate the intense head-to-head price and quality competition between CDK and Auto/Mate occurring today. The FTC rejected the potential for new entry or repositioning by existing producers as being timely, likely, or sufficient to counteract the anticompetitive effects of the acquisition. The FTC also asserted that the transaction parties could not show cognizable efficiencies that would offset the likely and substantial competitive harm from the acquisition.

2. *FTC Consents*

During FY2018, the FTC entered into nine consents: (1) Red Ventures Holdco, LP/Bankrate, Inc. (third-party paid referral service);[42] (2) Becton, Dickinson and Co./C. R.

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[39] Complaint at 2, *In the Matter of CDK Global*, FTC Docket No. 9382 (Mar. 19, 2018) ("CDK Complaint"), *available at* https://www.ftc.gov/system/files/documents/cases/docket_no_9382_cdk_automate_part_3_complaint_redacted_public_version_0.pdf.

[40] Press Release, Fed. Trade Comm'n, *FTC Challenges CDK Global, Inc.'s Proposed Acquisition of Competitor Auto/Mate, Inc.* (Mar. 20, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/03/ftc-challenges-cdk-global-incs-proposed-acquisition-competitor.

[41] *CDK Complaint* at 3–7.

[42] Press Release, Fed. Trade Comm'n, *Parties Agree to Divestiture of Senior Living Facilities Referral Service Caring.com as a Condition of Red Venture's Acquiring Bankrate* (Nov. 3, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/11/parties-agree-divestiture-senior-living-facilities-referral-service. The FTC alleged that Red Ventures and Bankrate supply proprietary internet content and customer leads for a variety of industries. Bankrate's Caring.com competes with A Place for Mom.com, a third-party paid senior living facilities referral service jointly owned by two of Red Ventures' largest shareholders. The two online services are the number one and number two largest providers and are alleged to be each other's closest competitors for both national and local business. Under the settlement, the parties will divest Caring.com within six months and provide transition services to the acquirer. The Commission may appoint a monitor. In addition, the parties must establish firewalls.

Bard, Inc. (medical devices);[43] (3) Potash Corp. of Saskatchewan Inc./Agrium Inc. (chemicals to make fertilizer);[44] (4) Seven & i Holdings Co./Sunoco (retail fuel outlets);[45] (5) Air Medical Group Holdings, Inc./AMR Holdco, Inc. (air ambulance services);[46] (6) Amneal Pharmaceuticals LLC/Impax Laboratories, Inc. (10 generic medications);[47] (7) Northrop

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[43] Press Release, Fed. Trade Comm'n, *FTC Requires Divestiture of Two Medical Device Product Lines as Condition of Becton, Dickinson and Company Acquiring C. R. Bard, Inc.* (Dec. 22, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2018/01/ftc-approves-final-order-requiring-divestiture-2-medical-device; Press Release, Fed. Trade Comm'n, *FTC Approves Final Order Requiring Divestiture of 2 Medical Device Product Lines as Condition of Becton, Dickinson and Company Acquiring C. R. Bard, Inc.* (Jan. 26, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/01/ftc-approves-final-order-requiring-divestiture-2-medical-device. The FTC required the sale of Becton Dickinson's soft tissue core needle biopsy devices business and Bard's tunneled home drainage catheter system business to Merit Medical Systems, Inc. In the United States, the combination would allegedly have monopolized (combined share was 98%) this type of catheter. Combined, the transaction parties would have had a 60% share of soft tissue core needle biopsy sales. The European Union also required Becton Dickinson to divest its soft tissue core needle biopsy product line worldwide, as well as its soft tissue core marker product under development. European Comm'n Press Release IP/17/4024, *Mergers: Commission approves acquisition of Bard by BD, subject to conditions* (Oct. 18, 2017), *available at* http://europa.eu/rapid/press-release_IP-17-4024_en.htm.

[44] Press Release, Fed. Trade Comm'n, *FTC Requires Canadian Fertilizer and Chemical Companies PotashCorp and Agrium to Divest 2 Production Facilities as Condition of Merger*, *available at* https://www.ftc.gov/news-events/press-releases/2017/12/ftc-requires-canadian-fertilizer-chemical-companies-potashcorp (Dec. 27, 2017). The transaction parties are Canada's two largest fertilizer producers. The FTC found that the merger would harm concentration in the market for superphosphoric acid ("SPA"), a highly concentrated form of phosphoric acid used in crop nutrient phosphate, and the combined market share for the two parties would be over 65% for nitric acid sold to customers near their nitric acid plants in Ohio. Both products are used in making fertilizer. Under the consent, Agrium's Condo, Idaho SPA facility will be sold to Itafos, and its North Bend, Ohio nitric acid facility will be sold to Trammo Inc.

[45] Press Release, Fed. Trade Comm'n, *FTC Requires Divestitures as Condition of 7-Eleven, Inc. Parent Company's $3.3 Billion Acquisition of Nearly 1,100 Retail Fuel Outlets from Competitor Sunoco* (Jan. 19, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/01/ftc-requires-divestitures-condition-7-eleven-inc-parent-companys. The FTC alleged that retail fuel stations compete on price, convenience store format, product offerings, and location and that they pay close attention to each other. The geographic markets alleged by the FTC are localized, ranging from a few blocks to a few miles. The complaint alleges that the acquisition would have resulted in a highly concentrated market in 76 local markets; 18 mergers to monopoly; 39 "3-to-2" markets; and 19 "4-to-3" markets. The consent requires 7-Eleven to sell 26 retail fuel outlets it owns to Sunoco and requires Sunoco to retain 33 fuel outlets that 7-Eleven otherwise would have acquired.

[46] Press Release, Fed. Trade Comm'n, *Ambulance Companies Air Medical Group Holdings, Inc. and AMR Holdco, Inc. Agree to Divest Air Ambulance Services in Hawaii as a Condition of Merger* (Mar. 7, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/03/ambulance-companies-air-medical-group-holdings-inc-amr-holdco-inc. Transaction parties are currently only two providers of air ambulance services that transport patients to different Hawaiian islands for medical care. AMR agreed to sell its inter-facility air ambulance transportation business, including four fixed-wing aircraft, to LifeTeam. In addition, AMR will support LifeTeam's efforts to secure a state certificate to operate ground ambulances to transport patients from air ambulances to hospitals.

[47] Press Release, Fed. Trade Comm'n, *FTC Requires Generic Drug Marketers Amneal Pharmaceuticals LLC and Impax Laboratories Inc. to Divest Rights to 10 Generic Medications as Condition of Merger* (Apr. 27, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/04/ftc-requires-generic-drug-marketers-amneal-pharmaceuticals-llc. The FTC alleged harm for future competition in U.S. markets for seven generic products and

Grumman Corp./Orbital ATK, Inc. (missile systems/solid rocket motors);[48] (8) CRH plc/Ash Grove Co. (Portland cement and construction-grade sand and gravel);[49] and (9) Grifols S.A./Biotest US Corporation (blood plasma collection centers in three cities).[50]

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a decrease of current competition for three additional products. The consent requires divestiture to three separate upfront buyers.

[48] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.* (June 5, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket. The FTC alleged that Northrop is one of four companies capable of supplying the U.S. government with missile systems, including tactical missiles, strategic missiles and missile defense interceptors. Orbital is purportedly the premier supplier of solid rocket motors ("SRMs"), an essential component of missiles. The FTC alleged a vertical theory of harm: Northrop would have reduced competition in the market for missile systems purchased by the U.S. government by withholding or raising the price charged for SRMs to rival missile systems contractors, thereby resulting in less innovation and higher prices for taxpayers. The FTC indicated that while it typically disfavors behavioral remedies, given the special characteristics of the defense industry, it would accept such a remedy here. Specifically, under the proposed consent decree, Northrop must supply competitors with SRMs on a nondiscriminatory basis, separate the operation of its SRM business from the rest of the company's operations with a firewall, and permit the appointment of compliance officers by the U.S. Department of Defense to oversee Northrop's conduct under the consent.

[49] Press Release, Fed. Trade Comm'n, *FTC Requires Construction Company CRH plc to Divest Facilities in Montana, Nebraska and Kansas as a Condition of Acquiring Competitor Ash Grove Cement Company* (June 14, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/06/ftc-requires-construction-company-crh-plc-divest-facilities. CRH and Ash Grove are two of the largest suppliers of Portland cement in Montana, Nebraska, and Kansas, and the main suppliers of construction-grade sand and gravel that is used in cement and other road materials. The consent requires the divestiture of one cement plant, two sand-and-gravel plants, one sand-and-gravel pit, three limestone quarries, and two hot-mix asphalt plants in Montana, Nebraska, and Kansas, to three separately identified upfront buyers. The FTC also required CRH to agree with the buyer of the Montana cement plant and quarry that for a period of three years that the buyer will have the right to (1) use two CRH cement terminals in Alberta, Canada, and (2) require that CRH, at the buyer's option, purchase cement purchased at the plant for distribution in Canada. The FTC's stated reason for this additional relief is that the plant currently sells a significant amount of cement into Canada.

[50] Press Release, Fed. Trade Comm'n, *FTC Requires Grifols S.A. to Divest Assets as Condition of Acquiring Biotest US Corporation* (Aug. 1, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/08/ftc-requires-grifols-sa-divest-assets-condition-acquiring-biotest. The FTC conditioned clearance of the transaction on Grifols divesting blood plasma collection centers in Lincoln, Nebraska; Augusta, Georgia; and Youngstown, Ohio. Grifols and Biotest US were the only companies that operated plasma collection centers in these cities. Donated plasma is a critical input for a variety of medical products. The relevant geographic markets for plasma collection services are local, reflecting the distances that individuals are willing or able to travel to donate plasma. Donors typically do not travel more than 25 minutes, or 15 to 20 miles, to donate plasma, and choose their donation center on the basis of proximity, convenience, quality of the facility and the fee. The FTC asserts that, absent the divestiture, Grifols also likely would be able to exercise market power by unilaterally decreasing donor fees. The proposed settlement provides for the divestiture to be to Kedrion Biopharma Inc., a leading manufacturer of protein products and the fifth-largest producer of plasma proteins worldwide. The complaint also alleged that if Grifols had also acquired Biotest US's 41% share of ADMA Biologics, Inc., the acquisition would have harmed the U.S. market for hepatitis B immune globulin ("HBIG"). ADMA Biologics, Inc. ("ADMA") has the largest share of HBIG in the United States and competes with Grifols (the third-largest supplier) and only one other supplier. However, Biotest US had recently transferred its ownership share in ADMA to The Biotest Divestiture Trust, the parent company of Biotest US. The proposed consent agreement prohibits Grifols, without prior notification, from acquiring any ownership interest in ADMA or obtaining any rights to nominate or obtain representation on the ADMA Board of Directors.

