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2021: A Transition Year That Points to Continued Vigorous Antitrust Enforcement of M&A Transactions

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I. Introduction

The first year of the Biden Administration marked significant changes at both the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC" or "Commission"). All indications are that U.S. antitrust enforcement is likely to be as vigorous going forward. The current enforcement policy is part of a growing broader political consensus that antitrust laws should promote societal goals beyond market efficiency or consumer welfare, to include labor, privacy, sustainability, and equities. To some extent, this new approach is consistent with what competition authorities in other key jurisdictions (*e.g.*, the United Kingdom ("UK") and the European Commission ("EC")) have already adopted.

On June 15, 2021, Lina Khan was sworn in as Chair of the FTC.[1] Khan's appointment as Chair is consistent with other messages being sent that aggressive antitrust enforcement is a priority of the Administration. Prior to becoming Chair of the FTC, Khan was an Associate Professor of Law at Columbia Law School, having previously served as counsel to the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law, as legal adviser to FTC Commissioner Rohit Chopra, and as legal director at the progressive Open Markets Institute. She is likely to continue to advocate her progressive vision in enforcement decisions, and ultimately to change antitrust law and policy. She has selected Holly Vedova, a former attorney advisor to then-Commissioner Chopra, as the Director of the Bureau of Competition ("BC Director").

In the six months that Chair Khan has led the FTC, significant procedural and substantive changes have been adopted that could impact the timing and burden of FTC's investigations and may produce antitrust enforcement actions that are broader in nature. Procedurally, the FTC has announced changes in its Hart-Scott-Rodino ("HSR") Act review process that will extend the review period for all deals, and, for those transactions that potentially raise concerns, will not only further delay closing, but impose greater burdens on the parties to comply. In addition, the FTC has indicated that it will, in deals that raise concerns, impose on the transaction parties the requirement that for at least 10 years they will need the FTC's approval before proceeding with specified categories of *future* transactions *regardless of the size* of those transactions. This type of provision could have significant ramifications for repeat M&A players. The FTC also indicated that it will impose restrictions on divestitures of assets and, where appropriate, acquisitions, on the divestiture buyers. Such requirements could impact the range of potential firms that are willing to be divestiture buyers, potentially decreasing the chances that the concerns raised in a transaction

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[1] Press Release, Fed. Trade Comm'n, *Lina M. Khan Sworn in as Chair of the FTC* (June 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/06/lina-m-khan-sworn-chair-ftc.

can be resolved amicably through an FTC consent. The FTC also rescinded its Unfair Methods of Competition policy statement, signaling the potential that the FTC will not limit its objectives to consumer welfare concerns, and the 2020 Vertical Merger Guidelines, at a time when vertical transactions are subject to increased scrutiny.

On September 13, 2021, President Biden nominated Alvaro Bedoya, a privacy lawyer, to fill the expired Commission seat held by Commissioner Chopra. Bedoya has been the founding director of the Georgetown Law Center on Privacy & Technology. His focus has been on surveillance technologies. Commissioner Chopra departed the FTC on October 8, 2021 to assume his position as Chairman of the Consumer Financial Protection Bureau. On December 1, 2021, the U.S. Senate Commerce Committee split 14-14 on a vote to advance Bedoya's nomination for FTC Commissioner. On January 4, 2022, President Biden renominated Bedoya for the FTC Commissioner position, following the U.S. Senate returning the nomination to the President the preceding day under the U.S. Senate's standing rules. Until Bedoya's nomination is confirmed, Chair Khan's future measures to change the FTC might be slowed due to the lack of a Democratic majority on the Commission.

On July 26, 2021, the White House announced the selection of Jonathan Kanter as the Assistant Attorney General for Antitrust ("AAG").[2] Kanter is an antitrust law expert, having worked at the FTC and then having spent about 20 years in private practice, most recently focusing on challenging big-tech companies' conduct. On November 16, 2021, the Senate confirmed Kanter's nomination with broad bipartisan support. Although there may be some areas in which the FTC and the DOJ will diverge as each decides how to achieve the Administration's objectives, Kanter also is likely to be a proactive enforcer willing to bring actions that are consistent with more progressive views of the antitrust laws. Even prior to AAG Kanter's arrival—under the direction of the Attorney General's Office—the DOJ had brought a series of enforcement actions that include vertical, potential competition, and monopsony theories of harm, in some cases rejecting sizeable settlement offers of the transaction parties aimed at avoiding litigation.

Although there has been some momentum in Congress to modify the antitrust laws, given the other pressing legislative initiatives and the upcoming mid term elections, the chances for broad across-industry reform occurring in 2022 are limited. However, we are likely to see, in the near term, additional funding for the agencies and Congressional encouragement of vigorous antitrust enforcement, possibly using the existing laws, but interpreting them to achieve broader societal objectives. Given this heightened antitrust environment, it is now more important than ever that transaction parties identify current overlapping operations that may raise issues under traditional horizontal merger theories, as well as other possible areas of inquiry, including vertical merger issues, the elimination of potential competition, and the impact of the transaction on labor markets. 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 reviewing agency remains concerned about the transaction. They should have a clear understanding early in the review process of whether they are prepared to litigate if these concerns cannot be resolved. Finally, particular care needs to be exercised in transactions that may raise concerns with competition authorities outside of the United States to ensure that the parties' strategy and approach is coordinated globally. With careful

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[2] Press Release, U.S. Dep't of Justice, *President Biden Announces Jonathan Kanter for Assistant Attorney General for Antitrust* (July 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/20/president-biden-announces-jonathan-kanter-for-assistant-attorney-general-for-antitrust/.

planning, however, it remains the case that the vast majority of transactions even involving strategic firms should be achievable, although potentially with greater delays and additional effort by the parties.

II. FTC Merger Enforcement Activities

At the beginning of 2021, the FTC had two preliminary injunction ("PI") cases involving hospital mergers pending in district court and two consummated transactions in litigation before the FTC's administrative law judge ("ALJ"). The FTC lost one of these pending PI cases (*Jefferson Health/Einstein*) and won the other one (*Hackensack/Englewood*, which the transaction parties have appealed to the Third Circuit). Both administrative proceedings remained undecided at the conclusion of 2021, with one (*Altria/JUUL*) having gone to a full trial and the other (*Axon/Safariland*) being stayed during consideration by the U.S. Supreme Court on a challenge of FTC jurisdiction.

In 2021, the FTC filed three district court PI cases (along with the accompanying administrative court cases) challenging the proposed *Procter & Gamble/Billie*, *Illumina/Grail*, and *Lehigh Cement/Keystone* transactions. The transaction parties abandoned both the *Procter & Gamble/Billie* and *Lehigh Cement/Keystone* transactions soon after the cases were filed; the *Illumina/Grail* case had a series of unusual procedural twists, and the transaction parties closed pending EC and administrative court review. The FTC brought one additional challenge, involving Nvidia Corp.'s proposed acquisition of Arm Ltd., in administrative court alone. There are, however, a number of interesting similarities between the *Illumina/Grail* and *Nvidia/Arm* cases. *First*, they involve challenges on vertical theories of harm in which the target is a maverick involved in developing next-generation products. *Second*, relying on the timing for pending review processes at the competition authorities outside the United States, the FTC decided not to pursue a PI in district court, but instead to proceed only in administrative court. Although this approach has been previously taken by the FTC on a limited basis in other matters, it is likely to be particularly advantageous to the FTC in these cases, given their complexity and the FTC's unanimous track record before its ALJ in the past two decades of cases. The FTC's ability to choose its forum, and, therefore, increase its odds of prevailing, is a unique procedural advantage that the FTC has in merger challenges and a critical distinction from its sister enforcement agency, the DOJ, which must bring its challenges of mergers before a judge in federal district court.

Outside of litigation, the FTC obtained remedies as a condition for clearance in six proposed transactions. As in prior years, many of the consents involved healthcare—notably this year, kidney dialysis services—and generic drugs. In addition, two of the consents involved retail gas stations. In September 2021, the FTC indicated its intentions to take a tougher approach in wholesale and retail gasoline company acquisitions, citing prior enforcement practices focusing on diesel and gasoline station divestitures in overlapping local markets rather than "at the metro, regional, or national level, creating conditions ripe for price coordination and other collusive practices."[3]

The consents in all six matters provide for divestitures to an identified upfront buyer. In addition, the *DaVita/University of Utah* consent prohibits DaVita from entering into or enforcing non-compete/non-solicitation agreements relating to physicians and patients for a two-year period.

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[3] Holly Vedova, Dir., Bureau of Competition, *Protecting Americans at the Gas Pump Through Aggressive Antitrust Enforcement*, FED. TRADE COMM'N: COMPETITION MATTERS BLOG (Sept. 21, 2021, 10:54 AM), https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/protecting-americans-gas-pump-through-aggressive.

That consent also contains for the first time the prior approval provision discussed above. In the three FTC consent decrees that were announced post-October 25, 2021, similar prior approval provisions were also included. The FTC's blog posting on gas stations suggests that oil and gas transactions may be "prime candidates" for prior approval requirements extending beyond the overlapping product and geographic markets being remedied in the consent.[4]

Finally, in at least four other transactions, the parties abandoned the transaction during the FTC's investigation due to antitrust concerns. One of these abandoned transactions involved a potential combination of two hospital systems.

1. FTC Litigation Challenges

a. FTC and Pennsylvania Attorney General Lose Jefferson Health/Einstein Challenge

On February 27, 2020, in a four-to-zero vote (then-FTC Chairman Joseph Simons was recused), the FTC authorized an action to be filed in the Eastern District of Pennsylvania to block the proposed merger of Jefferson Health ("Jefferson") and Albert Einstein Healthcare Network ("Einstein").[5] The Pennsylvania Attorney General ("AG") joined the suit. In addition, the FTC issued an administrative complaint alleging that the proposed merger would eliminate robust competition between the two leading providers of inpatient General Acute Care ("GAC") services and inpatient acute rehabilitation services in Philadelphia County and Montgomery County, Pennsylvania, to the detriment of patients.

The complaint alleged that, post-transaction, the respondents would control at least 60% of GAC services in the northern Philadelphia area (as measured by commercially insured patient admissions) and become the market leader in the Montgomery County area.[6] In addition, the respondents operate six of the eight inpatient rehabilitation services facilities in the Philadelphia area,[7] and would control at least 70% of inpatient acute rehabilitation services (as measured by commercially insured patient admissions) in the Philadelphia area.[8]

The FTC asserted that Jefferson and Einstein competed for inclusion in commercial insurers' hospital networks. Thus, according to the FTC, a commercial insurer would find it difficult to market a health plan to Philadelphia employers that excluded all of the GAC hospitals owned by Einstein and Jefferson; therefore, eliminating competition between the parties would likely increase the merged firm's bargaining leverage with commercial insurers.[9] In addition, Jefferson and Einstein had a history of upgrading medical facilities, improving patient access, and offering more competitive reimbursement rates and terms to commercial insurers because of such competition.[10]

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[4] *Id.*

[5] Press Release, Fed. Trade Comm'n, *FTC and Commonwealth of Pennsylvania Challenge Proposed Merger of Two Major Philadelphia-area Hospital Systems* (Feb. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-commonwealth-pennsylvania-challenge-proposed-merger-two-major.

[6] Complaint ¶ 5, *In the Matter of Thomas Jefferson Univ.*, FTC Docket No. 9392 (Feb. 27, 2020), https://www.ftc.gov/system/files/documents/cases/d09392_administrative_part_iii_complaint.pdf.

[7] *Id.* at ¶ 8.

[8] *Id.* at ¶ 10.

[9] *Id.* at ¶¶ 12, 13.

[10] *Id.* at ¶ 14.

The administrative trial was originally scheduled to begin on September 1, 2020; due to the Covid-19 pandemic, however, the entire case was stayed until July 6, 2020, and the trial was rescheduled to begin on January 5, 2021.[11]

On March 12, 2020, both respondents filed their respective Answers in the administrative proceeding. The transaction parties asserted that the alleged relevant product markets and geographic markets failed as a matter of law.[12] New entry and expansion by competitors would be timely, likely and sufficient to ensure that there would be no harm to competition, patients and consumers, and consumer welfare.[13] Insurers and other payors have a variety of tools to ensure that they receive competitive pricing and terms.[14] In addition, the parties contend that the combination "will be pro-competitive, and will result in substantial merger-specific pricing efficiency and synergies, and other pro-competitive effects, which will inure to the benefit of consumers of healthcare in the Greater Philadelphia area."[15] Furthermore, Einstein asserted that it is a weakened competitor and a failing firm.[16]

On September 11, 2020, a week-long in-person and teleconference hearing began before U.S. District Judge Gerald J. Pappert. On December 8, 2020, Judge Pappert denied the FTC's request for a PI.[17] The court rejected the testimony of the economists and the insurers, finding that the testimony was "neither unanimous, unequivocal nor supported by the record as a whole."[18] In addition, the court rejected the alleged markets on the basis that they wrongly "focus more on patients" rather than the insurers that would feel the immediate impact of any price increase.[19] The government's expert assumed that what matters for the economic analysis is how much demand there is from the plan's members for a particular provider without showing that the insurers are "aligned with patient decisions about where to seek care. . . . As a matter of academic econometric analysis, [the government's economist] could be correct, but relying on that simple principle is insufficient. . . . Market definition can rest on a mathematical equation only if the variables used in the equation reflect the market's commercial realities."[20]

The opinion also distinguished the FTC's victory in the Third Circuit in *Penn State Hershey Medical Center/Pinnacle Health System*,[21] where the appellate court reversed a lower court's

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[11] Third Order Regarding Scheduling in Light of Public Health Emergency, *In the Matter of Thomas Jefferson Univ.*, FTC Docket No. 9392 (June 3, 2020), https://www.ftc.gov/system/files/documents/cases/d09392_commission_third_order_regarding_scheduling_in_light_of_public_health_emergency.pdf.

[12] Answer of Thomas Jefferson Univ. ("Jefferson Answer") 17, *In the Matter of Thomas Jefferson Univ.*, FTC Docket No. 9392 (Mar. 12, 2020), https://www.ftc.gov/system/files/documents/cases/d09392_r_thomas_jefferson_u_answerpublic597914.pdf.

[13] *Id.* at 18.

[14] *Id.*

[15] Answer of Respondent Albert Einstein Healthcare Network ("Einstein Answer") 12, *In the Matter of Thomas Jefferson Univ.*, FTC Docket No. 9392 (Mar. 12, 2020), https://www.ftc.gov/system/files/documents/cases/d09392_r_einstein_answerpublic597913.pdf; Jefferson Answer at 1.