3. *Consummated Merger Challenges*

In December 2017, the FTC sued Otto Bock Healthcare North America, Inc. ("Ottobock"), the North American subsidiary of a German prosthetic limb maker, over its September 2017 acquisition of Freedom Innovations ("Freedom"), arguing that the acquisition eliminated existing competition in the market for microprocessor prosthetic knee ("MPK") products.[51] At issue are (1) whether Freedom was Ottobock's only rival in the relevant market before the transaction and (2) how the acquisition impacted competitive conditions. A MPK is a type of advanced artificial knee that uses sensors to make real-time adjustments. Ottobock's newest model is alleged to be very comparable to Freedom's. Together, Ottobock and Freedom comprise 70% of MPK sales; the FTC claims there are only four additional competitors worldwide, all of which operate on a significantly smaller scale. According to the FTC, the transaction would not only eliminate competition between the transaction parties, but also result in higher prices, lower quality and less innovation.[52]

The defendants contended that Freedom was in severe financial distress and was likely to exit the market. In addition, defendants pointed to four other MPK producers that have the capacity and ability to continue to manufacture and sell such products, ensuring a competitive market.

The hearing before ALJ D. Michael Chappell began on July 10, 2018. On June 19, 2018, the transaction parties filed a motion to withdraw the matter from adjudication for consideration of proposed settlement, which the FTC opposed. On July 9, 2018, the ALJ denied the motion.[53]

4. *Closing Statements—Essilor/Luxottica Group*

On March 1, 2018, the FTC closed its investigation of the proposed merger of Essilor and Luxottica.[54] The FTC had conducted an extensive investigation, consisting of the production of more than one million documents from the transaction parties, interviews of more than 100 market participants and a review of documents and data produced by more than 20 third parties. The FTC cooperated closely with the EC and the Canadian Competition Bureau, as well as the competition authorities of Australia, Brazil, Chile, China, Israel, Mexico, Singapore, and South Africa.

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[51] Press Release, Fed. Trade Comm'n, *FTC Challenges Consummated Merger of Companies That Make Microprocessor Prosthetic Knees* (Dec. 20, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-consummated-merger-companies-make-microprocessor.

[52] Complaint, *In the Matter of Otto Bock HealthCare North America, Inc.*, FTC Docket No. 9378 (Dec. 20, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf; Answer and Affirmative Defenses of Respondent Otto Bock (Jan. 10, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/180110ottobockanswer.pdf. The transaction was below the HSR Act notification threshold and, therefore, was not reversed prior to consummation.

[53] Opinion and Order of the Commission, *In the Matter of Otto Bock HealthCare North America, Inc.*, FTC Docket No. 9378 (July 9, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/d09378_otto_bock_commission_opinion_and_order_redacted_public_version_7-9-18.pdf.

[54] Statement, Fed. Trade Comm'n, *Statement of Federal Trade Commission Concerning the Proposed Acquisition of Luxottica Group by Essilor* (Mar. 1, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/03/statement-federal-trade-commission-concerning-proposed.

The FTC found that while Essilor and Luxottica are two of the largest companies in the optical industry, they primarily provide complementary products and services. Essilor is a leading designer and manufacturer of ophthalmic lenses and the largest provider of wholesale laboratory services in the United States. Luxottica is a leading designer, manufacturer, and distributor of optical frames and sunglasses; it is the largest optical retailer, as well as the second-largest managed vision provider, in the United States.[55] The FTC staff considered three principal theories of harm: (1) vertical foreclosure; (2) potential competition in wholesale laboratory services;[56] and (3) horizontal competition in the retail sector. In the last of these areas, the FTC assumed, for analysis purposes, that the merger was a combination of Luxottica's retail stores and Essilor's Vision Source, which is an alliance of independent eye care professionals. Even treating these members as if Essilor owned them outright, the combined store was too small to raise concerns.

5. *Abandoned Transactions*

In addition to those transactions abandoned after a complaint issue, parties sometimes abandon the transaction presuit in response to FTC concerns. Less common is the abandonment of a proposed transaction upon the issuance of the second request. On July 9, 2018, Churchill Downs Inc. dropped its $50.6 million proposed purchase of a Mississippi casino from Eldorado Resorts Inc. after the FTC issued a second request.[57]

B. U.S. Department of Justice

The DOJ began FY2018 with two merger challenges pending in federal district court, one of which it settled prior to trial, and the other of which the DOJ lost at trial and is now appealing to the D.C. Circuit. The DOJ also entered into seven consents to resolve concerns in proposed mergers, and one consent involving a consummated merger. The transaction parties also reportedly abandoned another merger due to the agency raising antitrust concerns.

1. *Court Challenges*

a. *DOJ's Challenge of Parker-Hannifin Corporation's Consummated Acquisition of CLARCOR Inc. Settles*

The DOJ filed suit on September 26, 2017 in the federal district court of Delaware, challenging the consummated acquisition of CLARCOR Inc. by Parker-Hannifin Corporation.[58]

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[55] The FTC staff considered whether the merged firm would have the ability and incentive to foreclose or raise the costs of rival independent eye care professionals. The staff believed this would be possible if Essilor/Luxottica would (1) have the ability to increase the price of an upstream input, or cut off that input, and (2) be able to recapture enough sales downstream to make the net effect profitable. The staff found that neither condition would be met here, due to alternative upstream suppliers and to the fact that Luxottica's national share of the optical retail market was only 10%.

[56] The FTC staff's focus here was on the "free-to-choose" segment of the wholesale laboratory services. The investigation suggested that Luxottica was unlikely to compete meaningfully in the market.

[57] Press Release, Churchill Downs, *Churchill Downs Agrees in Principle to Assume Management of Eldorado Resorts' Lady Luck Casino Nemacolin* (July 9, 2018), *available at* http://ir.churchilldownsincorporated.com/news-releases/news-release-details/churchill-downs-incorporated-and-eldorado-resorts-announce.

[58] Press Release, U.S. Dep't of Justice, *Justice Department Files Antitrust Lawsuit Against Parker-Hannifin Regarding the Company's Acquisition of CLARCOR's Aviation Fuel Filtration Business* (Sept. 26, 2017),

The complaint alleges that the transaction substantially lessened competition in markets for aviation fuel filtration products in the United States by eliminating "all head-to-head competition between the only two domestic manufacturers of these products, effectively creating a monopoly in the United States."[59] The DOJ asserted that, as a result of the lost competition, customers would face higher prices, and a loss of innovation and service quality.[60]

The challenge arose seven months after the transaction's consummation and following the expiration of the HSR Act waiting period. The DOJ's press release noted that "[d]uring the pendency of the Department's investigation, Parker-Hannifin failed to provide significant document or data productions in response to the department's requests. In addition, the company has not agreed to enter into a satisfactory agreement to hold separate the fuel filtration businesses at issue and to maintain their independent viability pending the outcome of the investigation and, now, this litigation."

On December 18, 2017, the DOJ entered into a settlement with Parker-Hannifin Corp. that required the divestiture of Parker-Hannifin's Facet filtration business, including its aviation fuel filtration assets.[61]

b. Antitrust Division Appeals AT&T/Time Warner Trial Loss

On November 20, 2017, the DOJ filed suit in the United States District Court for the District of Columbia, challenging AT&T Inc.'s ("AT&T") proposed $108 billion acquisition of Time Warner Inc. ("TW").[62] AT&T (along with its satellite TV subsidiary, DirecTV) is the nation's largest distributor of traditional subscription television. TW owns many of the top television networks, including TNT, TBS, CNN, and HBO. The DOJ's complaint asserts:

> [D]istributors that control popular programming "have the incentive and ability to use (and indeed have used whenever and wherever they can) that control as a weapon to hinder competition." Specifically . . . such vertically integrated programmers "can much more credibly threaten to withhold programming from [distributors]" and can "use such threats to demand higher prices and more favorable terms." . . . [T]he newly combined firm likely would . . . use its control of Time Warner's popular programming as a weapon to harm competition. AT&T/DirecTV would hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner's networks, and it would use its increased power to slow the industry's transition to new and exciting video distribution models that provide greater choice for consumers. The proposed merger would result in fewer innovative

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available at https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-against-parker-hannifin-regarding-company-s.

[59] Complaint, *United States v. Parker-Hannifin Corporation*, 1:17-cv-01354-UNA, Docket No. 1 (D. Del. Sept. 26, 2017), *available at* https://www.justice.gov/atr/case-document/file/999341/download.

[60] *Id.* at ¶¶ 37–39, 51.

[61] Press Release, U.S. Dep't of Justice, *Justice Department Reaches Settlement With Parker-Hannifin* (Dec. 18, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-reaches-settlement-parker-hannifin.

[62] Press Release, U.S. Dep't of Justice, *Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner* (Nov. 20, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-challenges-attdirectv-s-acquisition-time-warner.

offerings and higher bills for American families.[63]

On November 28, 2017, AT&T and TW filed their Answer.[64] The defendants argued that with the advent of digital platforms such as Netflix, Apple, Google, Facebook, Hulu, Amazon, Snapchat, and Twitter, there is an abundance of choice for consumers.[65] The proposed *AT&T/TW* merger "is a pro-competitive, pro-consumer response to an intensely competitive and rapidly changing video marketplace. . . . [N]o competitor will be eliminated by this merger. This transaction is . . . a classic vertical deal . . . so that the merged company can compete more effectively against market-leading cable incumbents and insurgent tech giants."[66] The transaction parties assert:

> [T]his transaction presents absolutely no risk of harm to competition or consumers. Rather, the transaction will allow the combined company to drive innovation in video content and distribution; develop an over-the-top path for Time Warner content to reach consumers directly; develop new ad-supported video models that shift more costs to advertisers and off of consumers; use AT&T's consumer data to increase the value of Turner's substantial advertising inventory and create a platform for other programmers to do the same; use the same data to improve Time Warner's decisions as to content investment, marketing and promotions, and scheduling of programming; enable numerous cross-promotional opportunities and achieve substantial cost savings by integrating various key functions and operations of both companies.[67]

Furthermore, "[b]ased on [the Comcast/NBCUniversal] . . . precedent . . . AT&T and Time Warner fully expected to resolve the Government's review of this merger by agreement, rather than litigation."[68] TW has "extended to third-party distributors the same sort of arbitration protections that the Government embraced in Comcast/NBCUniversal."[69]

Judge Richard Leon set an expedited schedule for discovery and a six-week trial commenced on March 19, 2018. On June 12, 2018, the court issued a 172-page opinion denying the DOJ's request for a PI and discouraging the DOJ's seeking of a stay of the decision.[70] Two days later, the DOJ and AT&T agreed that AT&T would hold TW separate until the earlier of February 28, 2019 or the final resolution of the matter, permitting AT&T to complete its acquisition.[71]

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[63] Complaint at 1–2, *United States v. AT&T Inc.*, No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017), *available at* https://www.justice.gov/opa/press-release/file/1012896/download.