[16] Einstein Answer ¶ 13; *see also* Jefferson Answer ¶ 12.

[17] *FTC v. Thomas Jefferson Univ.*, 505 F. Supp. 3d 522 (E.D. Pa. 2020).

[18] *Id.* at 528.

[19] *Id.* at 541.

[20] *Id.* at 541, 544.

[21] *FTC* v. *Penn State Hershey Medical Center*, 838 F.3d 327 (3d Cir. 2016).

denial of a PI on the basis that in that case there was evidence that insurers could not market a plan to employers in the area without covering at least one of the merging hospitals. That case had also included a "natural experiment," where an insurer stopped covering both of the merging hospitals and lost half of its members despite offering lower prices than its competitors. In the instant case, the court found that "[g]iven the numerous health care systems here, no insurer can credibly assert that there would be 'no network' without a combined Jefferson and Einstein. . . . There are numerous health systems and many more hospitals within a far smaller radius [than in central Pennsylvania]."[22] The court also rejected the existence of a separate rehabilitation market on the same reasoning that it focused more on patients than their insurers.

The FTC and the Pennsylvania AG filed an Emergency Motion for Injunction Pending Appeal with the district court on December 9, 2021, which the court denied on December 14, 2021 (but, with the consent of defendants, extended the expiration of the temporary restraining order until 11:59 p.m. on December 21, 2021).[23] The FTC (without the Pennsylvania AG) filed a Notice of Appeal and an Emergency Motion for an Injunction Pending Appeal ("Emergency Motion") in the Third Circuit on December 10, 2021 and December 11, 2021, respectively.[24] On December 21, 2020, the Third Circuit denied the FTC's Emergency Motion.[25] Notably, in January 2021, the Pennsylvania AG settled with the hospitals and withdrew from the challenge. The hospitals agreed to some price protections as well as a commitment to invest $200 million in Einstein's North Philadelphia facilities over a seven-year period.[26]

Pursuant to Rule 3.26 of the Commission's Rules of Practice, the hospitals filed a motion with the Commission to withdraw its challenge of the merger from adjudication on the grounds that further litigation is not in the public interest following the district court's denial of the PI and the Third Circuit's denial of the motion for injunction pending appeal.[27] On March 1, 2021, the FTC announced that it would be dropping its Third Circuit appeal, and, on March 15, 2021, returned the matter to adjudication before the ALJ solely for the purpose of dismissing the complaint. The parties merged their networks on October 4, 2021.

b. FTC Successfully Challenges Hackensack Meridian Health/Englewood Healthcare Combination

On December 3, 2020, the FTC filed an action in the District Court for the District of New Jersey seeking to block Hackensack Meridian Health Inc.'s ("Hackensack") proposed acquisition of Englewood Healthcare Foundation ("Englewood").[28] The FTC alleged that the combined

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[22] *FTC* v. *Thomas Jefferson Univ.*, 505 F. Supp. 3d at 545, 552.

[23] Order, *FTC* v. *Thomas Jefferson Univ.*, C.A No. 20-01113 (E.D. Pa. Dec. 14, 2020).

[24] Notice of Appeal, *FTC* v. *Thomas Jefferson Univ.*, No. 20-3499 (3d Cir. Dec. 10, 2020); Emergency Motion of the Fed. Trade Comm'n for an Injunction Pending Appeal, *FTC* v. *Thomas Jefferson Univ.*, No. 20-3499 (3d Cir. Dec. 11, 2020).

[25] Order, *FTC* v. *Thomas Jefferson Univ.*, No. 20-3499 (3d Cir. Dec. 21, 2020).

[26] Harold Brubaker, *Pa. Attorney General Drops Opposition to Jefferson-Einstein Deal*, PHILA. INQUIRER, Jan. 12, 2021, https://www.inquirer.com/business/health/pennsylvania-attorney-general-drops-opposition-jefferson-einstein-merger-20210112.html.

[27] Respondents' Motion to Withdraw Matter from Adjudication, *In the Matter of Thomas Jefferson Univ.*, FTC Docket No. 9392 (Dec. 31, 2021), https://www.ftc.gov/system/files/documents/cases/d09392_respondents_motion_to_withdraw_matter_from_adjudicationpublic.pdf.

[28] Press Release, Fed. Trade Comm'n, *FTC Challenges Hackensack Meridian Health, Inc.'s Proposed Acquisition*

healthcare system would control three of the six GAC hospitals in Bergen County, New Jersey, and would eliminate the close competition that existed between the parties. Hackensack University Medical Center, the system's flagship hospital, is just five miles away from one of Englewood's hospitals and those two hospitals offer the same services for 97% of their admissions.

The district court hearing began on May 10, 2021. Defendants argued that Bergen County is not the relevant product market. About 45% of Englewood's in-patient population lives outside Bergen County and about 10% of patients from Bergen County go to New York hospitals for in-patient services. In addition, Hackensack is an academic medical center, drawing from a much larger geographic area. The transaction had been approved by the New Jersey AG and the New Jersey Department of Health.

On August 4, 2021, Judge John Michael Vazquez granted the FTC's PI, halting the acquisition while the administrative trial proceeded.[29] The court found that the FTC had established its *prima facie* case that the transaction would lead to anticompetitive effects in the relevant markets, defined as "commercially insured patients in Bergen County."[30] The geographic boundaries of Bergen County had been corroborated during trial by certain insurers testifying that they could not market a plan that did not include a Bergen County hospital to Bergen County residents. The court found that the FTC had demonstrated that the post-merger Herfindahl-Hirschman Index ("HHI") would be 2,835, with a change in HHI of 841, and that Hackensack would control almost half of the market in Bergen County. The parties' internal documents were critical to the judge's decision and the court cited these documents extensively to support claims that the two parties were close competitors. In addition, commercial insurer testimony indicated that Hackensack and Englewood do compete for the same patients and that these insurers viewed them as competitors.

The FTC's expert testified that the merger would have a price impact of approximately $31 million per year, based on the patient-based willingness-to-pay model. In addition, the court analyzed an "acquisition clause" in Hackensack's contracts with payers that allows Hackensack to raise the rates of any hospitals it acquires to the rates of Hackensack's similar facilities as providing evidence that a post-merger price increase would occur.[31] Although Hackensack had sent letters to payers stating that it would not enforce these clauses, the court held that these letters were created to bolster the parties' litigation position, would not be given any weight, and were not binding contracts.

The court also rejected Hackensack's commitment to improvements at Englewood and Hackensack as being not specific or enforceable. The court doubted Hackensack's claims for expansion and optimization at Hackensack facilities. The court noted that Hackensack had not previously signaled to insurers that it faced capacity constraints, had never declined a patient transfer and never went to redirect, or sought to transfer patients to Englewood. As a result, the court held that the parties had failed to rebut the FTC's *prima facie* case. Moreover, the court pointed out that its ruling merely indicates that, at this stage, the injunction is in the public interest, and not a determination that the merger is not in the public interest.

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of Competitor Englewood Healthcare Foundation (Dec. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-challenges-hackensack-meridian-health-incs-proposed.

[29] Opinion with Findings of Fact & Conclusions of Law, *FTC* v. *Hackensack Meridian Health, Inc.*, No. 2:20-cv-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021).

[30] *Id.* at *20.

[31] *Id.* at *23–*24.

The FTC's Office of Public Affairs Director, Lindsay Kryzak, stated the same day the court issued its decision: "Too many hospital mergers lead to jacked up prices and diminished care for patients most in need. It remains a mystery why these two hospital systems decided to pursue a highly suspicious merger in the middle of a global pandemic. The Court has hit pause on this merger. . . . Hospital executives hatching merger plans should take note."[32]

On August 25, 2021, the hospitals filed an appeal of the PI with the Third Circuit.[33] In its appeal briefing, the hospitals contended that the district court erred in the geographic market definition, the likelihood of price increases, and the evaluation of the procompetitive benefits of the acquisition. The hospitals argued that a geographic market based on county lines is an arbitrary political boundary and does not reflect the commercial realities of the market. Additionally, the hospitals asserted that the district court erroneously used patients' willingness to pay as the standard, which has no bearing on insurers' willingness to pay.

Although the administrative trial was scheduled to begin on July 15, 2021, following a series of joint motions, that trial will now not begin until 30 days after the Third Circuit rules on the appeal of the PI.

On November 8, 2021, a coalition of AGs from 24 states, the District of Columbia, and Guam, filed an *amicus* brief in the Third Circuit urging the Court to affirm the district court's decision. Notably absent from this brief was the New Jersey AG. As mentioned above, New Jersey's Department of Health and New Jersey's AG had approved the deal, although, as the FTC pointed out, under a statute that safeguards nonprofits' charitable assets. The American Hospital Association and the Association of American Medical Colleges also filed an *amicus* brief in support of the deal. According to these provider groups, no litigated FTC case has previously defined a relevant geographic market based on where "commercially insured patients" live; it is simply not feasible for hospitals to charge patients different prices based on where they live. Thus, they argue, the district court's acceptance of the FTC's relevant geographic market was a legal error and grounds for reversal.

c. Procter & Gamble Company/Billie, Inc. Abandoned After FTC Files Complaint

On December 8, 2020, the FTC filed a PI action in the District Court of the District of Columbia to enjoin Procter & Gamble Company's acquisition of Billie, Inc. and also filed an administrative complaint.[34] According to the FTC's press release, "P&G sells women's and men's razors under various brands, including Gillette, Venus, and Joy," while "Billie sells a quality, mid-tier women's system razor targeted at Generation Z and Millennial women." The FTC noted that Billie's marketing effort "attack[s] the practice of pricing women's razors higher than comparable men's razors—otherwise known as the 'pink tax.' "[35] The District Court complaint noted Billie's emphasis on a "female-first" message which "challenged the traditional portrayal of women's

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[32] Press Release, Fed. Trade Comm'n, *Statement of FTC Office of Public Affairs Director Lindsay Kryzak on District Court's Decision to Grant Preliminary Injunction Halting New Jersey Hospital Merger* (Aug. 4, 2021), https://www.ftc.gov/news-events/press-releases/2021/08/statement-ftc-office-public-affairs-director-lindsay-kryzak.

[33] Notice of Appeal, No. 21-2603, *FTC* v. *Hackensack Meridian Health Inc.* (3d Cir. Aug. 25, 2021).

[34] Press Release, Fed. Trade Comm'n, *FTC Sues to Block Procter & Gamble's Acquisition of Billie, Inc.* (Dec. 8, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-block-procter-gambles-acquisition-billie-inc.

[35] *Id.*

razors."[36] Further, "Billie targeted P&G from the start, with a vision to '[d]ethrone Gillette Venus to become the number one women's razor brand in the U.S.' "[37] The FTC further asserted that "P&G's CEO of Grooming viewed the 'big' value from this acquisition as the 'removal of the competitive threat.' "[38] The administrative trial was scheduled to begin on June 22, 2021. On January 5, 2021, the parties abandoned the transaction.[39]

d. FTC Challenges Illumina/Grail Transaction, Gets District Court Case Dismissed, but Proceeds with Administrative Trial

On March 30, 2021, the FTC, in a four-to-zero vote, authorized the Staff to challenge Illumina's proposed acquisition of Grail in both federal court and in an administrative action.[40] According to the FTC, Illumina was the dominant provider of DNA sequencing, a necessary input for multi-cancer early detection ("MCED") tests. MCED tests could revolutionize how cancer is detected and treated; rather than wait for cancer symptoms to appear, MCED tests use a liquid biopsy to examine fragments of DNA in the bloodstream to determine whether cancer cells have shed any DNA, which is what a vast majority of cancerous tumors do. These tests would be used to detect approximately 50 different cancers, in direct contrast to existing diagnostic tests that can screen for only one. In addition, the MCED tests are used to detect five types of cancers for which there are no other screening tests available. All of these tests require use of a next-generation sequencing ("NGS") platform, including the NGS equipment and designated consumables, such as cells/cartridges and reagents.

Grail, with its Galleri MCED test, is competing with several other firms to develop and commercialize this technology. The FTC asserted that Grail and its rivals' MCED tests in development relied on Illumina's NGS platforms. Illumina had originally purchased Grail in 2015 but had subsequently decreased its ownership to 14.5% of Grail's voting stock.

The FTC alleged harm under both potential competition and vertical theories. According to the FTC, Illumina, as the only supplier of a critical input, possessed the ability to foreclose or disadvantage Grail's MCED rivals. Thus, if the acquisition were consummated, Illumina would gain the incentive to foreclose or disadvantage firms that pose a significant competitive threat to Grail and to limit the competition of any MCED product that Illumina expected to compete closely with Galleri. Since Grail's rivals would have no alternatives, they would not be able to divert purchases away from Illumina. In addition, Illumina would have the ability to monitor each company developing an MCED test using its platform. Galleri would then be well positioned to recapture all or most of the sales from Grail's rivals.

The FTC further posited that short-read NGS is the only type of sequencing technology that can satisfy all the requirements for MCED tests. Thermo Fisher Scientific, Inc. is the only other

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[36] Complaint ¶ 3, *FTC* v. *The Procter & Gamble Co.*, C.A. No. 1:20-cv-0393 (D.D.C. Dec. 9, 2020), ECF No. 9-1.

[37] *Id.*

[38] *Id.* at ¶ 5.

[39] Press Release, Fed. Trade Comm'n, *Statement of Ian Conner, Director of the FTC's Bureau of Competition, Regarding the Announcement that The Procter & Gamble Company Has Abandoned Its Proposed Acquisition of Billie, Inc.* (Jan. 5, 2021), https://www.ftc.gov/news-events/press-releases/2021/01/statement-ian-conner-director-ftcs-bureau-competition-regarding.

[40] Press Release, Fed. Trade Comm'n, *FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail* (Mar. 30, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection.

short-read NGS platform provider in the United States. Beijing Genomics Institute ("BGI") is the only other short-read NGS platform provider in the world. BGI, however, is currently enjoined from selling in the United States during the duration of a patent infringement suit filed by Illumina. Although some other firms are attempting to develop NGS platforms, the FTC believes these firms are years away from launching viable substitutes for Illumina's short-read NGS. Moreover, even if other NGS platforms entered the market, the FTC asserted that it would take years, if at all, for MCED test developers to switch from Illumina's NGS platforms to another platform. A switch might require new clinical trials and the need to reconfigure testing.

Because the MCED market asserted by the FTC is pre-commercial, market shares did not exist. As a result, the FTC relied on Illumina's internal projections, with a projected market size of tens of billions of dollars by 2025.