[64] Answer, *United States v. AT&T Inc.*, No. 1:17-cv-02511 (D.D.C. Nov. 28, 2017), *available at* https://cdn.arstechnica.net/wp-content/uploads/2017/11/att-answer-to-doj.pdf.

[65] *Id.* at ¶ 1.

[66] *Id.* at ¶ 2.

[67] *Id.* at ¶ 6.

[68] *Id.* at ¶ 7.

[69] *Id.* at ¶ 8.

[70] Memorandum Opinion, *United States v. AT&T Inc.*, No. 1:17-cv-02511 (D.D.C. June 12, 2018), ECF No. 146.

[71] Joint Motion to Modify Case Management Order, *United States v. AT&T Inc.*, No. 1:17-cv-02511 (D.D.C. June 14, 2018), ECF No. 148; Exhibit A to Joint Motion to Modify Case Management Order, *United States v. AT&T Inc.*, No. 1:17-cv-02511 (D.D.C. June 14, 2018), ECF No. 148-1.

The court's decision was an unequivocal victory for the defendants. The court applied the traditional antitrust burden-shifting framework, under which: (1) the DOJ must first show that the merger is likely to substantially lessen competition in the relevant market; (2) the defendants then must rebut that burden by providing evidence of efficiencies that outweigh the merger's anticompetitive effects; and (3) the DOJ replies with additional evidence of anticompetitive effects. Judge Leon found that the DOJ had failed at the first step—making a fact-specific showing that the transaction would lessen competition in any market. First, the court rejected the DOJ's theory that the transaction would increase AT&T's leverage over its rivals to extract higher prices because the combined company could withstand the loss of advertising and subscriber fees during a blackout by consumers switching to DirecTV, which AT&T owns. The court found that the DOJ's evidence was contradicted by examples of distributors successfully operating without Turner content. Second, the court rejected the DOJ's claim that AT&T—acting either unilaterally or in concert with Comcast/NBCU—would foreclose or restrict "must-have" Turner content. The court dismissed AT&T's ordinary course business documents that appeared to be supportive of the theory as being inconsistent with actual industry trends and AT&T's business incentive to obtain broad distribution of Turner content. Finally, the court rejected the DOJ's theory that AT&T would foreclose its rivals from using HBO as a promotional tool to attract and retain customers. Rather, the court found that this was a "gossamer thin claim," partly due to the court's conclusion that "Netflix is an adequate substitute for HBO" and "HBO is in the fight for its life."[72]

The court emphasized the dramatic changes that the video distribution and video programming industries were experiencing. It found ordinary course documents unpersuasive in light of these developments. Moreover, the court rejected the DOJ's economic expert's use of an economic bargaining model that predicted content prices to increase because it rested on assumptions and critical inputs that the court found were contradicted by the evidence. The court found more persuasive the natural experiments supported by defendants' expert testimony that showed that prior vertical integration had not led to higher content prices.

Although not needed to justify its decision, the court, in a footnote, criticized the DOJ for failing to account for the effect of Turner's commitments to arbitrate content disputes and not to impose blackouts. The court found that TW's commitment was yet another "reason[] to be skeptical of the Government's increased-leverage theory of competitive harm" and described it as "extra icing on a cake already frosted."[73]

On July 12, 2018, the DOJ filed its notice of appeal with the U.S. Court of Appeals for the D.C. Circuit.[74] In its appeal, the DOJ requested an accelerated timeline, with all legal briefs to be filed by mid-October and oral arguments shortly thereafter. Under the proposed expedited timeline, the appeals court could decide the case in early 2019.

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[72] Memorandum Opinion at 152, 166–68.

[73] *Id.* at 149 note 51.

[74] Notice of Appeal, *United States v. AT&T Inc.*, No. 17-cv-02511 (D.D.C. July 12, 2018), ECF No. 153.

On August 6, 2018, the DOJ filed its opening brief, in which it asserted that the district court made "two fundamental errors" in reaching its verdict.[75] First, the DOJ argued that "the district court erroneously concluded that the merger will not give TW *any* increased bargaining leverage,"[76] even though "the court agreed that TW enjoyed bargaining leverage before the merger."[77] Judge Leon rejected the inputs into the bargaining model as well as the key principles underlying the model. Second, the court incorrectly concluded that TW "would not maximize the profits of the combined entity as a whole by extracting higher fees from rival distributors when negotiating with them for Turner content."[78] This conclusion basically rejected the principle of "corporate-wide profit maximization," while at the same time the court accepted that the merger would result in cost savings through coordination between TW and DirecTV.

On September 20, 2018, AT&T filed a brief in the Court of Appeals stating that the government did not meet its burdens: "In the crucible of litigation, DOJ's claims were exposed as both narrow and fragile."[79] AT&T further noted that this lawsuit was the "first litigated challenge to a vertical merger in four decades, prompting many press outlets to question whether the White House had improperly influenced DOJ's decision to bring the case." On September 26, 2018, in a highly unusual move, nine state attorneys general ("AGs") filed a brief supporting AT&T's position.[80] The AGs pointed out that not only do they not support the DOJ's appeal, but not a single state joined with the DOJ in bringing the suit, which, according to the brief, is a rare occurrence. The state AGs said the district court's decision that the DOJ's case against the deal was without merit validated the absence of state support for the suit.

On October 11, 2018, the DOJ filed a reply brief characterizing AT&T's brief as "little more than a revisionist 58-page summary of the district court's opinion, does not remedy the economic and logical inconsistencies in the decision. Tellingly, AT&T rarely defends the court's logic. Instead, it attempts to construct a new opinion, incorrectly elevating a handful of the court's musing footnotes and phrases as if they were holdings."[81] Furthermore, "there is no merit to AT&T's hyperbolic contention that the economics of bargaining predicts that *any* vertical merger in the pay-television industry will result in higher programming prices. . . . As the government showed, for a merger to lessen competition substantially . . . the programmer must have the type of content that can drive consumers who lose it to switch,

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[75] Proof Brief of Appellant United States of America at 37, *United States v. AT&T Inc.*, No. 18-5214 (D.C. Cir. Aug. 6, 2018) (Public Copy—Sealed Material Deleted).

[76] *Id.* at 30.

[77] *Id.*

[78] *Id.* at 31.

[79] Proof Brief of AT&T, Inc., DirecTV Group Holdings, LLC, and Time Warner, Inc., *United States v. AT&T Inc.*, No. 18-5214 (D.C. Cir. Sept. 20, 2018) at 1.

[80] Proof Bipartisan Brief of the States of Wisconsin, Alabama, Georgia, Louisiana, New Mexico, Oklahoma, South Carolina, Utah, and the Commonwealth of Kentucky as *Amici Curiae* in Support of Defendants-Appellees, *United States v. AT&T Inc.*, No. 18-5214 (D.C. Cir. Sept. 26, 2018).

[81] Proof Reply Brief of Appellant United States of America at 1, *United States v. AT&T Inc.*, No. 18-5214 (D.C. Cir. Oct. 11, 2018) at 1.

and the distributor must earn a margin on subscribers gained from the switch. Most vertical mergers do not meet this standard . . . . This one does."[82]

2. *Consents*

In FY2018, the DOJ entered into seven consents involving proposed transactions: (1) CenturyLink, Inc./Level 3 Communications, Inc. (telecommunications services);[83] (2) Entercom Communications Corp./CBS Radio, Inc. (radio stations);[84] (3) Vulcan Materials Company/Aggregates USA, LLC (aggregate facilities);[85] (4) Martin Marietta Materials, Inc./LG Panadero, L.P. (quarries);[86] (5) Bayer AG/Monsanto Company (crop protection);[87]

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[82] *Id.* at 12–13.

[83] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Order for CenturyLink to Proceed with Its Acquisition of Level 3 Communications* (Oct. 3, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-centurylink-proceed-its-acquisition-level-3. The DOJ alleged that the combined companies would have reduced competition for local fiber-optic-based telecommunications services in Albuquerque, Boise, and Tucson and the sale of intercity dark fiber for 30 routes. The settlement requires the divestiture of Level 3's telecommunications networks in Albuquerque, Boise, and Tucson, and grant of dark fiber indefeasible rights of use for 30 intercity routes.

[84] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures of Radio Stations in Boston, San Francisco and Sacramento as Part of Entercom's Acquisition of CBS Radio* (Nov. 1, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestitures-radio-stations-boston-san-francisco-and-sacramento. The DOJ alleged that the proposed transaction would have eliminated head-to-head competition between the parties' radio stations for local and national advertisers in Boston, Massachusetts, San Francisco, California, and Sacramento, California. The settlement requires the divestiture of 13 radio stations in these cities.

[85] Press Release, U.S. Dep't of Justice, *Justice Department Requires Vulcan to Divest 17 Aggregate Facilities in Order to Acquire Aggregates USA* (Dec. 22, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-vulcan-divest-17-aggregate-facilities-order-acquire-aggregates. Both parties produce and sell coarse aggregate, which is used in the construction of highways, including as an essential input in asphalt concrete and ready-mix concrete. They were allegedly the only two producers in the Knoxville, Tennessee, Tri-Cities, and Abingdon, Virginia areas. Under the proposed settlement, Vulcan will divest 13 active quarries and yards and four inactive quarries in these areas to Blue Water Industries.