The FTC had rejected as an effective remedy Illumina's offer to its clinical oncology customers to guarantee contractually equal and fair access to Illumina sequencing.

On April 6, 2021, Illumina and Grail responded to the suit, calling it "speculative and baseless" and indicated that it would deprive patients of an accelerated process that would lead to the adoption of a revolutionary blood test.[41] They filed a motion to have the case moved from the District of Columbia to the Southern District of California, where the companies and many witnesses are located.[42] On April 20, 2021, Judge Rudolph Contreras granted the transfer motion.[43]

The transaction had not been notified by the parties to the EC because Grail had no active products or European Union ("EU") revenues. In an unprecedented action consistent with its recently revised referral guidelines,[44] the EC requested that the competition authority in France refer the review to it; France—with support from Belgium, Greece, the Netherlands, Iceland, and Norway—did so in early April 2021;[45] on April 19, 2021, the EC accepted the referral.[46] On April 29, 2021, Illumina asked the General Court of the EU in Luxembourg to bar the EC from reviewing the transaction, citing, among other things, the seven-month delay since the deal announcement for the EC to seek such a referral.[47] Illumina's challenge of the EC's review of its transaction is pending.

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[41] Answer of Defendants Illumina, Inc. and Grail, Inc., *FTC* v. *Illumina, Inc.*, C.A. No. 1:21-cv-00873 (D.D.C. Apr. 6, 2021).

[42] Defendants' Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a), *FTC v. Illumina, Inc.*, C.A. No. 1:21-cv-00873 (D.D.C. Apr. 2, 2021).

[43] Order Granting Defendants' Motion to Transfer Venue, *FTC v. Illumina, Inc.*, No. 1:21-cv-00873 (D.D.C. Apr. 20, 2021).

[44] *See* Euro. Comm'n, Commission Guidance on the Application of the Referral Mechanism Set Out in Article 22 of the Merger Regulation to Certain Categories of Cases (Mar. 26, 2021), https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf; *see also* Press Release, Euro. Comm'n, *Mergers: Commission Announces Evaluation Results and Follow-up Measures on Jurisdictional and Procedural Aspects of EU Merger Control* (Mar. 26, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1384.

[45] Fr. Conseil d'État, Ord. 450878, 450881, *Grail/Illumina* (Apr. 1, 2021), https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-04-01/450878.

[46] Press Release, Euro. Comm'n, *Daily News: Mergers: Commission to Assess Proposed Acquisition of GRAIL by Illumina* (Apr. 20, 2021), https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846.

[47] Press Release, Illumina, Inc., *Illumina Files Action for Annulment of European Commission's Decision Asserting Jurisdiction to Review GRAIL Acquisition* (Apr. 29, 2021), https://www.illumina.com/company/news-center/press-releases/2021/e2c75c6a-6cbe-4e45-b8a6-6d90d40c253e.html.

Meanwhile, the EC has continued with its review of the transaction. On July 22, 2021, the EC confirmed that the transaction would face an in-depth Phase II investigation, citing concerns that the deal might reduce competition and innovation in the emerging market for cancer detection tests based on sequencing technologies. Consistent with the FTC's case, the EC's concerns are premised on a vertical input foreclosure theory.

The FTC appears to have reacted to these EC developments when it filed a motion to dismiss its PI complaint, without prejudice, in federal district court on May 20, 2021.[48] In fact, the FTC told the court that since the EC is investigating the transaction, the parties cannot implement the transaction, which obviated the need for a PI at this time. Instead, the FTC argued, the merits of the FTC's challenge could be decided in administrative court, with the administrative trial scheduled to commence on August 24, 2021. The transaction parties filed a brief in opposition to the dismissal without prejudice, arguing that the FTC should not be allowed to seek a PI at a later date.[49] During the hearing on May 28, 2021, Judge Ann Bencivengo informed the defendants that they needed to show "legal prejudice" to prevail.[50] The defendants argued that they would suffer such prejudice, since the FTC's move made it impossible for the companies to get a full and fair hearing of their case before the September 2021 outside date specified in their agreement and that the uncertainty of closing would be problematic for the company, as it planned to introduce its blood test during the summer of 2021. Judge Bencivengo rejected these arguments and granted the FTC's dismissal motion on June 1, 2021.[51]

With the EC review process and the FTC administrative challenge likely to extend well beyond the agreement's outside date, Illumina faced the potential that Grail would terminate the agreement in September 2021 and collect a $600 million break-fee (on its $7.1 billion deal) from Illumina. Illumina took action on August 18, 2021, by closing the transaction, even though the EC asserted that its approval was needed before consummation of the transaction. Illumina did, however, keep Grail a separate company during the EC review. Nevertheless, this bold move could subject Illumina to stiff fines for gun-jumping if the EC prevails in the General Court of the EU. In its September 20, 2021 Statement of Objections on the transaction, the EC warned Illumina: "This is the first time companies openly [implemented] their deal while we are carrying out an in-depth investigation."[52]

The FTC's administrative law trial began on August 24, 2021. The EC has continued to extend its investigation beyond an initial March 25, 2022 deadline.

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[48] Press Release, Fed. Trade Comm'n, *Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case* (May 20, 2021), https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth.

[49] Opposition to FTC's Motion to Dismiss the Complaint Without Prejudice, *FTC* v. *Illumina, Inc.*, 3:21-cv-00800 (S.D. Cal. May 26, 2021).

[50] Jonathan Wosen, *Illumina's Chances of Acquiring Grail Take a Hit After San Diego Judge's Decision*, THE SAN DIEGO UNION-TRIBUNE, May 28, 2021, https://www.sandiegouniontribune.com/business/story/2021-05-28/illuminas-chances-of-acquiring-grail-take-a-hit-after-san-diego-judges-decision.

[51] Order, *FTC* v. *Illumina, Inc.*, 3:21-cv-00800 (S.D. Cal. June 1, 2021).

[52] Press Release, Euro. Comm'n, *Mergers: The Commission Adopts a Statement of Objections in View of Adopting Interim Measures Following Illumina's Early Acquisition of* GRAIL (Sept. 20, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4804.

e. Lehigh Cement Company/Keystone Cement Company Abandon Merger After FTC Filed Lawsuit

On May 20, 2021, the FTC filed an administrative complaint and authorized a PI suit to enjoin Lehigh Cement Company LLC's ("Lehigh") acquisition of Keystone Cement Company ("Keystone").[53] The FTC alleged that the acquisition would harm competition in the market for gray portland cement in eastern Pennsylvania and western New Jersey. The FTC alleged that the transaction would have reduced the number of significant competitors from four to three. Lehigh owns and operates multiple facilities that sell cement, including two cement plants within close proximity of Keystone's plant in Bath, Pennsylvania. Lehigh is the leading cement supplier in this region and, the FTC asserted, would control more than 50% of cement sales post-merger. In addition, the FTC found that Lehigh and Keystone are close competitors for many customers and that Keystone's aggressive pricing has caused Lehigh to lower its cement prices.

On June 4, 2021, the transaction parties abandoned their proposed merger.[54]

f. Parties Abandon Nvidia and Arm Transaction After FTC Sues to Block Merger

In its second court challenge of a vertical transaction in 2021 involving next-generation products, the FTC, on December 2, 2021, voted four-to-zero to bring an administrative court action to block U.S. chip supplier Nvidia Corp.'s ("Nvidia") $40 billion acquisition of U.K. chip designer Arm Ltd. ("Arm"). Similar to the pending *Illumina/Grail* case, the FTC decided not to pursue a PI at this time, presumably due to the pending reviews of the transaction in a number of jurisdictions. As mentioned above, the FTC's ability to choose its forum is a key procedural advantage over the DOJ that it has when challenging a merger.

Nvidia, one of the world's largest computing companies, develops and markets computer chips and devices, and, according to the complaint, is the dominant supplier of stand-alone graphics processing units for personal computers and datacenters that are used widely for artificial intelligence processing and graphics processing.[55] Nvidia also develops and markets products for advanced networking, datacenter central processing units, and computer-assisted driving. Arm, which is owned by Tokyo-based Softbank Group Corp., creates and licenses microprocessor designs and architectures, referred to as "Arm Processor Technology," to other technology companies, including Nvidia, and, according to the FTC, has become the *de facto* industry standard. Companies reportedly rely on Arm's technology to make computer chips that power a wide range of modern computing devices, including driver-assistance systems and large

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[53] Press Release, Fed. Trade Comm'n, *FTC Challenges Merger of Two Pennsylvania Cement Producers, Alleging It would Harm Regional Competition* (May 20, 2021), https://www.ftc.gov/news-events/press-releases/2021/05/ftc-challenges-merger-two-pennsylvania-cement-producers-alleging.

[54] Press Release, Fed. Trade Comm'n, *Statement of Acting Bureau of Competition Director Maribeth Petrizzi Regarding Decision of Pennsylvania Cement Producers Lehigh Cement Company LLC and Keystone Cement Company to Abandon Their Proposed Merger* (June 4, 2021), https://www.ftc.gov/news-events/press-releases/2021/06/statement-acting-bureau-competition-director-maribeth-petrizzi.

[55] Press Release, Fed. Trade Comm'n, *FTC Sues to Block $40 Billion Semiconductor Chip Merger* (Dec. 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger. The FTC indicated that it had cooperated closely with Staff of the competition agencies in the EU, the UK, Japan, and South Korea. Presumably, the FTC did not file a case in federal district court as well because competition approvals remained outstanding in these jurisdictions and in China, so there was not the threat that the parties would be able to close their transaction absent a PI. The transaction may also be subject to certain foreign investment concerns; the UK, for instance, reportedly is considering whether the proposed transaction could affect national security, in addition to competition.

datacenters.[56] The FTC complaint alleged that the combined firm would be able to stifle innovative next-generation technologies, and could undermine critical infrastructure developments.[57] Arm licenses its Arm Processor Technology using an industry-described neutral, open licensing approach. Today, it typically profits when its licensees sell more units.[58] As discussed below, post-merger, its incentives would be different.

Specifically, the complaint alleged harm in three relevant product markets: (1) DPU SmartNICs (network interface devices that incorporate software-programmable cores for offloading and isolating processing tasks related to networking security, virtualization, and other datacenter support services from the server's main CPU); (2) high-level automotive advanced driver assistance, and central computer system-on-a-chip; and (3) Arm-Based Datacenter CPUs for cloud computing service providers. In each of these markets, the marketplace is small but likely to increase significantly in the near term. Arm's technology and partnering is viewed as critical to product development and innovation, and the proposed acquisition allegedly would create a firm with the incentive and ability to harm rivals in the market.

The FTC posited that Arm's technology is a critical input that enables competition between Nvidia and its competitors in several markets and that the proposed merger would give Nvidia the ability and incentive to use its control of this technology to undermine its competitors, reducing competition, and ultimately resulting in reduced product quality, reduced innovation, higher prices, and fewer choices. The complaint also argued that the acquisition would harm competition by giving Nvidia access to the competitively sensitive information of Arm's licensees and that it would likely decrease the incentive for Arm to pursue innovations that are perceived to conflict with Nvidia's business interests. Today, Arm's licensees routinely share competitively sensitive information with Arm and rely on Arm for support in developing, designing, testing, debugging, troubleshooting, maintaining, and improving their products. Arm licensees currently share this information with Arm because Arm is a neutral partner, not a rival chip maker. Accordingly, the FTC alleged this acquisition would likely harm innovation competition by eliminating innovations that Arm would have pursued but for a conflict with Nvidia's interests.

Finally, the complaint alleged the lack of mitigating factors. *First*, the parties will not be able to demonstrate that entry into or expansion of products in the relevant markets that do not incorporate Arm Processor Technology would be timely, likely, or sufficient to reverse the anticompetitive effects of the proposed transaction. *Second*, the proposed acquisition would not generate verifiable, cognizable, merger-specific efficiencies that would reverse the likely competitive harm from the proposed acquisition.

Interestingly, the complaint requested the court, in addition to prohibiting the transaction, to require that, for a period of time, Nvidia and Arm provide prior notice to the Commission of acquisitions with any other company.

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[56] Complaint ¶ 4, *In the Matter of Nvidia Corp.*, FTC Docket No. 9404 (Dec. 6, 2021), https://www.ftc.gov/system/files/documents/cases/d09404_part_3_complaint_public_version.pdf.

[57] *See also* statement by BC Director Vedova in the FTC's press release, *supra* note 55 ("The FTC is suing to block the largest semiconductor chip merger in history to prevent a chip conglomerate from stifling the innovation pipeline for next-generation technologies, . . . The FTC's lawsuit should send a strong signal that we will act aggressively to protect our critical infrastructure markets from illegal vertical mergers that have far-reaching and damaging effects on future innovations.").

[58] Complaint ¶ 25, *supra* note 56.

Nvidia has consistently defended the transaction, arguing that it would benefit the industry and promote competition and vowing to preserve Arm's open-licensing model, invest in research and development activities, and expand Arm's offerings, which would create more opportunities for customers who use Arm's products. Nvidia reportedly had offered the UK a series of conduct remedies, including to spin-off Arm's licensing business as a separate entity, and committing to equal access and open licensing of Arm's intellectual property as well as protection of confidential information.

The administrative trial was scheduled to begin on August 9, 2022. The EC "stopped the clock" on its review on November 25, 2021, extending the EC's April 12, 2022 deadline for a decision. The UK's deadline for a decision is May 2, 2022. The review in China was also likely to take several more months. On February 14, 2022, though, Nvidia terminated its proposed acquisition because of the regulatory challenges preventing its consumamtion. In accordance with their agreement, Arm's parent, Softbank Group Corp., will retain the $1.25 billion prepaid by Nvidia as a termination fee.

2. Consent Decrees

The FTC entered into six consents involving proposed transactions in 2021: (1) Casey's General Stores, Inc./Buck's Intermediate Holdings, LLC (retail fuel outlets/convenience stores);[59] (2) 7-Eleven, Inc./Marathon Petroleum Corp.'s Speedway (retail fuel and convenience stores);[60] (3)

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[59] Press Release, Fed. Trade Comm'n, *FTC Requires Divestitures as Condition of Casey's General Stores, Inc.'s Acquisition of Buck's Intermediate Holdings, LLC* (Apr. 28, 2021), https://www.ftc.gov/news-events/press-releases/2021/04/ftc-requires-divestitures-condition-caseys-general-stores-incs. The FTC conditioned clearance of the merger on the divestiture of six retail fuel outlets to Western Oil II, LLC within 10 days after Casey's completes the acquisition. The complaint alleges that the acquisition would otherwise have harmed competition in the retail sale of gasoline in seven local markets in Nebraska and Iowa, and that, in four of those local markets, the retail sale of diesel fuel would also be harmed, because the acquisition would have reduced the number of competitors to three or fewer in those markets.

[60] Press Release, Fed. Trade Comm'n, *FTC Orders the Divestiture of Hundreds of Retail Stores Following 7-Eleven, Inc.'s Anticompetitive $21 Billion Acquisition of the Speedway Retail Fuel Chain* (June 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/06/ftc-orders-divestiture-hundreds-retail-stores-following-7-eleven. On June 25, 2021, the FTC entered into an order requiring the divestiture of 12 retail outlets to Anabi Oil, 106 retail outlets to CrossAmerica Partners and 63 retail fuel outlets to Jacksons Food Services. In addition, the order: (1) prohibits 7-Eleven from enforcing any non-compete provisions of any franchisees or employees working and/or doing business with the divested assets; (2) requires 7-Eleven and Marathon to obtain prior Commission approval for five years before purchasing any of the divested assets; and (3) requires that, for 10 years, the companies must provide prior notice of future acquisitions within the 293 local markets at issue and an additional three markets. On May 14, 2021, 7-Eleven closed on its purchase of approximately 3,900 Speedway retail gasoline and convenience stores; the transaction parties had entered into a timing agreement that allowed the deal to close on that day and had negotiated a settlement agreement with Staff at the end of April 2021 that involved the divestiture of 293 fuel outlets. Less than three days before the scheduled closing, Commissioners Slaughter and Chopra requested more time to review the settlement, with the only concern raised being the amount of time specified for the divestitures to occur, which 7-Eleven offered to change. Commissioners Slaughter and Chopra issued a statement that objected to the closing. Fed. Trade Comm'n, Statement of Acting Chairwoman Rebecca Kelly Slaughter and Commissioner Rohit Chopra, *In the Matter of Seven & i Holdings Co., Ltd./Marathon Petroleum Corp.*, FTC File No. 201-0108 (May 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590059/201_0108_statement_by_ac_slaughter_and_c_chopra_on_seven_marathon_closing.pdf. On May 19, 2021, 7-Eleven announced that it had executed agreements to sell the 293 locations to three separate buyers. Press Release, 7-Eleven, *7-Eleven, Inc. Announces Agreements to Sell 293 Speedway and 7-Eleven Stores* (May 19, 2021), https://corp.7-eleven.com/corp-press-releases/05-19-2021-7-eleven-inc-announces-agreements-to-sell-293-speedway-and-7-eleven-stores.

DaVita, Inc./University of Utah Health (dialysis clinics);[61] (4) The Golub Corp./Tops Market Corp. (supermarkets);[62] (5) ANI Pharmaceuticals, Inc./Novitium Pharma LLC (generic sulfamethoxazole-trimethoprim oral suspension ("SMX-TMP") and generic dexamethasone);[63] and (6) Global Partners/Richard Wiehl/Wheels (retail gas stations).[64]

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[61] Press Release, Fed. Trade Comm'n, *FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics* (Oct. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following. The FTC alleged that there are only three providers of outpatient dialysis services in the Provo area and that the combination would tend to create a monopoly. Therefore, the FTC required DaVita to divest three Provo-area dialysis clinics to Sanderling Renal Services, Inc. (with transition services for up to a year) and prohibited DaVita from entering into or enforcing: (1) non-compete agreements with physicians employed by the University; (2) any agreement that restricts Sanderling from soliciting DaVita's employees for hire; and (3) soliciting patients who receive services from the divested clinics for two years. In addition, the order requires DaVita to obtain prior approval from the FTC before acquiring any new ownership interest in a dialysis clinic anywhere in Utah for a period of 10 years.

Commissioner Christine Wilson issued a concurring statement, providing the reasons for her support of the prior approval and non-compete agreements in this particular matter. Fed. Trade Comm'n, Concurring Statement of Commissioner Christine S. Wilson, *In the Matter of DaVita, Inc., and Total Renal Care, Inc.*, FTC File No. 211-0013 (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597906/concurring_statement_of_commissioner_christine_s_wilson_in_the_matter_of_davita_inc_and_total_renal.pdf. Here, DaVita has engaged in a pattern of acquiring independent dialysis facilities, many of which were HSR exempt, and consequently escaped premerger review, including this proposed acquisition. There is some evidence that this pattern has led to higher prices and lower service levels in the dialysis field. Similarly, the non-compete restriction in this matter is necessary to achieve an effective remedy due to the short supply of nephrologists and the inability of a facility owner to retain or replace a licensed nephrologist could serve as a barrier to entry, or, in this case, preclude the buyer from continuing to compete in the market. The no-poach provisions are similarly appropriate here given that DaVita and its former CEO were recently indicted for agreeing to naked "no-poach" agreements and by including the restriction that the Commission can pursue an order violation in the event that DaVita attempts to limit competition through anticompetitive "no-poach" agreements in the future.

[62] Press Release, Fed. Trade Comm'n, *FTC Requires Northeast Supermarkets Price Chopper and Tops Market Corp. to Sell 12 Stores as a Condition of Merger* (Nov. 9, 2021), https://www.ftc.gov/news-events/press-releases/2021/11/ftc-requires-northeast-supermarkets-price-chopper-to-sell-12-stores. The FTC conditioned the acquisition of Tops Market Corp. ("Tops") by The Golub Corp., which owns the Price Chopper chain of supermarkets, with the divestiture of 12 Tops stores operating in 11 local markets in upstate New York and Vermont, to C&S. The FTC complaint asserted that, without the divestitures, the merger would allow the newly merged company to increase prices to above-competitive levels, unilaterally or by coordinating with competitors. The proposed order required that the divestitures occur on a rolling basis, beginning by January 17, 2022, at a rate of two stores per week for six weeks. The order also requires prior approval of the FTC before: (1) Price Chopper may acquire any supermarkets in these 11 markets; and (2) C&S may sell any acquired stores for three years, extended for an additional seven years before it may sell an acquired store to a buyer that operates one or more supermarkets in the same county. The FTC recognized the collaboration of the New York AG in investigating this matter.

[63] Press Release, Fed. Trade Comm'n, *FTC Requires Generic Drug Marketers ANI Pharmaceuticals, Inc. and Novitium Pharma LLC to Divest Rights and Assets to Two Generic Products as Condition of Merger* (Nov. 10, 2021), https://www.ftc.gov/news-events/press-releases/2021/11/ftc-requires-generic-drug-marketers-ani-pharmaceuticals-inc. The FTC conditioned its approval of the transaction on the parties divesting to Prasco LLC: (1) ANI's development rights to generic SMX-TMP, which is an antibiotic used to treat a variety of infections, including ear infections, urinary tract infections, and bronchitis; and (2) generic dexamethasone tablets, an oral steroid used to treat inflammation associated with a variety of conditions, including certain types of arthritis, allergic reactions, skin diseases, and respiratory problems. ANI is a current supplier of SMX-TXP, and, according to the FTC, Novitium was one of a limited number of companies well positioned to enter the market. For dexamethasone, both ANI and Novitium have products in development and the acquisition would eliminate a potential entrant in an already concentrated market. The proposed order also contains a prior approval provision for future related acquisitions in these markets as well as certain products

3. Consummated Merger Challenges

a. FTC Continues with Challenge of Axon/VieVu Merger in Administrative Court

On January 3, 2020, the FTC issued an administrative complaint challenging Axon Enterprise, Inc.'s ("Axon") May 2019 acquisition of VieVu, LLC ("VieVu").[65] The FTC alleged that Axon and VieVu were each other's closest competitors in the market for body-worn cameras ("BWCs") sold to large, metropolitan police departments. Accordingly, the acquisition had eliminated direct and substantial competition between the two firms, further entrenching Axon's position as the dominant supplier of BWC systems to large, metropolitan police departments.

The FTC complaint alleged that, post-merger, Axon began to tout its pricing power and raised its prices.[66] In addition, the FTC alleged that Axon had limited the availability of VieVu BWC systems to customers and had stopped developing new generations of VieVu hardware and software. According to the FTC, new entry or repositioning by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects and the barriers to entry are high because of substantial upfront capital investment requirements, switching costs, and the need for large, metropolitan police department referrals.

The FTC indicated that, as part of the merger, Safariland, the parent of VieVu, had entered into several non-compete and customer non-solicitation agreements covering products and services not related to the merger and that Axon and Safariland had entered into company-wide non-solicitation agreements with a 10-or-more-year term. The parties also entered into a decade-long supply agreement whereby Safariland would develop and exclusively supply conducted electrical weapons ("CEW") holsters to Axon for its taser-branded CEW. The FTC deemed Axon to be the dominant supplier of CEWs. The FTC asserted that these restraints were not reasonably limited to protecting a legitimate business interest.

Hours before the Commission filed its complaint on January 3, 2020, Axon filed an injunctive and declaratory judgment action in the District of Arizona.[67] The action alleged that the administrative proceeding had violated Axon's Fifth Amendment due process and equal protection

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that have erythromycin and ethylsuccinate as the active ingredients. Although the parties do not currently compete in erythromycin and ethylsuccinate products, ANI sells such a product and Novitium owns an unexecuted option to acquire a similar product. Prasco is prohibited under the order from selling the acquired products for a period of 10 years after the order is issued, except to an acquirer that receives prior approval from the Commission.

[64] Press Release, Fed. Trade Comm'n, *FTC Order Protects Retail Fuel Customers Following Global Partners LP's Acquisition of Wheels* (Dec. 20, 2021), https://www.ftc.gov/news-events/press-releases/2021/12/ftc-order-protects-retail-fuel-customers-following-global. Global Markets ("Global") agreed to divest seven of the 27 Wheels-brand stations it sought to acquire from Richard Wiehl. The FTC was concerned about competition in the towns of Fairfield, Bethel, Milford, Wilton, and Shelton. With the exception of Wilton, the FTC's concerns were both for retail gasoline and diesel fuel. Global has agreed. For 10 years, Global must obtain prior approval from the Commission before acquiring retail fuel assets within a two-mile driving distance of any divested outlet. Divestiture buyer Petroleum Marketing Investment Group must obtain prior approval from the Commission for a period of three years before transferring any of the divested stations to any buyer, and for a period of seven years before transferring a divested station to any buyer with an interest in a retail fuel outlet within two miles' driving distance of that divested station.

[65] Press Release, Fed. Trade Comm'n, *FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments* (Jan. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn.

[66] Complaint ¶¶ 5–6, *In the Matter of Axon Enter., Inc.*, FTC Docket No. D9389 (Jan. 3, 2020), https://www.ftc.gov/system/files/documents/cases/d09389_administrative_part_iii_-_public_redacted.pdf.

[67] Complaint, *Axon Enter., Inc.* v. *FTC*, No. CV-20-00014 (D. Ariz. Jan. 3, 2020).

rights by subjecting Axon to unfair procedures before an administrative body rather than a trial before a neutral federal judge and that the Commission's structure was unconstitutional. In addition, the case sought a declaratory judgment that Axon's acquisition did not violate any antitrust laws. On January 9, 2020, Axon moved the district court to preliminarily enjoin the Commission's administrative proceeding.[68] On January 10, 2020, Axon filed a motion to stay the administrative action until entry of the final judgment in Axon's federal action. Axon and Safariland filed their answers in the administrative action on January 21, 2020 and January 22, 2020, respectively. On February 27, 2020, the ALJ denied Axon's motion to stay proceedings. On April 8, 2020, the district court dismissed Axon's complaint due to a lack of subject matter jurisdiction and denied Axon's injunctive motion as moot.[69] On April 13, 2020, Axon appealed the decision to the Ninth Circuit, which heard oral arguments on July 17, 2020. On January 28, 2021, the majority of the Panel of the Ninth Circuit concluded that, while the FTC Act itself does not expressly state that a party cannot sue in federal court to challenge the enforcement process, Congress implicitly precluded district court jurisdiction. The majority also found that Axon had "no right to avoid the administrative proceeding itself."[70]

On April 15, 2021, the full Ninth Circuit denied Axon's request to have the Panel's decision reconsidered. Later that same day, Axon requested the Ninth Circuit to stay the FTC's administrative proceeding while it appealed to the U.S. Supreme Court the constitutionality of the FTC's proceeding.[71] On July 20, 2021, Axon petitioned the U.S. Supreme Court, arguing that it makes little sense to subject a company to the constitutional harm it is trying to avoid before hearing its claims. On December 20, 2021, Axon filed a supplemental brief in support of its petition stating that the Fifth Circuit's decision, issued December 13, 2021, in *Cochran* v. *SEC*[72] has created a clear circuit split. While the *Cochran* ruling involves the SEC Act, Axon maintains that, for "purposes of determining whether Congress impliedly stripped district courts of jurisdiction over structural constitutional challenges," there is no distinction between the SEC Act and the FTC Act.[73] On January 25, 2022, the U.S. Supreme Court granted *certiorari*, setting the stage for its consideration of Axon's argument.[74]

After the complaint was issued, Safariland and Axon rescinded the non-compete and non-solicitation provisions that the FTC complaint alleged were anticompetitive. On April 17, 2020, Safariland agreed to settle the FTC's allegations by entering into a consent that ensured that Safariland would not enter into new agreements with similar anticompetitive provisions with Axon. Axon also indicated that it was willing to divest the acquired business entity, but the FTC demanded that it also agree to grant licenses for its own intellectual property to any buyer of the business, effectively creating a "clone" of Axon.

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[68] Plaintiff's Motion for Preliminary Injunction, *Axon Enter., Inc.* v. *FTC*, No. CV-20-00014 (D. Ariz. Jan. 9, 2020).

[69] *Axon Enter. Inc.* v. *FTC*, 452 F. Supp. 3d 882 (D. Ariz. 2020).

[70] *Axon Enter. Inc.* v. *FTC*, 986 F.3d 1173, 1182 (9th Cir. 2020).

[71] Motion to Stay Mandate Pending Filing of Petition for Writ of Certiorari, *Axon Enter. Inc.* v. *FTC*, No. 20-15662 (9th Cir. Apr. 15, 2021).

[72] *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021).

[73] Supplemental Brief for Petitioner 3, *Axon Enter. Inc. v. FTC*, No. 21-86 (Dec. 20, 2021).

[74] *Axon Enter. Inc. v. FTC*, No. 21-86, *cert. granted*, 2022 U.S. LEXIS 599 (Mem.) (Jan. 24, 2022). *See also* Matthew Perlman, *High Court Takes Up Axon's FTC Challenge*, LAW360 (Jan. 24, 2022, 10:54 AM), https://www.law360.com/competition/articles/1457921/high-court-takes-up-axon-s-ftc-challenge.