[86] Press Release, U.S. Dep't of Justice, *Justice Department Requires Martin Marietta to Divest Quarries to Preserve Competition in Connection With its Acquisition of Bluegrass Materials* (Apr. 25, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-martin-marietta-divest-quarries-preserve-competition-connection. According to the complaint, Martin Marietta and Bluegrass produce and sell aggregate, an essential input in asphalt and ready-mix concrete that is used in road building and construction. The DOJ concluded that for a significant number of customers in and immediately around Forsyth County and North Fulton County, Georgia, and in the Washington County, Maryland area, the transaction parties were two of only three competitive sources of aggregate qualified by the State's Department of Transportation. The DOJ asserted that the loss of competition between the parties would likely result in higher prices and poorer customer service. The DOJ conditioned clearance of the transaction upon: (1) the divestiture of Bluegrass's Beaver Creek quarry in Hagerstown, Maryland and all of the quarry's assets to an acquirer approved by the DOJ in consultation with the State of Maryland within 90 days of the filing of the Complaint (or, if later, five days after notice of entry of the Final Judgment by the Court); and (2) the divestiture of the lease to its Forsyth County quarry in Suwanee, Georgia and all of the quarry's assets to Midsouth Paving. The DOJ indicated that it required an upfront buyer for the Forsyth County quarry because of the unique nature of the lease being divested.

[87] Press Release, U.S. Dep't of Justice, *Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto* (May 29, 2018), *available at*

(6) CRH plc/Pounding Mill Quarry Corporation (aggregate/asphalt concrete);[88] and (7) Walt

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https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened. The complaint alleged that the proposed merger would reduce competition in four broad categories: (1) genetically modified ("GM") seeds; (2) foundational herbicides; (3) seed treatments; and (4) vegetable seeds. In addition to the alleged anticompetitive effects in each of the product markets resulting from the loss of head-to-head competition or foreclosure, the complaint also alleges that the merger would have a significant impact on innovation, particularly in the development of "integrated solutions" (combinations of seeds, traits, and crop protection products, supported by digital farming technologies). Bayer and Monsanto are close competitors in the GM seeds and traits markets for three important U.S. row crops—cotton, canola, and soybeans—with the elite seed varieties suitable for regions in the United States allegedly controlled largely by a handful of vertically integrated companies. In addition, Bayer and Monsanto compete to sell the "foundational" herbicides that are paired with these seeds. Similarly, the DOJ found that the combination would likely result in three forms of competitive harm related to seed treatments: (1) the loss of head-to-head competition in seed treatments for nematodes; (2) vertical foreclosure effects resulting from the combination of Monsanto's strong position in corn seeds with Bayer's substantial position in insecticidal seed treatments for corn rootworm; and (3) vertical foreclosure effects from the combination of Monsanto's strong position in soybeans with Bayer's substantial position in fungicidal seed treatments for soybean sudden death syndrome. Finally, the complaint alleges that the merger would be likely to substantially lessen competition in the markets for five types of vegetable seeds: carrots (94% combined share for the transaction parties), cucumbers (90% combined share), onions (71% combined share), tomatoes (55% combined share), and watermelons (43% combined share, with only one other significant competitor). Overall, Monsanto is the largest global vegetable seed company, while Bayer is the fourth largest, and the two companies are strong competitors in all five of these seeds markets.

The settlement requires the divestiture to BASF of (1) all assets used by Bayer's GM seeds and traits businesses in the United States and almost all of the assets associated with Bayer's other global GM seeds and traits businesses; (2) all assets relating to Bayer's foundational herbicides business; (3) certain crop protection products that are complementary to Bayer's traits business; and (4) assets relating to its seed treatment businesses. The divested assets generally include intellectual property and research capabilities, pipeline R&D projects and Bayer's digital agriculture business. The comprehensive package includes additional assets that will give BASF the scale and scope to compete effectively. Because many of the divested assets will be separated from Bayer's existing business units and incorporated into BASF, the consent includes provisions aimed at ensuring that the assets include the transfer of existing third-party agreements and customer information, a transition services agreement, and an interim supply agreement. The consent requires Bayer to warrant that the assets being divested are sufficient for BASF to maintain the viability and competitiveness of the divested businesses following BASF's acquisition of the assets and give BASF a one-year window after closing to identify additional assets that are reasonably necessary to ensure the continued competitiveness of the divested business. The consent grants BASF the ability to hire all of the personnel from Bayer needed to support these businesses.

The DOJ reported that the divestiture of these businesses and assets, with a collective worth of approximately $9 billion, is the largest merger divestiture in history. The DOJ recognized its collaboration with the EC, the Canadian Competition Bureau, and Brazilian antitrust authorities.

[88] Press Release, U.S. Dep't of Justice, *Justice Department Requires CRH to Divest Rocky Gap Quarry in Order to Proceed With Pounding Mill Acquisition* (June 22, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-crh-divest-rocky-gap-quarry-order-proceed-pounding-mill. According to the DOJ, both CRH and Pounding Mill produce and sell aggregate, which is an essential input in the manufacturing of asphalt concrete. CRH also produces and sells asphalt concrete. Moreover, the DOJ found that for a significant number of customers in southern West Virginia, CRH and Pounding Mill are two of only three competitive sources of aggregate qualified by the West Virginia Department of Transportation. The combination would result in a loss of horizontal, head-to-head competition, and, therefore, would be likely to result in higher prices. The DOJ also alleged that the acquisition would raise vertical competition concerns because only one company, a recent entrant, competes with CRH to supply asphalt concrete in southern West Virginia and that company relies on Pounding Mill to supply the aggregate it needs to manufacture asphalt concrete. The DOJ cleared the

Disney Company/Twenty-First Century Fox (regional sports networks).[89] In addition, the DOJ required a divestiture in one consummated merger, involving TransDigm's February 2017 acquisition of Schroth Safety Products.[90] Changes in remedy policy and terms during FY2018 warrant careful watch. For example, in recent consent decrees, the DOJ has applied the standard it must meet in a civil contempt action for failure to comply with the settlement's terms from a "clear and convincing evidence" standard to a "preponderance of the evidence" standard. In the *TransDigm* proposed judgment, not only is there the "preponderance of the evidence" standard, but also a provision that TransDigm will reimburse the DOJ for any attorneys' fees, experts' fees, and costs incurred in connection with any effort to enforce the judgment.[91]

3. *Abandoned Transactions*

On March 5, 2018, the DOJ announced that Ultra Electronics Holdings plc ("Ultra") and Sparton Corporation ("Sparton") had abandoned their merger due to antitrust concerns.[92] Sonobuoys are used to support underwater missions for detection, classification, and localization of adversary submarines. Apparently, the transaction parties had recently supplied sonobuoys through a joint venture, ERAPSCO. According to the DOJ, the combination would have "permanently combine[d] the only two qualified suppliers of sonobuoys to the U.S. Navy."

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transaction conditioned on the divestiture of the Pounding Mill quarry in Rocky Gap, Virginia, which remedies both the horizontal and vertical concerns, to Salem Stone.

[89] Press Release, U.S. Dep't of Justice, *The Walt Disney Company Required to Divest Twenty-Two Regional Sports Networks in Order to Complete Acquisition of Certain Assets From Twenty-First Century Fox* (June 27, 2018), *available at* https://www.justice.gov/opa/pr/walt-disney-company-required-divest-twenty-two-regional-sports-networks-order-complete. The DOJ alleged that Disney's ESPN and Fox's cable sports programming compete head-to-head in the provision of cable sports programming to multichannel video programming distributors ("MVPDs") in each of the 22 local markets that Fox's regional sports networks serve. The DOJ concluded that the combination, if unaltered, would likely result in MVPDs paying higher prices for cable sports programming in those local markets.

[90] Press Release, U.S. Dep't of Justice, *Justice Department Requires TransDigm Group to Divest Airplane Restraint Businesses Acquired From Takata* (Dec. 21, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-transdigm-group-divest-airplane-restraint-businesses-acquired. The DOJ required that TransDigm Group Incorporated divest two businesses it had acquired from Takata Corporation in February 2017 in a non-HSR Act reportable transaction. The DOJ asserted that these divestitures are necessary to restore competition in markets for various types of restraint systems used on commercial airplanes. According to the DOJ, TransDigm's AmSafe subsidiary is the world's largest supplier of restraint systems used on commercial airplanes and Schroth was its only meaningful competitor. Schroth was allegedly a growing competitive threat to AmSafe in terms of price and R&D of new restraint systems technologies. Under the settlement agreement, TransDigm will divest all of Schroth, including its facilities in Pompano Beach, Florida and Arnsberg, Germany, to a German consortium.

[91] [Proposed] Final Judgment at 18–19, XV. *United States v. TransDigm Grp. Inc.*, 17-cv-02735 (D.D.C. Dec. 21, 2017), *available at* https://www.justice.gov/opa/press-release/file/1019821/download.

[92] Press Release, U.S. Dep't of Justice, *Ultra Electronics Abandons its Proposed Acquisition of Sparton Corp. After Department of Justice Expresses Concerns* (Mar. 5, 2018), *available at* https://www.justice.gov/opa/pr/ultra-electronics-abandons-its-proposed-acquisition-sparton-corp-after-department-justice.

4. *Closing Statements*

On September 17, 2018, the transaction parties announced that the DOJ had cleared Cigna's proposed acquisition of Express Scripts, Inc. ("ESI"). Although the DOJ did not, at the time, issue a closing statement in connection with its public statements in the *CVS/Aetna* transaction, the DOJ provided information on its decision in the *Cigna/ESI* merger. The DOJ indicated:

> The CVS/Aetna and Cigna/ESI mergers presented some common issues. For instance, both involved the vertical integration of a PBM with a health insurance company. Our investigation showed that neither merger was likely to substantially reduce competition because of this vertical integration.[93]

An important difference between these mergers, however, is that CVS and Aetna are two of the country's leading sellers of individual PDPs, and their merger would likely substantially reduce competition for that product. Cigna and ESI did not have significant horizontal overlaps in the sale of individual PDPs or any other products.[94]

1-II. Enforcement Trends and Issues

A. Pharma/Healthcare Active Area of Investigation and Enforcement Actions

Pharma/healthcare continued to be a very active area in 2018, both in terms of volume of transactions and government enforcement actions. Both the FTC and the DOJ have been active in investigating and taking enforcement action in various sectors of this industry.[95] In the pharma sector, the FTC introduced additional theories of harm that deviated from well-established precedent. In addition, the FTC brought court challenges this year involving the healthcare sector, and the DOJ prevailed at trial on the healthcare insurance cases it had brought in FY2016.

The FTC's consents in FY2018 involving pharmaceutical transactions applied the same methodology as in the last decade. The life cycle stage of a particular drug treatment determines the FTC's focus. Some pharma deals involve overlaps at the development stages, *i.e.*, for a new therapeutic treatment for which there is no commercial product to date. Such "innovation market" challenges, involving actual competition for future products, are complex and involve judgment calls regarding likelihood, foreseeability, and a determination of what projects competing companies have in their pipelines.[96] Until the first generic is

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[93] Public Q&A, U.S. Dep't of Justice, *United States v. CVS and Aetna: Questions and Answers for the General Public* (Oct. 10, 2018), *available at* https://www.justice.gov/opa/press-release/file/1099806/download.