The evidentiary hearing in the administrative proceeding was scheduled to begin on May 19, 2020, but the ALJ extended commencement until October 13, 2020, due to the Covid-19 pandemic. On October 2, 2020, the Ninth Circuit granted a request from Axon to pause the administrative trial proceedings while Axon challenged the Commission's merger review process. The Panel indicated that it had granted a temporary stay of the order to preserve the *status quo* pending consideration of the appeal on the merits.[75]

b. FTC Continues with Challenge of Altria's Investment in JUUL After Judge Rules for Parties

On April 1, 2020, the FTC announced that it had filed an administrative complaint alleging that Altria Group, Inc. ("Altria") and JUUL Labs Inc. ("JUUL") had entered into agreements violating Section 1 of the Sherman Act, Section 5 of the FTC Act, and Section 7 of the Clayton Act.[76] The FTC alleged that: (1) Altria and JUUL were competitors in the market for closed-system e-cigarettes between 2013 and 2017; (2) Altria's Mark Ten e-cigarettes had achieved second place in the market by mid-2017; (3) JUUL had entered the retail market in 2015 and had increased its market share rapidly after mid-2017 to 70% in October 2018; (4) instead of competing aggressively against JUUL, Altria entered into deal negotiations, with Altria's exit from the market being demanded by JUUL; and (5) Altria ceased competing in the e-cigarette market.

On December 20, 2018, the companies had announced a purchase agreement pursuant to which Altria acquired a 35% nonvoting stake, convertible into voting stock upon receipt of HSR clearance. In addition, upon HSR clearance, Altria had the right to appoint three of nine members of JUUL's board of directors. The parties had certain other agreements, which the FTC noted contained a non-compete provision that ended Altria's development of a newly improved portfolio of products. The FTC contended that the transaction eliminated a threat to JUUL's market dominance and assured JUUL's dominance through the extensive resources that Altria would bring to it, including distribution capabilities and offering its premier shelf space at retailers.

The parties argued that the non-compete at issue was ancillary to a legitimate business purpose. Furthermore, Altria's e-cigarette business had been struggling: the investment in JUUL provided it a more solid foothold in the e-cigarette category.[77]

The evidentiary hearing was originally scheduled to begin on January 5, 2021; due to the Covid-19 pandemic, however, the ALJ stayed the proceeding until July 6, 2020. The administrative trial began on June 2, 2021.[78] Over 13 days, the FTC and the respondents presented opposing

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[75] Order, *Axon Enter. Inc.* v. *FTC*, No. 20-15662 (9th Cir. Oct. 2, 2020), https://www.law360.com/articles/1316925/attachments/0.

[76] Press Release, Fed. Trade Comm'n, *FTC Sues to Unwind Altria's $12.8 Billion Investment in Competitor JUUL* (Apr. 1, 2020), https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitor-juul. Democratic Commissioner Chopra issued a concurring statement, joined by Democratic Commissioner Slaughter.

[77] Answer and Defenses of Respondent Altria Grp. Inc., *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (July 27, 2020), https://www.ftc.gov/system/files/documents/cases/d09393_r_altria_answer_and_defenses_public599010.pdf; Answer and Defenses of Respondent JUUL Labs, Inc., *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (July 27, 2020), https://www.ftc.gov/system/files/documents/cases/d09393_r_jli_answer_and_defenses_public599011.pdf.

[78] Third Order Regarding Scheduling in Light of Public Health Emergency, *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (June 3, 2020), https://www.ftc.gov/system/files/documents/cases/d09393_commission_third_order_regarding_scheduling_in_light_of_public_health_emergency.pdf.

views of the history of the deal negotiations, the role of the regulatory scheme, and the state of competition in the relevant market following the transaction.

The FTC's briefing and trial presentation focused on the parties' negotiations and the term sheets memorializing discussions among the parties' principals. The FTC, dismissing Altria's explanations for its removal of its products from the market as pretext, ultimately argued that the parties violated Section 1 of the Sherman Act under a rule of reason analysis by agreeing that Altria would exit the U.S. e-cigarette market as a condition of the transaction, and, separately, by entering into a written non-compete.[79] By attributing Altria's exit to the transaction, the FTC treated the partial acquisition as a full acquisition that had the effect of totally eliminating an actual competitor from the market, in violation of Section 7 of the Clayton Act. The FTC also argued that even if Altria independently decided to discontinue the sale of its e-cigarette products, the transaction violated Section 7 of the Clayton Act under an actual potential competition theory of harm.

At trial and in their briefing, the respondents detailed Altria's history of failed innovations in the e-cigarette space and the increasing regulatory scrutiny of e-vapor products, culminating in the FDA's letter to e-cigarette manufacturers calling for action to address youth usage of e-cigarettes. Rejecting the FTC's claims of pretext, the respondents argued that the evidence confirms that Altria removed its products for independent business reasons, and that the FTC failed to meet its burden under Section 1 of the Sherman Act of proving the existence of an illegal agreement, which, in turn, undermines the premise of the FTC's Clayton Act Section 7 actual competition claim.[80] As to the FTC's potential competition theory, the respondents argued that the FTC failed to demonstrate that Altria was an actual potential competitor due to, among other factors, the demanding regulatory approval process for e-vapor products.

On December 17, 2021, ALJ Chappell extended the decision time period by 30 days under Commission rules, indicating that he will file a sealed version of his decision on the case by January 21, 2022, and citing an "extraordinarily high" volume of material presented at trial. The record reportedly includes 2,480 exhibits and 3,410 pages of trial transcripts from 37 witnesses.[81] The companies exchanged lengthy post-trial briefs and proposed findings of fact and conclusions of law totalling over 4,000 pages, with the last filing submitted on October 20, 2021. On January 11, 2022, ALJ Chappell requested the Commission for an additional extension of the decision time period to February 17, 2022, citing "good cause" given the extensive record; the Commission granted his request on January 19, 2022.[82]

On February 24, 2022, ALJ Chappell dismissed the complaint, finding for the transaction parties on all counts. On March 2, 2022, the FTC staff responded by filing its notice to appeal the decision to the full Commission.

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[79] Complaint Counsel's Post-Trial Brief, FTC Docket No. 9393 (Aug. 23, 2021), https://www.ftc.gov/system/files/documents/cases/d09393_-_complaint_counsel_s_post-trial_brief.pdf.

[80] Post-Trial Brief of Respondents Altria Group, Inc. and JUUL Labs, Inc., *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (Aug. 24, 2021), https://www.ftc.gov/system/files/documents/cases/d09393_-_post-trial_brief_of_respondents_altria_group_inc._and_juul_labs_inc.pdf.

[81] Order Extending Time for Filing Initial Decision Pursuant to Commission Rule 3.51, *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (Dec. 17, 2021), https://www.ftc.gov/system/files/documents/cases/d09393_alj_order_extending_time_for_filing_initial_decision_pursuant_to_commission_rule_3_51public603476.pdf.

[82] Order Granting Extension of Time, *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (Jan. 19, 2022), https://www.ftc.gov/system/files/documents/cases/d09393commissionorderextension.pdf.

4. Abandoned Transactions

In 2021, the transactions abandoned for antitrust reasons prior to the FTC's commencement of litigation included the four transactions discussed in this section.

a. Tronox Holding plc/TiZir Titanium and Iron

On January 29, 2021, Tronox Holding plc ("Tronox") announced that it had abandoned its proposed acquisition of TiZir Titanium and Iron ("TiZir").[83] FTC Staff had recommended that the Commission block the transaction on a vertical theory of harm. Tronox is one of the largest producers of titanium dioxide pigment and, according to the FTC Staff, TiZir is one of the few global producers of chloride slag, a key input used to make the widely used titanium dioxide pigment.

b. Atrium Health Navicent, Inc./Houston Healthcare System, Inc.

On February 26, 2021, Atrium Health Navicent, Inc. ("Atrium")[84] and Houston Healthcare System, Inc. ("Houston") announced that they had abandoned their proposed merger.[85] FTC Staff of the Northeast regional office determined that the proposed merger would eliminate intense competition between two of the largest hospital systems in the Macon-Warner-Robins area of central Georgia and recommended that the Commission challenge the merger. Staff's concerns included the elimination of competition to improve quality of patient care, investment in facilities and technologies, and foreclosure of access to healthcare services.[86]

c. Berkshire Hathaway/Dominion Energy, Inc.

On July 12, 2021, Berkshire Hathaway ("Berkshire") and Dominion Energy, Inc. ("Dominion") announced the termination of Berkshire's proposed acquisition of Dominion's Questar Pipeline due to the "ongoing uncertainty" of obtaining FTC clearance in the transaction.[87] The FTC reported having collected extensive testimonial, documentary and economic evidence that demonstrated that the acquisition would have eliminated the close competition between Berkshire's Kern River Pipeline and the Questar Pipeline that has benefitted customers who sought large transportation contracts on direct connections between the facilities and the interest to

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[83] Press Release, Fed. Trade Comm'n, *Following Federal Trade Commission Staff Recommendation to Challenge Transaction, Tronox Holding plc. Abandons Proposed Acquisition of TiZir Titanium and Iron* (Jan. 29, 2021), https://www.ftc.gov/news-events/press-releases/2021/01/following-federal-trade-commission-staff-recommendation-challenge.

[84] Press Release, Fed. Trade Comm'n, *Following Federal Trade Commission Staff Recommendation to Challenge Transaction, Tronox Holding plc. Abandons Proposed Acquisition of TiZir Titanium and Iron* (Jan. 29, 2021), https://www.ftc.gov/news-events/press-releases/2021/01/following-federal-trade-commission-staff-recommendation-challenge.

[85] Andy Miller, *Atrium, Houston Call Off Hospital Deal, Citing Pandemic Pressures*, GEORGIA PUB. BROADCASTING (Feb. 26, 2021, 1:25 PM), https://www.gpb.org/news/2021/02/26/atrium-houston-call-off-hospital-deal-citing-pandemic-pressures.

[86] Press Release, Fed. Trade Comm'n, *Following Federal Trade Commission Staff Recommendation to Challenge Transaction, Two Health Care Systems in Central Georgia Abandon Proposed Merger*, https://www.ftc.gov/news-events/press-releases/2021/03/following-federal-trade-commission-staff-recommendation-challenge.

[87] Press Release, Dominion Energy, *Dominion Energy and Berkshire Hathaway Energy Agree to Terminate Sale of Questar Pipelines; Dominion Energy Commencing Competitive Sale Process* (July 12, 2021), https://news.dominionenergy.com/2021-07-12-Dominion-Energy-and-Berkshire-Hathaway-Energy-Agree-to-Terminate-Sale-of-Questar-Pipelines-Dominion-Energy-Commencing-Competitive-Sale-Process.

prepare the Kern River and Questar Pipelines as the only pipelines serving central Utah with natural gas brought in from the Rocky Mountains' production basins. BC Director Vedova reacted to the announcement by expressing disappointment that the FTC had to expand these resources to review this transaction when the FTC had contested Questar Pipeline's attempt to buy a 50% share of the Kern River Pipeline in 1995 and stating that an even closer competition had developed since then.[88]

d. Great Outdoors Group, LLC/Sportsman's Warehouse Holdings, Inc.

On December 3, 2021, Great Outdoors Group, LLC ("Great Outdoors") and Sportsman's Warehouse Holdings, Inc. ("Sportsman's") announced that they had abandoned their proposed acquisition, having concluded that the parties would not obtain FTC clearance to consummate the merger. The parties had originally expected to close the transaction in the second half of 2021 and their announcement followed an 11-month investigation by FTC Staff. The FTC Staff asserted that Great Outdoors, under its Bass Pro Shops and Cabela's names,[89] competed closely with rival specialty outdoor goods retailer Sportsman's "to offer customers a broad and deep in-store assortment of outdoor gear, alongside expert sales staff, creating a one-stop shopping experience for outdoor enthusiasts. This competition has benefitted customers in at least two dozen local markets throughout the United States."[90] The FTC also indicated that it had worked with the Tennessee, Pennsylvania, Alaska, Colorado, Iowa, and California AGs. Great Outdoors will pay a $55 million termination fee on its abandoned $785 million transaction.

III. U.S. Department of Justice Enforcement

The DOJ began 2021 with two active litigation matters, both of which (*Geisinger Health/Evangelical* with a settlement and *Visa/Plaid*[91] when the parties abandoned the deal) ended before trial. During 2021, the DOJ brought four district court merger challenges—three of which remain pending. The *Aon/Willis Towers Watson* transaction was abandoned after the case was brought. In that transaction, the parties had obtained approval in a number of jurisdictions, including the EC, after agreeing to undertake sizeable divestitures to identified upfront buyers. Due to the range of proffered divestitures, the judge narrowed the case to two markets and provided a time period for additional settlement offers to be made, but the parties abandoned the transaction instead.

Notably, the pending cases involve an alliance (*American Airlines/JetBlue*, which the DOJ argues is tantamount to a merger), a vertical case (*U.S. Sugar/Imperial Sugar*), and a monopsony

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[88] Press Release, Fed. Trade Comm'n, *Statement Regarding Berkshire Hathaway Energy's Termination of Acquisition of Dominion Energy, Inc.'s Questar Pipeline in Central Utah* (July 13, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-regarding-berkshire-hathaway-energys-termination.

[89] The 2017 acquisition of Cabela's was scrutinized by the FTC under a second request, but ultimately was allowed to close. *See* Closing Letter to Counsel for Cabela's Inc., *Proposed Merger of Bass Pro Group, L.L.C. and Cabela's Inc.*, FTC File No. 171-0004 (July 3, 2017), https://www.ftc.gov/system/files/documents/closing_letters/nid/1710004cabelaclosingletter.pdf.

[90] Press Release, Fed. Trade Comm'n, *Expected Federal Trade Commission Opposition to Transaction Leads Great Outdoors Group, LLC and Rival Sportsman's Warehouse Holdings, Inc. to Abandon Plans for Proposed Merger* (Dec. 3, 2021), https://www.ftc.gov/news-events/press-releases/2021/12/expected-federal-trade-commission-opposition-transaction-leads.

[91] According to the complaint, the *Visa/Plaid* case involved a monopolist in online debit services acquiring a uniquely situated nascent competitor developing a payments platform that would challenge that monopoly. The DOJ challenged the proposed acquisition on both Clayton Act Section 7 and Sherman Act Section 2 grounds. *See* Press Release, *infra* note 95.

case involving top-selling authors (*Penguin/Simon & Schuster*). In all four of the cases brought in 2021, the DOJ focused on the existence of a small category of top "X" firms, with a competitive moat around them, and the elimination of a rival maverick through the transaction.

During 2021, the DOJ also entered into consents to resolve concerns in 11 proposed mergers. Most of the consents provided for the sale of the assets/business to an identified upfront buyer. Three of the consents (*Huntington/TCF Financial*, *Bancorp/Cadence*, and *S&P/IHS*) included as relief the agreement not to enter into or enforce certain non-competes. Another of the consents, *Lactalis/Kraft Heinz*, required the divestiture of the entire worldwide cheese product portfolio of the two impacted brands, even though the concerns raised were limited to feta and ricotta cheese. As has been included in some recent prior consents, the bank-related consents include a provision under which the companies agree that, for any traditional branches located in the specified market that are closed within three years of the merger's closing, the companies will sell or lease that branch to an insured depository institution that offers deposit and credit services to small businesses.

1. Court Challenges

a. Geisinger Health/Evangelical Community Hospital Settle Case

On August 5, 2020, the DOJ filed a lawsuit in the U.S. District Court for the Middle District of Pennsylvania to block Geisinger Health's ("Geisinger") partial acquisition of Evangelical Community Hospital ("Evangelical").[92] Geisinger is a large hospital system in central and northeastern Pennsylvania. Evangelical is an independent community hospital in Lewisburg, Pennsylvania, which the DOJ asserted is a close competitor of Geisinger for GAC services in a six-county area in central Pennsylvania. The two hospitals together account for approximately 71% of GAC revenues in this region.

The complaint alleged that Geisinger had initially sought to acquire 100% of Evangelical but realized that such an acquisition would violate antitrust laws.[93] Instead, the parties entered into a partial (30% ownership interest) acquisition agreement to avoid antitrust scrutiny. The DOJ asserted, however, that the terms of the acquisition agreement would create significant entanglements between Geisinger and Evangelical. In addition, the agreement allegedly would restrain trade through a variety of provisions, including agreements not to compete and market allocation. In addition, the DOJ asserted that the arrangement would violate Section 8 of the Clayton Act due to interlocking directorates.

The DOJ announced a settlement with Geisinger and Evangelical to resolve the DOJ's concerns.[94] The settlement requires Geisinger to cap its ownership interest in Evangelical at a 7.5% passive interest in order to prevent Geisinger from exercising any form of control or influence over Evangelical and to replace the parties' incentives to compete with each other on

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[92] Press Release, U.S. Dep't of Justice, *Justice Department Sues To Block Geisinger Health's Transaction With Evangelical Community Hospital* (Aug. 5, 2020), https://www.justice.gov/opa/pr/justice-department-sues-block-geisinger-health-s-transaction-evangelical-community-hospital.

[93] Complaint, *United States* v. *Geisinger Health*, No. 4:20-cv-01383 (M.D. Pa. Aug. 5, 2020), https://www.justice.gov/opa/press-release/file/1301656/download.

[94] Press Release, U.S. Dep't of Justice, *Justice Department Resolves Antitrust Case Against Leading Central Pennsylvania Health Care Providers* (Mar. 3, 2021), https://www.justice.gov/opa/pr/justice-department-resolves-antitrust-case-against-leading-central-pennsylvania-health-care.

both quality and price. At the same time, the settlement permits Evangelical to obtain new electronic health records information technology systems and related IT support from Geisinger and requires Evangelical to use the funds it receives from Geisinger for specific projects that benefit patients and the community.

b. Visa Abandons Its Plaid Acquisition After DOJ Challenges Deal

On November 5, 2020, the DOJ brought suit in the Northern District of California seeking to block Visa Inc.'s proposed acquisition of Plaid Inc.[95] The DOJ alleged that "Visa is a monopolist in online debit services, charging consumers and merchants billions of dollars in fees each year to process online payments," and that "Plaid, a successful fintech firm, is developing a payments platform that would challenge Visa's monopoly."[96] Thus, the DOJ challenged the proposed acquisition on both Section 7 of the Clayton Act and Section 2 of the Sherman Act grounds.

Visa purportedly accounted for 70% of online debit transactions. According to the complaint, Plaid powered some of the most innovative fintech apps. Plaid's technology allows developers to plug into consumers' various financial accounts, with consumer permission, to aggregate spending data, look up balances, and verify other personal financial data, and connects to 200 million consumer bank accounts and 11,000 U.S. banks. As a result, the DOJ asserted that because Plaid accesses data on behalf of so many fintech app customers, it has become the leading financial data aggregation company in the United States. In addition, Plaid allegedly plans to leverage its connections to build a bank-linked payments network that would compete with Visa. Plaid's money movement platform would allow consumers to pay merchants directly from their bank accounts using bank credentials rather than a debit card. Finally, Plaid's established connections and technology purportedly uniquely position it to enter the payments market and disrupt Visa's monopoly. Therefore, Plaid is a nascent competitive threat to Visa's online debit business.

Visa had argued that Plaid was not uniquely positioned to compete against Visa in this marketplace. Competition exists as well from other big tech and credit card giants. In addition, MasterCard, which had acquired Finicity, and American Express were potential rivals. Visa also pointed to other firms with payments experience, consumer brand awareness, and/or merchant relationships, such as PayPal, Apple, Google, Stripe, Square, Zelle and FIS. Google, Apple, Facebook and Amazon have each also expressed some interest in establishing payments businesses.

Trial was scheduled to begin on June 28, 2021. On January 12, 2021, Visa and Plaid announced that they had abandoned the transaction.[97]

In a September 14, 2021 speech, Associate Attorney General Vanita Gupta discussed the bringing of this case (by the Trump Administration) approvingly:

> Take digital markets. Many have raised concerns that "digital gatekeepers" maintain their

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[95] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Visa's Proposed Acquisition of Plaid* (Nov. 5, 2020), https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid. Interestingly, a week before filing its PI action to block the transaction, the DOJ filed in district court in Massachusetts an action to compel Bain & Company to provide documents specified in a Civil Investigative Demand ("CID") it had issued that the agency claimed it needed to complete its review of the acquisition.

[96] *Id.*

[97] Press Release, U.S. Dep't of Justice, *Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block* (Jan. 12, 2021), https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

position through a combination of anticompetitive mergers and outright anticompetitive conduct. We take these concerns seriously, and the department has made it a priority to understand and, where appropriate, address them.

Acquisitions involving potential or nascent competitors are one category of particularly concerning transactions because they undermine competition that can disrupt monopolies. . . . [A]cquiring firms before they can become a competitor—sometimes called a "killer acquisition"—is a classic tool for monopolists. The department's case against Visa's proposed acquisition of Plaid is a prime example. Our investigation revealed that Visa was trying to buy up a rival before it could disrupt the industry and so we sued to block the merger. In response, the parties abandoned their transaction. Plaid now remains an independent company.

The department will not shy away from similar challenges in the future. Killer acquisitions can sideline or silence ideas that might eliminate the barriers keeping too many Americans out of banking, housing and health care markets. We will therefore closely scrutinize acquisitions involving dominant firms and would-be rivals. In doing so, we should be careful not to discourage investment in new startups. But we should also remember that startups cannot thrive without a competitive economy.[98]

c. *Aon Abandons Willis Towers Watson Transaction After Deal Is Challenged*

On June 16, 2021, the DOJ filed an action in the U.S. District Court in the District of Columbia to enjoin Aon plc's ("Aon") proposed $30 billion acquisition of rival insurance broker Willis Towers Watson plc ("WTW").[99] The DOJ alleged that the transaction would substantially lessen competition in five product markets in the United States: (1) property, casualty, and financial risk broking for large customers; (2) health benefits broking for large customers; (3) actuarial services for large single-employee defined benefit pension plans; (4) the operation of private multicarrier retiree exchanges; and (5) reinsurance broking.

Combined market shares in all five markets were between 40% and 95%. The combination would have purportedly combined the second and third largest of the "Big Three" global insurance brokers, with Marsh McLennan being the remaining rival. The complaint contained quotes from internal company documents suggesting that the merger would eliminate competition by remaking the "Big Three" into the "Big Two." The complaint further alleged that the merger would have eliminated substantial head-to-head competition.

The parties had announced their transaction on March 9, 2020. The outside date for closing specified in the contract was September 9, 2021 (*i.e.*, 18 months from signing). Although the transaction parties sought—over the objections of the DOJ—a speedy trial to begin in September 2021 (*i.e.*, within the contractual time period), Judge Reggie Walton set the trial date for November 18, 2021, and further indicated that he could not even guarantee that this date would remain firm.[100]

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[98] Associate Attorney General Vanita Gupta Delivers Remarks at Georgetown Law's 15th Annual Global Antitrust Enforcement Symposium (Sept. 14, 2021), https://www.justice.gov/opa/speech/associate-attorney-general-vanita-gupta-delivers-remarks-georgetown-law-s-15th-annual.

[99] *See* Complaint, United States v. Aon plc, C.A. No. 1:21-cv-01633 (D.D.C. June 16, 2021), https://www.justice.gov/opa/press-release/file/1404951/download. *See also*, Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Aon's Acquisition of Willis Towers Watson* (June 16, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-aon-s-acquisition-willis-towers-watson.

[100] Brent Kendall, *Aon Dealt a Blow in Bid for Quick Trial on U.S. Challenge to Willis Towers Merger*, WALL ST.

The parties had initially offered divestitures of WTW businesses to Arthur J. Gallagher ("Gallagher") for conditional approvals in a number of jurisdictions, including the EC, Turkey, and South Africa. Aon subsequently announced the divestiture of Willis Re and other WTW corporate risk and brokering and health and benefits services to Gallagher on May 12, 2021.[101] Aon announced that it had further agreed to sell to Aquiline Capital Partners, a private investment firm, as well as its Retiree Health Exchange business, to Alight on June 3, 2021.[102] In total, Aon agreed to divest $3 billion of assets.

The DOJ found the proffered divestitures to be inadequate in two markets—(1) property, casualty, and financial risk broking for large customers, and (2) health benefits broking for large customers—due to the limited geographical footprint (two offices versus over 180 offices the transaction parties had in the aggregate) included in the divestiture package—and involved ongoing entanglements. Large customers allegedly need more and a greater breadth of services. For instance, large customers rely more heavily on data and analytics to understand better the total costs of their risks; large customers want consistent global services; and large customers are sensitive to the firm's reputation and trade record. The DOJ asserted that while *some* customers *could* turn to other alternatives, that does not mean that a significant number of customers *would* do so.

Aon countered that the government did not understand the industry. There are numerous other broking firms that compete for "large" customers. The market for broking relies on relationships, not manufacturing plants or office buildings. The services provided to the large companies, according to Aon, are not as uniquely different and necessary as those provided by similar companies.[103]

On July 20, 2021, Judge Walton narrowed the facts of the case to the two remaining markets, but kept the November trial date, and further set a deadline of August 9, 2021 for the parties to reach a partial consent decree.[104] On July 26, 2021, Aon and WTW announced the termination of their proposed acquisition due to the pending litigation, triggering the payment of a $1 billion break-fee by Aon.[105]

J. (July 6, 2021), https://www.wsj.com/articles/aon-dealt-a-blow-in-bid-for-quick-trial-on-u-s-challenge-to-willis-towers-merger-11625607068.

[101] Press Release, Aon plc, *Aon and Willis Towers Watson (WTW) Take Important Step Toward the Close of Proposed Combination with Agreement to Sell Set of WTW Assets to Gallagher* (May 12, 2021), https://ir.aon.com/about-aon/investor-relations/investor-news/news-release-details/2021/Aon-and-Willis-Towers-Watson-WTW-Take-Important-Step-Toward-the-Close-of-Proposed-Combination-with-Agreement-to-Sell-Set-of-WTW-Assets-to-Gallagher/default.aspx.

[102] Press Release, Aon plc, *Aon Signs Agreements to Sell its U.S. Retirement Business to Aquiline and its Aon Retiree Health Exchange™ Business to Alight* (June 3, 2021), https://ir.aon.com/about-aon/investor-relations/investor-news/news-release-details/2021/Aon-Signs-Agreements-to-Sell-its-U.S.-Retirement-Business-to-Aquiline-and-its-Aon-Retiree-Health-Exchange-Business-to-Alight/default.aspx.

[103] Press Release, Aon plc, *Aon and Willis Towers Watson Issue Statement on U.S. Department of Justice Action* (June 16, 2021), https://aon.mediaroom.com/2021-06-16-Aon-and-Willis-Towers-Watson-Issue-Statement-on-U-S-Department-of-Justice-Action.

[104] Scheduling and Case Management Order, *United States* v. *Aon plc*, C.A. No. 1:21-cv-01633 (D.D.C. July 20, 2021), https://www.law360.com/articles/1405247/attachments/0.

[105] Press Release, Aon plc, *Aon and Willis Towers Watson Mutually Agree to Terminate Combination Agreement* (July 26, 2021), https://aon.mediaroom.com/2021-07-26-Aon-and-Willis-Towers-Watson-Mutually-Agree-to-Terminate-Combination-Agreement.

d. DOJ Challenges American Airlines/JetBlue Alliance

On September 21, 2021, the Antitrust Division and AGs in six states and the District of Columbia brought a civil action in the U.S. District Court for the District of Massachusetts, alleging that the "Northeast Alliance" entered into by American Airlines Group Inc. ("American") and JetBlue Airways Corporation ("JetBlue") on July 15, 2020 violates Section 1 of the Sherman Act.[106] The complaint alleged that in the alliance "the two rivals have quietly agreed to share their revenues and coordinate which routes to fly, when to fly them, who will fly them, and what size planes to use on flights to and from four major airports": Boston Logan, JFK, LaGuardia, and Newark.[107] The complaint further alleged that American and JetBlue "will effectively merge their operations" for these four airports, which comprise about two-thirds of JetBlue's business.[108] As a result, the alliance would eliminate significant competition between the two airlines, which has led to lower fares and higher quality services and will diminish JetBlue's incentives to compete with American in other markets across the country.[109]

The complaint asserted the following: Four large airlines—legacy carriers American, Delta, and United, as well as Southwest Airlines—have control over 80% of, and therefore dominate, domestic air travel. Because airlines are generally unable to merge formally across national borders, American has orchestrated *de facto* mergers through a series of alliances, which are intricate joint ventures involving extensive coordination and sharing of revenues. JetBlue has been "an important counterweight to the concentration of power" and its own estimate indicated that "it has saved consumers a total of more than $10 billion since the airline's founding, offering lower fares and better service and forcing competitors to do the same. . . . JetBlue's reputation for lowering fares is so well known in the airline industry that it has earned a name: the 'JetBlue Effect.' "[110] The complaint further asserted that American and JetBlue had been "poised to compete even more intensively"[111] before entering into the Northeast Alliance:

> "Recognizing the significant and growing threat posed by JetBlue, and not satisfied with the consolidation that has made it the largest airline in the world, American now seeks to co-opt JetBlue through an unprecedented domestic alliances. Knowing full well that an outright merger would invite a challenge under Section 7 of the Clayton Act, American instead seeks to align JetBlue's economic incentives with its own far-reaching partnership. . . . In so doing, American and JetBlue have violated Section 1 of the Sherman Act by effectively merging their operations in Boston and NYC and eliminating competition that has resulted in substantial benefits for consumers. JetBlue itself recognized the danger posed by this close dependence."[112]

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[106] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Unprecedented Domestic Alliance Between American Airlines and JetBlue* (Sept. 21, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-unprecedented-domestic-alliance-between-american-airlines-and. The six states are Arizona, California, Florida, Massachusetts, Pennsylvania, and Virginia.