[94] *Id. See also* Closing Statement, U.S. Dep't of Justice, *Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of the Cigna-Express Scripts Merger* (Sept. 17, 2018), *available at* https://www.justice.gov/atr/closing-statement; Press Release, U.S. Dep't of Justice, *Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed With Merger* (Oct. 10, 2018).

[95] *See* Sharis A. Pozen, Former Acting Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Competition and Health Care: A Prescription for High-Quality, Affordable Care,* Remarks as Prepared for the World Annual Leadership Summit on Mergers and Acquisitions in Health Care (Mar. 19, 2012), *available at* https://www.justice.gov/atr/file/518931/download, for a general overview of recent DOJ healthcare activity.

[96] Ilene Knable Gotts & Richard T. Rapp, *Antitrust Treatment of Mergers Involving Future Goods,*

introduced into the market, competition may exist among competing branded drugs for a particular therapeutic treatment. Next, the competition focus shifts to the branded product and its generic bioequivalent, which gets approved into the marketplace through an abbreviated new drug application ("ANDA") process. Many pharma deals involve a company without a commercially available product, but which is poised to enter the market—for instance, a company with a pending ANDA to introduce a generic version of a drug. Since all drug sellers must register with the Food and Drug Administration ("FDA"), the FTC is able to obtain information on who has applied to sell a drug, how far along it is in the pipeline, and what other companies are also pursuing approval. Such future competition is routinely analyzed in a merger review.

In FY2016, the *Teva/Allergan* merger[97] involved the FTC's also considering whether the transaction potentially would create competitive concerns that would extend beyond markets for individual pharmaceutical products. Specifically, the FTC considered the following: first, whether a large portfolio of generic drugs could provide the merging company with the breadth of a portfolio large enough to give it an advantage in winning business in individual drug product markets, *i.e.*, give the combined firm pricing power through the bundling of drug portfolios; second, whether it would affect incentives to challenge branded-drug patents, *e.g.*, discourage the combined firm from filing patent challenges against branded-drug manufacturers; and, finally, as in the *Ciba-Geigy/Sandoz* transaction in FY1996,[98] the Commission considered whether the transaction would discourage development of new generic products.

The FTC has been very active in challenging any hospital system/physician group combinations. The hospital challenges were protracted, with trials and appeals to federal circuit courts. As is true with most antitrust matters, market definition is often the critical determinant of whether the agency will require relief, and, if challenged, whether the agency will prevail before the court. In healthcare cases, however, market delineation is often tricky, due to such factors as the divergence between payor and physician/consumer and applicable regulatory regimes. In addition, given the country's focus on healthcare reform, it is not surprising that hospitals have tried to assert quality and cost-saving objectives as defenses to a transaction.

Even combinations of specialty physician groups, particularly in rural areas, can raise concerns. In 2016, for example, one of the consents involved a consummated combination

ANTITRUST SOURCE at 102 (Fall 2004), *available at* http://www.nera.com/content/dam/nera/publications/2004/Antitrust_Magazine_Fall_2004.pdf; Rosa M. Abrantes-Metz, Christopher P. Adams & Albert D. Metz, *Empirical Facts and Innovation Markets: Analysis of the Pharmaceutical Industry*, ANTITRUST SOURCE at 1 (March 2005), *available at* https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/06_mar05_abrametz323.authcheckdam.pdf.

[97] Press Release, Fed. Trade Comm'n, *FTC Requires Teva to Divest Over 75 Generic Drugs to Settle Competition Concerns Related to its Acquisition of Allergan's Generic Business* (July 27, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/07/ftc-requires-teva-divest-over-75-generic-drugs-rival-firms-settle.

[98] Press Release, Fed. Trade Comm'n, *FTC Accord in Ciba-Geigy/Sandoz Merger To Prevent Slowdown in Gene Therapy Development & Preserve Competition in Corn Herbicides, Flea-Control Markets* (Dec. 17, 1996), *available at* https://www.ftc.gov/news-events/press-releases/1996/12/ftc-accord-ciba-geigysandoz-merger-prevent-slowdown-gene-therapy.

of six independent orthopedic practices in Berks County, Pennsylvania. The FTC alleged that, pre-merger, health plans could choose among the individual practices. This trend continued in 2017, with the *Sanford Health/Mid Dakota Clinic* challenge, where the FTC successfully challenged the acquisition of physician groups and hospitals in Bismarck and Mandan, North Dakota.

On July 21, 2016, the DOJ simultaneously sued to block Anthem's proposed acquisition of Cigna and Aetna's proposed acquisition of Humana. The two transactions would have reduced the number of big health insurance companies from five to three. Crucial to the DOJ's victory in these cases were the market definitions adopted by the courts. In addition, the courts were skeptical of the efficiencies claims of the parties.

The consolidation of healthcare and pharma companies continued in 2018.[99] As discussed above, the DOJ reviewed both CVS Corp.'s proposed acquisition of Aetna Inc. and Cigna's proposed acquisition of ESI, both of which involved horizontal and vertical aspects. After an extensive investigation, neither required remedies based on vertical theories of harm, but the *CVS/Aetna* transaction's horizontal overlap in Medicare Part D required divestitures to obtain DOJ approval.

B. The Agencies—and the Courts—Focus on Merger Remedies

Both the FTC and the DOJ have consistently focused on remedies and required comprehensive divestiture packages to resolve their concerns.[100] In addition, many of the

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[99] *See, e.g.*, *Dignity Health/Catholic Health Initiatives*, in which the parties combined have 139 hospitals in 28 states. Press Release, Dignity Health, *Dignity Health and Catholic Health Initiatives to Combine to Form New Catholic Health System Focused on Creating Healthier Communities* (Dec. 7, 2017), *available at* https://www.dignityhealth.org/about-us/press-center/press-releases/dignity-health-and-catholic-health-initiatives-announcement.

[100] The FTC's attention on remedies is likely due in part to the reasons that the FTC attributes to the failure of three divestiture sales. The first of these reported "failures" occurred in connection with the FTC's November 2012 order that Hertz sell its Advantage low-cost rental business and rights to operate 29 Dollar Thrifty airport locations in order to gain clearance of its $2.3 billion acquisition of Dollar Thrifty. Hertz sold the business to Simply Wheelz, a subsidiary of Franchise Services of North America, which at that time operated U-Save Car Rental. The divestiture acquisition occurred in early 2013. As part of the acquisition, Simply Wheelz opted to lease 24,000 vehicles from Hertz under an agreement that required Simply Wheelz to auction the cars by the end of 2014, and, if sold for less than Hertz's claimed value, to pay Hertz the difference.

The FTC issued its final order on July 10, 2013; four months later, on November 5, 2013, Simply Wheelz filed for bankruptcy, reportedly in part due to Hertz's exercise of its right to terminate its fleet-leasing arrangement with Advantage, since Advantage owed Hertz in excess of $39 million. In January 2014, the FTC sought public comments on the sale of the bankrupt Advantage Rent-a-Car operations to Catalyst Capital Group ("Catalyst"), a private equity firm, which would purportedly need to spend more than $100 million on Advantage to acquire a new fleet of rental vehicles. The FTC approved the sale on January 30, 2014. Catalyst opted to operate only 40 of the 70 locations available for purchase, and, ultimately, the Bankruptcy Court put 22 of these locations up for bid; Hertz and Avis were awarded 10 and 12 sites, respectively. These sites had been closed for months prior to being auctioned off; without these divestitures, the assets were likely to have exited the market. In light of the circumstances, the FTC permitted Hertz to reacquire the sites.

A second "failed" divestiture has arisen in connection with the divestiture of 146 supermarkets to Haggen Holdings, LLC ("Haggen") on January 27, 2015 to resolve concerns about Albertsons' acquisition of Safeway. On August 14, 2015, Haggen announced that it would close 27 acquired stores and, on September 8, 2015,

litigated matters were initiated after the agencies rejected the remedies proposed by the transaction parties. In some of those cases, the court was asked to review the adequacy of these remedies.

In January 2017, the FTC issued its long-awaited merger retrospective study.[101] The study reviewed 89 merger orders entered into between 2006 and 2012. The FTC concluded that the study confirmed that the FTC's merger remedy practices are generally effective. Four areas, however, were earmarked for adjustment.

First, the study found that divestiture buyers of a more limited package of assets were deemed not to succeed at times, even when the buyer was identified upfront. The FTC indicated that, going forward, parties can expect that proposals to divest selected assets will undergo more detailed scrutiny and that the Commission will accept a proposal of less than the entire ongoing business only if the parties and the divestiture buyer demonstrate that divesting the more limited asset package is likely to maintain or restore competition. An example cited is whether the ongoing business divestiture is infeasible. In addition, the Commission indicated that it may require divestiture of assets (including manufacturing facilities) related to additional complementary products, the use of brand or trade names, or other affirmative conduct obligations, including facilitating the transfer of customers, to ensure the buyer's viability.

Second, the study indicated that divestiture buyers sometimes have had unforeseen complexities in transferring critical back-office functions and would have needed more time to transition these services. The FTC indicated that it is important that the divestiture buyer be able to conduct due diligence to understand what back-office support services one needed and that it will undertake additional scrutiny in this area. In addition, the FTC takes the position that critical back-office functions on a transitional basis must be supplied to the divestiture buyer at no more than the parties' cost.

Third, the study raised concerns that some divestiture buyers have lacked adequate funding commitments to ensure success. As a result, the FTC indicated that it is now paying

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Haggen filed for Chapter 11 bankruptcy to permit it to reorganize with only its core profitable stores. On September 24, 2015, Haggen announced that it would exit from California, Arizona, and Nevada, and continued to operate only 37 stores in those states. Haggen, Cerberus International, and Safeway petitioned the FTC on September 23, 2015, seeking approval on an expedited basis of a modification of the consent to permit Albertsons to rehire Haggen employees who were otherwise being terminated by Haggen, without violating the consent order. The FTC had no choice but to grant this request.