[107] Complaint 2, *U.S.* v. *American Airlines Grp.*, C.A. No. 1:21-cv-11558 (D. Mass. Sept. 21, 2021), https://www.justice.gov/opa/press-release/file/1434621/download.

[108] *Id.* at ¶ 22.

[109] *Id.* at ¶ 5.

[110] *Id.* at ¶¶ 5, 6.

[111] *Id.* at ¶ 7.

[112] *Id.* at ¶ 9.

"If JetBlue complies with American's wishes, the Northeast Alliance gives American ways to reward JetBlue"[113] and if they don't, ways to punish JetBlue. The Mutual Growth Incentive Agreement commits the parties "to pool and apportion revenues earned on flights" for these four airports "such that each partner earns the same revenues regardless of whether a passenger flies on an American or a JetBlue plane."[114] "While American and JetBlue technically retain the ability to price independently, in reality neither airline will have the incentive to undercut the other on price because doing so would simply reduce the revenues each earns under the revenue-sharing arrangement."[115] In addition, the parties "can raise fares simply by one of them exiting a market where it competed against the other" or cutting the number of seats they fly in a market, and "then share in their now-ally's increased profits. . . . In any of these ways, American and JetBlue can increase fares without ever talking to each other about pricing."[116]

Moreover, according to Plaintiffs, the Northeast Alliance effectively operates like a merger in domestic markets that have either Boston or JFK/LaGuardia as an endpoint. In these markets, American and JetBlue will coordinate capacity and share revenue with one another. "Under a merger analysis, the Northeast Alliance would be presumptively anticompetitive in 11 domestic markets . . . where both parties provided competing nonstop service to and from Boston" and in 17 domestic markets where the parties "both provided competing nonstop service to and from JFK/LaGuardia."[117] The complaint alleges harm in 98 domestic markets where no airline provided nonstop service but JetBlue's connecting service through Boston or JFK/LaGuardia competed against American's connecting service through other hubs, and purportedly the revenue-sharing and capacity coordination provided in the Northeast Alliance will dampen incentives to compete. Finally, the complaint alleges harm to competition in transatlantic markets where JetBlue announced plans to launch services.[118]

The complaint preemptively asserted that Covid-19 does not excuse the combination, yet the huge drop in the volume of fliers has led to big losses to carriers. In the first half of 2021, American reported a $1.2 billion loss and JetBlue had a $183 million loss during the same time period (the last days of the Trump Administration). In addition, the parties' agreement with the U.S. Department of Transportation ("DOT") on January 10, 2021 does "not address the competitive harms likely to occur in the markets" with Boston endpoints; is "too small in scope to address the harms likely to occur in the markets" with NYC endpoints; "fails to remedy the harms in other markets where Defendants likely will reduce capacity and raise fares"; and fails "to prevent the diminution in JetBlue's independence and disruptiveness that is likely to result from the Northeast Alliance."[119]

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[113] *Id.* at ¶ 12.

[114] *Id.* at ¶ 19.

[115] *Id.* at ¶ 20.

[116] *Id.* at ¶ 20.

[117] *Id.* at ¶ 49.

[118] *Id.* at ¶¶ 63–67.

[119] *Id.* ¶ 79. Interestingly, Spirit Airlines filed an administrative complaint before the DOT on January 7, 2021, regarding the Northeast Alliance. On September 21, 2021, the DOT stayed the proceedings in the Spirit challenge and indicated that its agreement with American and JetBlue will remain in place during the pendency of the DOJ antitrust litigation. U.S. Dep't of Trans., Clarification of Departmental Position on American Airlines—JetBlue Airways Northeast Alliance Joint Venture, 86 Fed. Reg. 53401 (Sept. 27, 2021), https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20849.pdf.

The parties recently amended their agreements to carve out capacity coordination and revenue-sharing in six concentrated markets to and from Boston, where both parties provided competing nonstop service prior to the pandemic. The complaint states that these amendments leave open the prospect that the parties could add these routes back under certain circumstances and that the six markets remain covered by code-sharing.[120]

American and JetBlue both issued statements contending that the Northeast Alliance does not amount to a merger, that the Northeast Alliance promotes competition with other airlines, and that the Northeast Alliance had already resumed more routes and flights.[121] These include expanded low-fare offerings and making more long-haul international flights from New York viable for American. The defendants filed a motion to dismiss the lawsuit on November 22, 2021, and the case is scheduled to go to trial in September 2022.

e. DOJ Sues to Block Penguin Random House/Simon & Schuster Merger

On November 2, 2021, the DOJ brought a civil PI action in federal district court for the District of Columbia to stop Penguin Random House, LLC ("Penguin")—the world's largest book publisher—from buying Simon & Schuster, Inc. ("Simon").[122] The complaint alleges that the merger would give Penguin "outsized influence over who and what is published, and how much authors are paid for their work."[123] This lawsuit may signal a departure by the DOJ from the well-established focus of consumer harm (although the complaint does make a bare-bones assertion that the transaction could result in consumers having fewer new books to choose from) to a primary focus on harm to authors (a monopsony power concern). Thus, if the case proceeds to trial, it will mark the first litigated merger case in decades in which the DOJ has focused primarily on harm to sellers.[124]

The transaction involves the combination of Penguin, the number one, and Simon, the fourth largest, book publisher (both part of a so-called "Big Five"); throughout the complaint, however, the DOJ focuses to a great extent on examples of head-to-head competition between Penguin and Simon for top authors, where they are the final two bidders for book rights. Apparently, competition between these two firms has resulted in authors earning more for their publishing rights in the form of advances (*i.e.*, upfront payments made to authors for the rights to publish their works), and receiving better editorial, marketing, and other services that are critical to the success

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[120] *Id.* at ¶ 80.

[121] *See* Press Release, American Airlines, *American Airlines Statement on Lawsuit Filed by U.S. Department of Justice* (Sept. 21, 2021), https://news.aa.com/news/news-details/2021/American-Airlines-Statement-on-Lawsuit-Filed-by-US-Department-of-Justice/default.aspx; Press Release, JetBlue, *JetBlue CEO Robin Hayes Provides an Update on the Northeast Alliance and Action by the U.S. Department of Justice* (Sept. 21, 2021), http://mediaroom.jetblue.com/investor-relations/press-releases/2021/09-21-2021-212310385.

[122] Complaint, *United States* v. *Bertelsmann SE & Co. KGaA*, C.A. No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021), https://www.justice.gov/atr/case-document/file/1445931/download.

[123] *Id.* at 2.

[124] The DOJ has obtained enforcement actions in some monopsony-based matters, including in 2017 in *Danone/WhiteWave* (*see* Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture of Danone's Stonyfield Farms Business in Order for Danone to Proceed with WhiteWave Acquisition* (Apr. 3, 2017), https://www.justice.gov/opa/pr/justice-department-requires-divestiture-danone-s-stonyfield-farms-business-order-danone), in which the DOJ alleged that the transaction would have "blunted competition between the top two purchasers of raw organic milk" in the northeast United States.

of their books.[125] In most cases, the advance represents an author's total compensation.[126] If the merger were to be consummated, Penguin would control close to half of the market for the acquisition of publishing rights to anticipated top-selling books, with the next largest competitor being less than half its size, and the two largest publishers would collectively control more than two-thirds of this market.[127] The complaint alleges two relevant markets: (1) the acquisition of U.S. publishing rights to books from authors; and (2) the acquisition of U.S. publishing rights to anticipated top-selling books.

The complaint further alleged that smaller publishers lack the resources and capabilities of the Big Five publishers and thus they are limited in their ability to compete for the publishing rights to anticipated top-selling books. Smaller publishers typically have smaller "backlists" than the Big Five, which are a critical source of revenue that allow the Big Five to pay more and higher advances to authors.[128] Smaller publishers also lack scale in book sales and therefore lack the financial resources to: (1) regularly pay the advances required to secure publishing rights to anticipated top-selling books, and (2) absorb the financial losses from books that do not meet their sales expectations. Therefore, the complaint asserted, authors of anticipated top-selling books generally do not view smaller publishers as competitively significant options compared to the Big Five. Many smaller publishers lack distribution capabilities and depend upon Penguin and Simon for distribution services.[129] Moreover, the complaint claimed, the fact that smaller publishers may be an acceptable alternative for certain authors will not protect other authors who have benefitted from competition between Penguin and Simon, and who would continue to benefit in the future if the merger is enjoined.[130]

The complaint also alleged both unilateral and coordinated effects. According to the DOJ, a few large players dominate the industry and the terms of author contracts, other than advances, have become fairly standardized over time. With fewer players and an obvious leader, the remaining "Big Four" would likely find it easier to reach and sustain a consensus that harms authors through coordination.[131] The Big Five have a history of collusion.[132]

Penguin answered the complaint on December 13, 2021, arguing that its plan to buy a competitor, Simon, would be a boon for the industry, benefiting authors, booksellers, and readers. Penguin asserted that the DOJ "misunderstands" the way the publishing industry functions.[133] According to Penguin, the DOJ's assumptions regarding diminution of compensation to the highest-paid authors is "legally, economically and factually wrong, and it ignores the vast majority of authors who will indisputably benefit from the transaction."[134] Many writers outside of the highest-paid authors would stand to make more money by being brought into the Penguin supply

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[125] Complaint ¶ 2, *supra* note 122.

[126] *Id.* at ¶ 5.

[127] *Id.* at ¶ 7.

[128] *Id.* at ¶ 29.

[129] *Id.* at ¶ 55.

[130] *Id.* at ¶ 50.

[131] *Id.* at ¶ 52.

[132] *Id.* at ¶ 53.

[133] Answer ¶ 11, *United States v. Bertelsmann SE & Co. KGaA*, C.A. No. 1:21-cv-02886 (D.D.C. Dec. 13, 2021).

[134] *See* Elizabeth A. Harris & Alexandra Alter, *Penguin Random House Defends Effort to Buy Simon & Schuster*, N.Y. TIMES (Dec. 13, 2021), https://www.nytimes.com/2021/12/13/books/penguin-random-house-simon-schuster.html.

chain, widely considered to be the best in the business, which would then make their work more visible and available. There are more than just the Big Five publishers—with other major players include Disney, Amazon, and Scholastic, along with hundreds of small- and mid-size publishing houses. According to Penguin, on any given deal, at least one smaller publisher will compete, and some of the country's highest-selling authors, including J.K. Rowling (*Harry Potter*) and Jeff Kinney (*Diary of a Wimpy Kid*), are published by companies outside of the Big Five publishers. The focus on the small group of authors who command the highest advances is an "invented market," since publishers do not "divide the market for book rights into distinct categories based on the author's compensation."[135] The defendants argue that there is no objectively definable market for authors of anticipated top-selling books. Penguin's supply chain and distribution network also helps neighborhood bookstores compete with Amazon.

f. DOJ Sues to Block U.S. Sugar's Proposed Acquisition of Imperial Sugar

On November 23, 2021, the DOJ brought a civil action in federal district court in Delaware to enjoin United States Sugar Corporation ("U.S. Sugar") from acquiring Imperial Sugar Company ("Imperial").[136] U.S. Sugar operates a large sugar refinery in Florida and sells all of its refined sugar through United Sugars Corporation ("United Sugars"), a marketing cooperative owned by U.S. Sugar and three other refined sugar producers. Combined, United Sugars's member-owners operate nine sugar refineries located in Florida, Minnesota, North Dakota, Montana, and Wyoming. Although U.S. Sugar is acquiring Imperial, United Sugars has entered into an agreement with U.S. Sugar and the other member-owners pursuant to which United Sugars would market and sell all of the refined sugar produced by Imperial post-acquisition. Imperial operates a sugar refinery in Savannah, Georgia, and sells its refined sugar directly to customers. Imperial also has an intermediate sugar transfer and liquification facility in Ludlow, Kentucky.

American Sugar Refining, also known by its Domino brand name, is the other producer supplying a significant portion of refined sugar in the southeastern United States. The DOJ complaint posits that the merger will reduce the number of suppliers of refined sugar in the southeast from three to two suppliers because Imperial's production would be combined into the United Sugars cooperative. This would apparently leave "wholesale customers in this region at the mercy of a cozy duopoly"[137] (that combined comprise 75% of sugar sales in the southeastern United States) because transportation costs make up a significant portion of the total price that customers pay for refined sugar, and, therefore, the nearest sugar producers tend to be customers' best competitive options. In fact, the DOJ alleges that the transaction will "further strain beleaguered supply chains by forcing customers to turn to more distant or foreign suppliers for alternatives."[138] The complaint alleges as relevant markets the production and sale of refined sugar sold to wholesale customers located in: (1) the southeastern United States, and (2) Georgia (where Imperial's refinery resides) and its bordering states. In calculating concentration levels, the DOJ has aggregated all of the refined sugar that United Sugar sells in the relevant geographic area.

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[135] Answer ¶¶ 4, 6, *supra* note 133.

[136] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block U.S. Sugar's Proposed Acquisition of Imperial Sugar* (Nov. 23, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-us-sugar-s-proposed-acquisition-imperial-sugar.

[137] Complaint 1, *U.S.* v. *United States Sugars Corp.*, C.A. 1:21-cv-01644 (D. Del. Nov. 23, 2021), https://www.justice.gov/atr/case-document/file/1451211/download.

[138] *Id.* at ¶ 5.