Finally, the divestiture buyer in the *Dollar Tree/Family Dollar* transaction had mixed success in the stores it acquired. Of course, these retail divestitures have occurred in a very challenging retail industry environment generally. For instance, in the recent *Bass Pro/Cabela* transaction, the FTC issued a no-action letter closing the investigation after the FTC staff conducted an extensive second request investigation. The FTC found that the sporting goods marketplace today is large and highly fragmented, with numerous competitors, including large full-line sporting goods stores, independents, and retail giants Walmart and Amazon. Omnichannel pricing ensured that there was no price discrimination; switching to a pricing system based on zones or local competitive conditions was not feasible or desirable, with pricing being done nationally.

[101] Fed. Trade Comm'n, *The FTC's Merger Remedies 2006–2012* (Jan. 2017), *available at* https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

closer attention to the sources of and limitations on funds available to the divestiture buyer and how those factors may affect the divestiture buyer's competitive and financial viability.

Finally, the study found the need to focus on the due diligence undertaken by the divestiture buyers, including the access to facilities and employees.

The Obama Administration had previously provided guidance on its views of merger remedies on June 17, 2011, when the DOJ issued an updated policy guide:

> The touchstone principle for the [Antitrust] Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market. . . . In horizontal merger matters, structural remedies often effectively preserve competition, including when used in conjunction with certain conduct provisions. Structural remedies may be appropriate in vertical merger matters as well, but conduct remedies often can effectively address anticompetitive issues raised by vertical mergers. In all cases, the key is finding a remedy that works, thereby effectively preserving competition in order to promote innovation and consumer welfare.[102]

Precedent during the Obama Administration included the agencies imposing a variety of behavioral conditions to support a structural divestiture. Transition services arrangements and supply arrangements have become more routinely included beyond the pharmaceutical industry, where they had already been the norm.[103] In FY2016, for instance, the FTC required that ArcLight augment its sale of terminals with requirements that it: (1) maintain minimum throughput volumes at the terminals for two years, and (2) supply the divestiture buyer with renewable fuels that may be blended with liquid propane products for five years. Mandatory licensing provisions may also alleviate competitive concerns by enabling competitors access to a key input;[104] some of the consents, however, include not only a license for the technology, but the right to purchase the technology or to transfer the license to a third party later.[105] In addition, nondiscrimination provisions have been included to incorporate the concepts of equal access, equal effort, and equal terms.

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[102] Press Release, U.S. Dep't of Justice, *Antitrust Division Issues Updated Merger Remedies Guide* (June 17, 2011), *available at* https://www.justice.gov/opa/pr/antitrust-division-issues-updated-merger-remedies-guide; *Antitrust Division Policy Guide to Merger Remedies* at 1–2 https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

[103] *See, e.g.*, Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Order for Regal Beloit Corporation to Proceed with Its Acquisition of A.O. Smith Corporation's Electric Motor Business* (Aug. 17, 2011), *available at* http://www.justice.gov/opa/pr/2011/August/11-at-1056.html; U.S. Dep't of Justice, Hold Separate Stipulation and Order, *United States v. Bemis Co.*, No. 1:10-cv-00295 (D.D.C. Feb. 24, 2010), *available at* http://www.justice.gov/atr/cases/f255700/255715.htm.

[104] *See, e.g.*, Press Release, U.S. Dep't of Justice, *Justice Department Requires Google Inc. to Develop and License Travel Software in Order to Proceed with Its Acquisition of ITA Software Inc.* (Apr. 8, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-at-445.html; Press Release, U.S. Dep't of Justice, *Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions* (Jan. 18, 2011), *available at* http://www.justice.gov/opa/pr/2011/january/11-at-061.html.

[105] *See, e.g.*, Proposed Final Judgment, U.S. Dep't of Justice, *United States v. Cameron Int'l Corp.*, No. 1:09-cv-02165 (D.D.C. Nov. 17, 2009), *available at* http://www.justice.gov/atr/cases/f252000/252080.htm.

Similarly, the FTC's *CoStar/LoopNet* consent contained what the FTC characterized as "conduct relief that is unusual in a merger settlement."[106] In addition to requiring that the parties divest LoopNet's interest in Xceligent, a competing database that the FTC considered to be the "most similar competitor for information services" to CoStar, the consent also "imposes certain conduct requirements to assure the continued viability of Xceligent as a competitor to the merged firm and to reduce barriers to competitive entry and expansion. These additional provisions will facilitate Xceligent's geographic expansion and prevent foreclosure of [the parties'] established customer base." For five years, the consent: (1) prohibits CoStar and LoopNet from restricting customers' ability to support Xceligent; (2) requires CoStar and LoopNet to allow customers to terminate their existing contracts, without penalty, with one year's prior notice;[107] and (3) bars the merged firm from requiring customers to buy any of its products as a condition for receiving other products, and from requiring customers to subscribe to multiple geographic coverage areas to gain access to a single area in which they are interested. In addition, the consent requires, for three years, that CoStar and LoopNet continue to offer their customers core products on a stand-alone basis. A related provision prohibits the parties from limiting use of Xceligent's REApplications product, a software tool for managing market research in connection with customers' purchase, lease, or license of CRE database services from competitors.[108]

Conduct remedies have been primarily used to resolve concerns in vertical mergers. Such remedies, however, are not always accepted by the DOJ—even prior to the Trump Administration. For instance, during the Obama Administration, Deputy AAG Jon Sallet indicated:

> In vertical transactions, observers sometimes assume that conduct remedies will always be available and sufficient. But that is not the current practice of the division—if it ever was . . . . Some vertical transactions may present sufficiently serious risks of foreclosing rivals' access to critical inputs or customers, or otherwise threaten competitive harm, that they require some form of structural relief or even require that the transaction be blocked.[109]

The Trump Administration's leadership at the DOJ has indicated that, although it is not saying it would never accept behavioral remedies, the standard for proving that the remedy

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[106] Press Release, Fed. Trade Comm'n, *FTC Places Conditions on CoStar's $860 Million Acquisition of LoopNet* (Apr. 26, 2012), *available at* http://www.ftc.gov/opa/2012/04/costar.shtm.

[107] Similarly, the *ArcLight/Gulf* consent requires that ArcLight and Gulf customers in the relevant markets be able to cancel their terminaling service contracts without penalty for six months after the divestiture. *See* Press Release, Fed. Trade Comm'n, *FTC Requires Energy Investor ArcLight Energy Partners Fund to Divest Assets as a Condition of Acquiring Gulf Oil Limited Partnership from Cumberland Farms, Inc.* (Dec. 28, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/12/ftc-requires-energy-investor-arclight-energy-partners-fund-divest.

[108] Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of CoStar Group, Inc., Lonestar Acquisition Sub, Inc., and LoopNet, Inc.* (May 2, 2012), FTC File No. 111-0172, *available at* https://www.ftc.gov/sites/default/files/documents/cases/2012/04/120426costaranal.pdf.

[109] Jon Sallet, Deputy Assistant Attorney General of the Antitrust Division, Remarks at the American Bar Association Fall Forum, U.S. Dep't of Justice, *The Interesting Case of the Vertical Merger* (Nov. 17, 2016), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-jon-sallet-antitrust-division-delivers-remarks-american.

will cure the anticompetitive harms is high. Rather, the DOJ will typically require structural relief to remedy antitrust concerns rather than behavioral remedies. In a keynote speech at the ABA Fall Forum on November 16, 2017, AAG Delrahim explained that behavioral remedies are "fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market."[110] Such regulatory schemes "require centralized decisions instead of a free market process. They also set static rules devoid of the dynamic realities of the market."[111]

In fact, the DOJ challenged the *AT&T/TW* merger reportedly after rejecting conduct restrictions and requiring that the parties offer structural remedies. In *Bayer/Monsanto*, the DOJ required the divestiture of certain seeds due to vertical concerns.

It is unclear to what extent the FTC will diverge from the DOJ by accepting conduct remedies in the future.[112] Competition Bureau Director Bruce Hoffman had indicated in January 2018 that:

> [T]he FTC prefers structural remedies to structural problems, even with vertical mergers.[113] But, at the same time, the FTC recognizes that "in some cases . . . a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration . . . . [I]f the FTC looks closely at a vertical merger that raises the concerns . . . no one should be surprised if the FTC requires structural relief . . . . If that can't be achieved without sacrificing the efficiencies that motivate the merger, then [it] can look at conduct remedies. If those won't work—or [if it] will be too difficult and problematic . . . to be confident that they will work without an excessive commitment of FTC resources where [it is] . . . effectively turned into a regulator—then there should be no surprise if [the FTC were to] seek to block the merger."[114]

During the November 15, 2018 ABA Fall Forum, however, Deputy AAG Bernard Nigro made clear that the DOJ would not rule out the possibility of accepted behavioral remedies in vertical mergers.[115] He reiterated the willingness to accept behavioral remedies during the Fall Forum,[116] noting that the FTC's remedies study showed that the majority of behavioral remedies in vertical mergers had been largely effective. In addition, in *Northrop Grumman/ Orbital ATK*, the FTC imposed behavioral—rather than structural—remedies, noting that the

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[110] Makan Delrahim, Assistant Attorney General of the Antitrust Division, Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

[111] *Id.*

[112] D. Bruce Hoffman, Acting Director, Bureau of Competition, Remarks at Credit Suisse 2018 Washington Perspectives Conference, *Vertical Merger Enforcement at the FTC* (Jan. 10, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

[113] *Id.* at 7.

[114] *Id.* at 8–9.

[115] *See* Kaela Cote-Stemmermann, *Behavioural remedies okay for vertical mergers, says Hoffman*, GCR (Nov. 16, 2018), *available at* https://globalcompetitionreview.com/article/usa/1176980/behavioural-remedies-okay-for-vertical-mergers-says-hoffman.

[116] *Id.*

FTC "typically disfavors behavioral remedies" but permitted this remedy in this transaction "given the special characteristics of the defense industry."[117]

The agencies have also required divestitures to include out-of-market assets (*i.e.*, a divestiture package that goes beyond the assets in the relevant market).[118] In *Community Health Systems/Health Management Associates*,[119] the FTC's concerns were focused on general acute care inpatient hospital services sold to commercial health plans in two geographic areas; the FTC, however, required that Community Health Systems include in its divestiture package the hospital facilities and all outpatient services and operations that were affiliated with the hospital, regardless of whether those services were provided at the hospital. The FTC viewed the outpatient business as necessary for the buyer of each hospital to be as effective a competitor as Health Management Associates had been prior to the transaction.

In addition, in *Sun Pharmaceutical/Ranbaxy*,[120] the FTC required the firms to sell assets related to three dosages of generic minocycline capsules on the premise that the combination would impact future competition for the three strengths of generic minocycline tablets used to treat a variety of infections. The FTC's rationale for including the generic capsules was that it would allow the upfront buyer to use a shorter FDA regulatory process because it would control both products and use the same ingredient supplier (API).

In *Holcim/Lafarge*,[121] the FTC conditioned clearance on the divestiture of plants and terminals, including a terminal in Alberta, Canada and a cement plant in Ontario, Canada. The Canadian assets that are named in the FTC consent decree were included by the FTC as necessary to remedy competitive concerns in northern U.S. markets.

In *ZF Friedrichshafen AG/TRW Automotive Holdings Corp.*,[122] the FTC conditioned approval of a $12.4 billion merger that would create the world's second-largest auto parts supplier with the divestiture of TRW's linkage and suspension business in North America and Europe, even though only suppliers that have production facilities in the United States,

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[117] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.* (June 5, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket.

[118] For a discussion of remedies, including out-of-market assets from the FTC's perspective, see Dan Ducore, Fed. Trade Comm'n, Bureau of Competition, *Divestitures may include assets outside the market* (Apr. 24, 2015), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2015/04/divestitures-may-include-assets-outside-market.

[119] Press Release, Fed. Trade Comm'n, *FTC Requires Community Health Systems, Inc. to Divest Two Hospitals as a Condition of Acquiring Rival Hospital Operator* (Jan. 22, 2014), *available at* http://www.ftc.gov/news-events/press-releases/2014/01/ftc-requires-community-health-systems-inc-divest-two-hospitals.

[120] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Sun Pharmaceutical's Proposed Acquisition of Ranbaxy* (Jan. 30, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/01/ftc-puts-conditions-sun-pharmaceuticals-proposed-acquisition.

[121] Press Release, Fed. Trade Comm'n, *FTC Requires Cement Manufacturers Holcim and Lafarge to Divest Assets as a Condition of Merger* (May 4, 2015), *available at* http://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets.

[122] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Merger of Auto Parts Suppliers ZF Friedrichshafen AG and TRW Automotive Holdings Corp.* (May 5, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/05/ftc-puts-conditions-merger-auto-parts-suppliers-zf.

Canada, and Mexico were deemed eligible to compete for U.S. business.[123] In addition, in *NXP Semiconductors*, the parties agreed to divest all NXP assets that are used primarily for manufacturing, research, and development of RF power amplifiers, including a manufacturing facility in the Philippines, a building in the Netherlands to house management and some testing labs, as well as all patents and technologies used exclusively or predominantly for the RF power amplifier business, based on the FTC's finding that the market for RF power amplifiers is worldwide. The FTC worked with the staff of antitrust agencies in the EU, Japan, and Korea on all aspects of the analysis, including potential remedies, in order to reach compatible approaches on an international scale.

More recently, in 2018, the FTC required that CRH grant the buyer of its Montana cement plant the right to use two CRH cement terminals in Alberta, Canada and the option to require CRH to buy cement from the Montana cement plant for three years because that plant currently supplies a substantial amount of cement to Canada.

The agencies have also taken a more expansive stance in transactions involving innovation and future generations of products. For instance, Applied Materials Inc. and Tokyo Electron Ltd. abandoned their merger plans after the DOJ informed them that their remedy proposal had failed to resolve the DOJ's competitive concerns.[124] Although the merger parties had reportedly offered to divest the overlapping etching and depositing business line of Tokyo Electron, the DOJ thought that the package did not adequately address the future impact of the deal on innovation in future generations of semiconductor equipment. Similarly, in the *Nielsen/Arbitron* transaction, the FTC focused on protecting a future market for syndicated audience cross-platform measurement services. The consent conditioned that transaction's approval on Nielsen's obligations to: (1) continue its cross-platform project with ESPN Inc. and comScore, Inc.; and (2) license Arbitron's Portable People Meter and related data, as well as software and technology being used in the ESPN project, to an FTC-approved third party for up to eight years.[125]

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[123] As noted in the *Director's Report Spring 2016*, the EC had determined as well that the merger would reduce competition in the chassis components for cars and trucks market. The broader divestiture resolved concerns in both jurisdictions. Deborah L. Feinstein, Fed. Trade Comm'n, Bureau of Competition, *Director's Report Spring 2016*, *available at* https://www.ftc.gov/system/files/documents/public_statements/944113/feinstein_-_spring_update_april_2016.pdf.

[124] Press Release, U.S. Dep't of Justice, *Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy* (Apr. 27, 2015), *available at* https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department.

[125] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Nielsen's Proposed $1.26 billion Acquisition of Arbitron* (Sept. 20, 2013), *available at* http://www.ftc.gov/opa/2013/09/nielsen.shtm. Commissioner Wright dissented from the decision on the basis that the future market theory should be subject to a higher evidentiary standard. *See* Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of Nielsen Holdings N.V. and Arbitron Inc.*, FTC Docket No. 131-0058 (Sept. 20, 2013), *available at* http://www.ftc.gov/os/caselist/1310058/ 130920nielsenarbitron-jdwstmt.pdf.

The same is true in consummated merger challenges. In both *Chicago Bridge*[126] and *Polypore*,[127] the FTC required the parties to include assets outside of the market to restore competition within the relevant market and to provide the divestiture buyer with the ability to compete. In addition, in *Valeant*,[128] the FTC required Valeant not only to divest the entire hard contact lens business it had acquired from Paragon Holdings in 2015, but also the assets it had later acquired that the FTC deemed necessary to ensure that the divested business would continue to have access to the vials it needs for its finished contact lens business.[129]

Consistent with the recent findings of the FTC's *Merger Remedies Study*, both agencies increasingly require the parties to identify an acceptable upfront buyer before accepting divestiture packages. The upfront buyer requirement is justified by the agencies as being necessary to ensure that the divestiture will be effective in maintaining competition at the same level as it had been prior to the transaction. The transaction parties, however, can face substantial delay from the process: the need to identify a divestiture buyer, negotiate a divestiture agreement, and have that buyer and the divestiture package vetted by the agencies before the main transaction is permitted to proceed can literally add months to the merger review process.

Moreover, as mentioned above, the agencies have been willing to challenge transactions in which the parties have offered large divestiture packages. In an FTC blog, the authors distinguished the divestiture package offered in *Superior/Canexus* from the divestiture package offered in *Ball/Rexam*:

> [In *Superior*,] the Commission determined that it had reason to believe that the acquisition, even with the proposed divestitures, would still result in competitive harm . . . . Though substantial, none of the various proposals included the right package of plants and other assets to fully eliminate both output suppression and coordination concerns with the underlying merger . . . . [In contrast, in *Ball/Rexam*, the sale of assets to Ardagh] would make it the third-largest producer in the United States and the world . . . . Its entry as a substantial and viable competitor remedies both unilateral and coordinated concerns with the underlying merger, while still allowing Ball to achieve beneficial efficiencies through its acquisition of Rexam.[130]

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[126] FTC Opinion, *In the Matter of Chicago Bridge & Iron Company*, FTC Docket No. 9300 (Jan. 6, 2005), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2005/01/050106opionpublicrecordversion9300_0.pdf?utm_source=govdelivery.

[127] FTC Opinion, *In the Matter of Polypore Int'l, Inc.*, FTC Docket No. 9327 (Dec. 13, 2010), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2010/12/101213polyporeopinion.pdf?utm_source=govdelivery.

[128] Agreement Containing Consent Order, *Valeant Pharmaceuticals Int'l, Inc.*, FTC File Nos. 151-0236 and 161 0028 (Nov. 7, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/161107_paragon_pelican_agreement_2.pdf.

[129] The proposed revisions to the *Antitrust Guidelines for International Enforcement and Cooperation* also indicate that the agencies will seek a remedy that involves conduct or assets outside the United States if it deems that doing so is necessary to ensure the remedy's effectiveness and is consistent with the agency's international comity analysis.

[130] Sean Sullivan & Ben Gris, Fed. Trade Comm'n, Bureau of Competition, *What does it take to settle a*

The DOJ rejected the large divestiture package offered by the parties in the *Halliburton/ Baker Hughes* merger and highlighted the agency's requirement that the divestiture must preserve competition in every market that the merger affects. The agencies will be skeptical of packages that entail "piecemeal" assets and entanglements between the parties. Similarly, the DOJ rejected the divestiture package offered in *Aetna/Humana*. Although in the *Halliburton/Baker Hughes* case the parties abandoned the merger prior to trial, in some recent merger challenges, the defendants sought to "litigate the fix" by proposing a divestiture remedy for the court to consider when deciding whether to block the consummation of the transaction.[131]

This strategy is not a new one. In *Libbey*, the defendant, as a party to a merger agreement, amended its agreement after the FTC challenged its merger with a competitor.[132] Although the amended agreement stated that it "supersede[d] all prior agreements," the FTC advocated that the court evaluate the original agreement in deciding whether an injunction should be issued.[133] The court disagreed, holding that "parties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in an effort to address the government's concerns." The court further held that when parties so amend a merger agreement, a court must evaluate the new agreement in deciding whether an injunction should be issued.[134]

In 2004, the same court applied *Libbey* in the *Arch Coal* ("Arch") case.[135] In that case, the merging parties, prior to the FTC's administrative complaint, had structured their merger to include two separate transactions: (1) the acquisition by Arch of Triton Coal Co. ("Triton"), including both of its mines in the Southern Powder River Basin of Wyoming; and (2) the subsequent sale, contingent upon the consummation of the merger, of one of Triton's mines to a third party, Peter Kiewit Sons', Inc. ("Kiewit"), which Arch had entered into during the FTC's investigation and prior to any litigation. The FTC filed a motion in limine to exclude for purposes of the PI hearing all evidence of the planned post-merger sale of the Triton mine to Kiewit. The FTC argued that the sale was simply the parties' proposed remedy to the merger that the FTC had challenged, and was not an integral part of the transaction properly before the court. The court disagreed. "[T]he Court does not find this structural choice to be dispositive on the issue of whether the Kiewit transaction should be considered in the

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merger case?, at 2 (July 22, 2016), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2016/07/what-does-it-take-settle-merger-case.

[131] *See, e.g.*, Complaint, *United States v. Halliburton Co.*, No. 1:16-cv-00233-UNA (D. Del. Apr. 6, 2016), *available at* https://www.justice.gov/opa/file/838651/download; Complaint, *United States v. Aetna Inc.*, No. 3-99 CV 398-H (N.D. Tex. June 21, 1999), *available at* https://www.justice.gov/atr/case-document/complaint-1; Complaint, *FTC v. Staples, Inc.*, No. 1:15-cv-02115 (D.D.C. Dec. 9, 2015), *available at* http://res.cloudinary.com/gcr-usa/image/upload/v1449787115/FTCvStaplesfedctcomplaint_paudu1.pdf.

[132] *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 42–43 (D.D.C. 2002).

[133] *Id.* at 46.

[134] *Id.*

[135] *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. Aug. 16, 2004) (memorandum opinion denying complaint counsel's motion in limine).

preliminary injunction proceeding."[136] In *Libbey*, the court noted that, even after the parties had amended their merger agreement, the FTC remained capable of vetting the amended agreement and had in fact voted to enjoin the amended merger agreement that the FTC was challenging and that was properly before the court for review on the FTC's motion for a PI.[137] Here, as well, Arch informed the FTC that it had signed an agreement with Kiewit and the FTC then issued its administrative complaint challenging the merger, "determin[ing] that the competitive concerns posed by Arch's acquisition of Triton were not remedied by Arch's offer to sell . . . to Kiewit."[138] Thus, the FTC had assessed and in reality challenged the merger agreement, including the [Kiewit] divestiture.[139] The court rejected the FTC's allegation that the merger would nevertheless increase the risk of coordination. Instead, the court considered the impact of the divestiture on market shares, and even credited the divestiture buyer's plans to expand the mine's output.

In *CCC Holdings*, the court considered—but rejected—the effectiveness of a licensing agreement with a third company, Web-Est, that the transaction parties asserted would enhance the competitiveness of an existing competitor by eliminating existing restrictions on Web-Est's ability to compete and would allegedly allow Web-Est to replace competition lost from the transaction.[140] The court determined that it could be a "problem" to allow "continuing relationships between the seller and the buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior."[141]

Moreover, it is not enough to indicate during a pending court proceeding that the transaction will be restricted and that the firm *will sell* assets to a single buyer as "a new, unified business."[142] In *Ardagh*, the judge concluded that it was "premature and precipitous" to consider the proposal and doubted that the proposal could be thoroughly studied in the three weeks remaining before the hearing of the PI.[143]

In FY2015, in the *Sysco* case, the transaction parties had entered into an agreement to divest significant assets to Performance Food Group ("PFG") to eliminate the competitive concerns raised by the proposed transaction. After noting that there was a lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that had been proposed to remedy an otherwise anticompetitive merger,[144] the court reviewed

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[136] *Id.* at 4.

[137] *Libbey*, 211 F. Supp. 2d at 46.

[138] Memorandum in Support of Plaintiff FTC's Motion *In Limine* at 4; *FTC v. Arch Coal, Inc.*, No. 1:04-cv-00534-JDB, (June 3, 2004), *available at* http://www.appliedantitrust.com/14_merger_litigation/cases_ftc/arch_coal/ddc/arch_coal_ddc_exclude_open6_3_2004.pdf.

[139] *Id.* at 4–5.

[140] *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 56–59 (D.D.C. 2009).

[141] *Id.* at 59.

[142] Alex Lawson, *Ardagh Restructures $2B Deal to Assuage FTC Worries*, LAW 360 (Sept. 20, 2013), *available at* https://www.law360.com/articles/474575/ardagh-restructures-2b-deal-to-assuage-ftc-worries.

[143] *Id.*

[144] *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015).

the testimony and documents and found the divestiture lacking. Specifically, the court was "not persuaded that . . . a sufficient number of national customers will view PFG as a viable alternative to the merged entity 'on day one' to maintain the intensity that characterizes the present competition between Sysco and USF."[145] The court found that, as with *CCC Holdings*, the transition services agreement provided that PFG would provide access to USF private-label products for three years, and the right to license USF's database for at least five years, with a continuing option for an additional five years. The court concluded that "PFG, therefore, [would] not be a truly independent competitor."[146]

Similarly, the court rejected the commitments of the buyer in a proposed stipulation filed just before trial not to engage in certain conduct in *OSF Healthcare*.[147] Although the court found that the stipulation addressed some consensus, it determined that the provisions did not fully address the concerns because "it does not specifically preclude price increases or otherwise limit the ability . . . to exercise its market power in order to achieve higher prices."[148] Finally, as mentioned above, the court considered—but rejected as inadequate—the divestitures offered by the parties in the *Staples/Office Depot* case.

The same principle applies to the DOJ's merger challenges. In *United States v. Franklin Electric Co.*, the DOJ challenged the parties' joint venture under Section 7 of the Clayton Act. The district court in that case also rejected the DOJ's argument that the court should not consider the defendants' proposed transaction to resolve the DOJ's antitrust concerns.[149] However, the proposed remedy in *Franklin Electric* was found to be inadequate to resolve concerns raised by the proposed merger.

In FY2017, the court in the *Aetna/Humana* transaction similarly rejected the efficiency of the proposed remedy. The court found that a divestiture of customers would be inadequate to address concerns, given the potential likelihood that customers would stay with the seller. In addition, the court concluded that the "fire sale" and the divestiture buyer's documents established that the divestiture buyer had significant concerns regarding the viability of the divestiture.

1-III. Possible Legislative Changes: Calls for Tougher Merger Enforcement on Large Firms Contradict Sound Antitrust Policy

On September 14, 2017, U.S. Senator Amy Klobuchar (ranking member of the Senate Judiciary Antitrust Subcommittee) introduced two bills that, if enacted, would substantially change the process and substantive standards for antitrust merger review in the United States.[150] The proposals, which have been endorsed by several other Democratic Senators,

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[145] *Id.* at 73, 76.

[146] *Id.* at 78.

[147] *FTC v. OSF Health Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012).

[148] *Id.* at 1085.

[149] Order, *United States v. Franklin Elec. Co.*, No. 00-C-0334-C (W.D. Wis. July 19, 2000) (denying plaintiff's motion in limine).

[150] Eric Kroh, *Sen. Klobuchar Unveils Bills To Beef Up Merger Enforcement*, LAW360 (Sept. 14, 2017), *available at* https://www.law360.com/articles/964180/sen-klobuchar-unveils-bills-to-beef-up-merger-enforcement.

are the latest and most definitive legislative expression of a desire for tougher merger enforcement. Sentiment against large companies and "mega-mergers," both in the United States and abroad, is on the rise, along with a sense that market concentration operates to the detriment of consumers and employees. Were it to gain wider support, the proposed legislation would signal a break from decades of antitrust enforcement policy centered on rigorous, fact-driven analysis and consumer welfare.

The proposed bills follow a policy paper released by the Democratic Congressional leadership in July 2017, entitled "A Better Deal: Better Jobs, Better Wages, Better Future."[151] The first of these bills,[152] the Merger Enforcement Improvement Act, S.1811, would increase procedural costs and burdens for large mergers and companies. The bill would require higher HSR Act filing fees for large transactions,[153] annual reports by parties to consent decrees detailing consumer benefits, and agency investigations into holdings by institutional investors,[154] the effectiveness of merger settlements, and the impact of mergers on wages, innovation, and new business formation.

The second bill, the Consolidation Prevention and Competition Promotion Act, S.1812, would change the substantive injunction standard from the current requirement that has been in effect for over a century, under which the agencies must prove that a merger would substantially lessen competition or tend to create a monopoly, to a lesser standard that a transaction is "materially likely" to cause more than *de minimis* harm to competition. In "mega-mergers,"[155] the bill would further shift the burden of proof from the government to the transaction parties. Finally, the legislation would create yet another regulator, an "independent Competition Advocate," with a mission to make recommendations to the FTC and the DOJ.

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[151] Eric Kroh, *Dems' 'Better Deal' Antitrust Plan Would Entail Sea Change*, LAW 360 (Aug. 2, 2017), *available at* https://www.law360.com/articles/950589/dems-better-deal-antitrust-plan-would-entail-sea-change; *see also* House Democratic Policy & Commc'ns Comm'n, *A Better Deal: Better Jobs, Better Wages, Better Future* (July 24, 2017), *available at* https://dpcc.house.gov/abetterdeal.

[152] Merger Enforcement Improvement Act, S.1811, 115th Cong. (proposed Sept. 14, 2017), *available at* https://www.congress.gov/bill/115th-congress/senate-bill/1811.

[153] For transactions valued at $5 billion or more, the HSR Act filing fee would increase to $2.25 million.

[154] Some recent scholarship suggests that competitive firms in concentrated markets charge higher prices if they have significant institutional shareholders in common that are "active" in governance. *See, e.g.*, José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, JOURNAL OF FINANCE (Forthcoming) (May 10, 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345; *but see* John R. Woodbury, *Can Institutional Investors Soften Downstream Product Market Competition?*, CPI ANTITRUST CHRONICLE (June 2017), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2017/06/CPI-Woodbury.pdf. During the second Obama Administration term, the DOJ conducted an investigation of the airline industry based on these theories, but did not find sufficient evidence to bring an enforcement action. Brent Kendall & Susan Carey, *Obama Antitrust Enforcers Won't Bring Action in Airline Probe*, WALL ST. J. (Jan. 11, 2017), *available at* https://www.wsj.com/articles/obama-antitrust-enforcers-wont-bring-action-in-airline-probe-1484130781.

[155] Consolidation Prevention and Competition Promotion Act of 2017, S.1812, 115th Cong. (proposed Sept. 14, 2017), *available at* https://www.congress.gov/bill/115th-congress/senate-bill/1812. The bill does not define what would constitute a "mega-merger." The extra scrutiny would apply to transactions in which the value of the acquired business exceeds $5 billion.

Judicial precedent in government challenges to mergers and the antitrust agencies' enforcement guidelines reflect a strong consensus among public and private sector economists, lawyers, consumer advocates, and the business community—a mainstream approach to antitrust enforcement that gives weight to the economic benefits of efficiency-enhancing transactions, while guarding against potential harms from excessive concentration. The agencies' enforcement policies have remained largely constant and effective across a range of administrations. The proposed legislation would alter that, and would be a potential source of divergence between the U.S. agencies and other mature antitrust enforcement agencies.

1-IV. Conclusion

Although it remains unlikely that the pending legislation will pass in its current form due to the divided Congress, it is quite likely that the debate and focus on increased antitrust enforcement will remain at the forefront and possibly become a part of the rhetoric during the 2020 presidential campaign. Even absent passage of the pending legislation to alter materially the merger review standards, the Trump Administration's leadership at the DOJ and the FTC has been indicating that they will be vigorous enforcers, particularly in the remedies they will accept to resolve concerns.