Although the DOJ characterizes the market as being already concentrated, the HHIs for the market for the production and sale of refined sugar to customers located in the southeast is only going from 2,000 to 2,800. However, in the market for production and sale of refined sugar to customers located in Georgia and its bordering states, the proposed acquisition increases HHIs from over 2,000 to over 3,100. In addition, some customers have specific preferences or need for granulated refined sugar instead of liquid sugar; some customers have specific needs and preferences for bulk shipments and bagged sugar; and some customers have specific needs or preferences for cane sugar over beet sugar. All of these factors make Imperial and United Sugars particularly close competitors for many customers and, after the proposed transaction, United Sugars would likely be able to charge these customers more.

The complaint alleged that, given the market structure, there is an enhanced likelihood post-merger that United Sugars (*i.e.*, not the purchaser of the assets, but the cooperative that competes with Imperial) and Domino would coordinate with each other and refrain from competing aggressively. The transaction would more closely align the incentives of United Sugars and Domino. According to the complaint, today, Domino is a very large vertically integrated firm that imports some raw sugar, whereas United Sugars is somewhat smaller and imports nothing, and Imperial is the smallest of the three and has no domestic sugar growing business to defend against imports. After the acquisition, Imperial would be eliminated as an independent force, and United Sugars and Domino would both be very large firms with similar market shares and a similar level of vertical integration. Both would, therefore, benefit from a competitive détente. Moreover, the refined sugar market is vulnerable to such coordinated interaction because: (1) refined sugar is a relatively homogenous product and there are high barriers to entry; (2) refined sugar prices are relatively transparent and sugar producers regularly monitor their competitors' prices; (3) this transparency is sufficient for firms to discern whether their rivals are undercutting them on price and enables competitors to signal to each other; (4) producers can readily identify which competitors are serving particular customers; and (5) producers other than United Sugars and Domino would benefit from the increased prices and therefore would not have the incentive to frustrate increased coordinated interaction between United Sugars and Domino, nor do distributors have the ability to constrain prices charged by United Sugars and Domino.

The complaint also alleged that United Sugars and Imperial today compete head-to-head to supply refined sugar to customers across the southeast.[139] This competition has purportedly led to lower prices, better service reliability, and better product quality for wholesale customers in this region.

Finally, the DOJ rejected the existence of any countervailing factors. Entry and expansion by producers of refined sugar are unlikely to prevent or remedy the transaction's likely anticompetitive effects in the relevant markets. Neither would the USDA's sugar program safeguard against substantial harm be threatened by this deal; it is vigorous competition among sugar refiners—not federal regulation—that sets the prices and terms of sale for refined sugar and that ensures higher prices, high-quality products, and reliable service. There are no merger-specific efficiencies that outweigh the harm threatened by this deal.

The transaction parties argue that the combination will actually create production logistics, and supply chain synergies, and efficiencies that will benefit U.S. consumers. Among other things, Imperial sources its raw sugar primarily from Central and South America and the Caribbean, while

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[139] *See, e.g.*, Complaint ¶ 5.

the sugar refined by the United Sugars cooperative is domestic. This means that Imperial could help supplement the supply if domestic crops are limited by severe weather.

2. DOJ Consents

In 2021, the DOJ entered into consents resolving concerns in 11 proposed transactions: (1) Republic Services/Santek (small container commercial waste collection);[140] (2) Stone Canyon/Morton Salt (salt);[141] (3) Huntington Bancshares Incorporated/TCF Financial Corporation (traditional bank branches);[142] (4) Zen-Noh Grain Corp./Bunge Ltd. (grain elevators);[143] (5) Danfoss/Eaton Corp. (orbital motor/hydraulic steering);[144] (6) Gray Television Inc./Quincy Media

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[140] Press Release, U.S. Dep't of Justice, *Justice Department Requires Republic Services to Divest Assets to Proceed with Santek Acquisition* (Mar. 31, 2021), https://www.justice.gov/opa/pr/justice-department-requires-republic-services-divest-assets-proceed-santek-acquisition. The DOJ, along with the Alabama Attorney General, required Republic to divest waste collection and disposal assets in five states to resolve concerns that the proposed acquisition would substantially lessen competition for small container commercial waste collection and municipal solid waste disposal services in six local markets. The DOJ alleged both coordinated and unilateral effects. Both parties were vertically integrated and allegedly strong in collection and disposal, such that the merger would have increased incentive and ability to weaken Republic's collection competitors by raising disposal prices. Under the settlement terms, the parties must divest: (1) hauling and transfer stations, landfill locations, and waste collection routes in Alabama, Georgia, Tennessee and Mississippi to Kinderhook Industries LLC; and (2) waste collection routes and associated assets in Texas to Waste Connections Inc.

[141] Press Release, U.S. Dep't of Justice, *Stone Canyon Required to Divest US Salt to Acquire Morton Salt* (Apr. 19, 2021), https://www.justice.gov/opa/pr/stone-canyon-required-divest-us-salt-acquire-morton-salt. The DOJ conditioned its approval of Stone Canyon Industry Holdings LLC's ("Stone") acquisition of Morton Salt Inc. ("Morton") on its divestiture of Stone's U.S. Salt LLC subsidiary ("U.S. Salt") evaporated salt business within four months of the deal's closing. According to the complaint, Morton and U.S. Salt are two of only three producers that manufacture and distribute round-can table salt in the United States. Morton is the largest branded supplier of this pantry staple and the largest U.S. supplier of private-label. The two companies are the only firms producing pharmaceutical-grade salt in the United States and Canada. Pharmaceutical-grade salt is used for dialysis treatment, intravenous saline solution, and other medical products. In addition, Morton and U.S. Salt are allegedly two of the major suppliers that manufacture and distribute bulk evaporated salt in the northeastern United States.

[142] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Huntington Bancshares Incorporated's Acquisition of TCF Financial Corporation* (May 25, 2021), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-huntington-bancshares-incorporated-s-acquisition-t-0. The DOJ conditioned its approval on the sale of 13 branches in Michigan, including all of the deposits and loans associated with the diverted branches, as well as the physical assets. The DOJ's press release noted that the parties also "agreed to suspend existing, and not to enter into new, non-compete agreements with branch managers and loan officers" in the divestiture counties for a period of 180 days after consummation of the merger. In addition, the companies agreed that any traditional branches located in any overlap market in Michigan and Ohio that are closed within three years of the merger's closing will be sold or leased to an insured depository institution that offers deposit and credit services to small businesses.

[143] Press Release, U.S. Dep't of Justice, *Justice Department Requires Substantial Divestitures in Zen-Noh Acquisition of Grain Elevators from Bunge to Protect American Farmers* (June 1, 2021), https://www.justice.gov/opa/pr/justice-department-requires-substantial-divestitures-zen-noh-acquisition-grain-elevators. Zen-Noh agreed to divest nine grain elevators in Arkansas, Iowa, Illinois, Louisiana and Missouri to resolve concerns raised about the prices paid to farmers for corn and soybeans in those states. Zen-Noh operates an export elevator on the Mississippi River in Louisiana that receives grain purchased from inland farmers. The DOJ asserts that, in some areas along the Mississippi and Ohio Rivers, farmers have few options for buyers of their grain. In the nine areas, the complaint alleges that Zen-Noh and Bunge are currently two of only a small number of grain purchasers and the two firms currently compete aggressively to win farmers' business in the purchase of corn and soybeans. The settlement required Zen-Noh to sell the grain elevators to Viserion Grain LLC, a Colorado-based global agriculture merchant formed with the financial backing of Pinnacle Management L.P. and a management team with substantial experience in the grain industry.

[144] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Transaction between Global*

Inc. (broadcast TV stations);[145] (7) Bancorp SouthBank/CadenceBank (retail bank branches);[146] (8) General Shale Brick Inc./Meridian Brick LLC (residential brick);[147] (9) Neenah Enterprises Inc./U.S. Holdings/US Foundry (gray iron municipal castings);[148] (10) Groupe Lactalis/Kraft Heinz (feta and ricotta cheese);[149] and (11) S&P/IHS Markit (price reporting agencies).[150]

Industrial and Agricultural Equipment Component Manufacturers (July 14, 2021), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-transaction-between-global-industrial-and. On July 14, 2021, the DOJ conditioned its approval of the transaction with the divestiture of three Danfoss factories in Kentucky, Germany, and Poland to Intergroup and three Eaton operations in Oklahoma and Minnesota to approved buyers. Notably, these are the same plants that Danfoss offered to divest to the EC. Danfoss and Eaton are two of the world's largest producers of orbital motors used in mobile off-road equipment, such as skid steer loading harvesters and street sweepers. They are also large producers of hydraulic steering units.

[145] Press Release, U.S. Dep't of Justice, *Justice Department Requires Substantial Divestitures in Gray's Acquisition of Quincy to Protect American Consumers and Small Businesses* (July 28, 2021), https://www.justice.gov/opa/pr/justice-department-requires-substantial-divestitures-gray-s-acquisition-quincy-protect. On July 28, 2021, the DOJ conditioned its approval of the transaction on Gray and Quincy divesting 10 broadcast TV stations to Allen Media Holdings LLC. Allen Media currently owns and operates 14 broadcast TV stations in 12 local markets. The DOJ alleged that without the required divestiture, the acquisition would have harmed cable and satellite TV subscribers and small businesses that advertise on broadcast TV in seven local markets, which are centered in: Tucson, Arizona; Rockford, Illinois; Cedar Rapids, Iowa; Paducah, Kentucky; Eau Claire, Wisconsin; Madison, Wisconsin; and Wausau, Wisconsin. The DOJ indicated that the combined company likely would have charged cable and satellite companies higher transmission fees to carry its broadcast TV stations in those local markets, resulting in higher monthly cable and satellite bills. In addition, the press release noted the combination would have enabled Gray to charge local businesses higher prices to advertise on broadcast TV stations in those local markets.

[146] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in BancorpSouth Bank's Merger with Cadence Bank* (Sept. 2, 2021), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-bancorpsouth-bank-s-merger-cadence-bank. On September 2, 2021, the DOJ conditioned its approval of the transaction upon the divestiture of seven branches in rural areas of northeastern Mississippi. The divested assets include all deposits and loans as well as physical assets. The companies also agreed to suspend existing non-compete agreements with branch managers and loan officers located in Aberdeen, West Point, and Starkville, Mississippi, and not to enter into new non-competes with these managers and officers. In addition, the companies agreed that any branches located in any of these markets that are closed within three years of the transaction's closing will be sold or leased to another institution that offers deposit and credit services to small businesses.

[147] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture for General Shale to Proceed with Acquisition of Meridian Brick* (Oct. 1, 2021), https://www.justice.gov/opa/pr/justice-department-requires-divestiture-general-shale-proceed-acquisition-meridian-brick. The DOJ conditioned its approval on the parties divesting three manufacturing facilities, 14 distribution yards and showrooms, and six mines for extracting input materials used in the manufacture of residential brick to Remson LLC. General Shale and Meridian Brick are two of the largest suppliers of residential brick in eight separate local markets in six states (Tennessee, Alabama, Kentucky, Indiana, Michigan, and Ohio). Residential brick is an essential building block in American home construction. The DOJ alleged that, without the divestures, the transaction would have resulted in high prices and lower-quality residential brick.

[148] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Neenah Enterprises Inc.'s Acquisition of US Foundry* (Oct. 14, 2021), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-neenah-enterprises-inc-s-acquisition-us-foundry. The DOJ conditioned its approval of the transaction on Neenah Enterprise Inc.'s ("NEI") divestiture of all rights, titles, and interests in over 500 gray iron municipal casting patterns to D&L Foundry Inc., an established provider of gray iron municipal castings in the United States, but with sales primarily outside the states where NEI and US Foundry compete. According to the DOJ, NEI and US Foundry are two of only three significant suppliers of gray iron municipal castings in 11 eastern and southern states. Gray iron municipal castings are customized molded iron products, such as manhole covers and frames used to access subterranean areas and grates and drains used to direct water in roadway, parking, and industrial areas. The DOJ asserts that the transaction "would have led to higher prices, lower quality, and slower delivery times for essential pieces of infrastructure."

[149] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Lactalis's Acquisition of Kraft*

IV. Conclusion

Antitrust policy and enforcement are currently in the political limelight. Even absent passage of legislation to materially alter the merger review standards and HSR rule changes, the DOJ and the FTC are likely to be very active in investigating and undertaking enforcement actions in mergers. Particularly hot areas will continue to be nascent/potential competition, particularly in high technology/pharma areas, vertical transactions, and digital/data sectors. Heightened antitrust enforcement conditions exist as well outside the United States in a number of key jurisdictions. Although in a vast majority of transactions—even those involving strategic buyers—the transaction will ultimately close, obtaining all requisite competition approvals could take additional time and require additional effort by the transaction parties. Transaction parties should take into account these trends when negotiating their deal terms and adopting their regulatory strategy.

Heinz's Natural Cheese Business in the United States (Nov. 10, 2021), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-lactalis-s-acquisition-kraft-heinz-s-natural-cheese. The DOJ required Lactalis to divest the worldwide rights and portfolios of Kraft Heinz's Athenos business to Emmi Roth USA, an established cheese supplier, and its Polly-O business to BelGioioso Cheese Inc., an established cheese supplier, in order to proceed with Lactalis's acquisition of Kraft Heinz's natural cheese business in the United States. Lactalis and Kraft Heinz are the two largest suppliers of feta cheese—sold under their respective Président and Athenos brands—to grocery stores and other retailers in the United States. They are also the two largest suppliers of ricotta cheese—sold under their respective Galbani and Polly-O brands—to grocery stores and other retailers in the New York City metropolitan area and four metropolitan areas in Florida: Miami/Ft. Lauderdale; Tampa/St. Petersburg; Orlando; and Jacksonville. The divestitures cover the entire portfolios of these businesses, which, according to the DOJ's press release, will "place the divestiture buyers in the position to market and promote all the cheese sold under these brands as Kraft Heinz does today."

[150] Press Release, U.S. Dep't of Justice, *Justice Department Requires Substantial Divestitures and Waiver of a Non-Compete for S&P to Proceed with its Merger with IHS Markit* (Nov. 12, 2021), https://www.justice.gov/opa/pr/justice-department-requires-substantial-divestitures-and-waiver-non-compete-sp-proceed-its. The DOJ conditioned its approval of S&P Global Inc.'s ("S&P") $44 billion acquisition of IHS Markit Ltd. ("IHS") upon divestiture of three of IHS's price reporting agency ("PRA") businesses to Dow Jones, a provider of business and financial news and related data products and services. PRAs provide price discovery for many numerous commodity markets, including markets where trades are done off exchanges in private transactions that are not subject to reporting obligations. The divestitures of Oil Price Information Services ("OPIS"), Coals, Metals, and Mining, and Petrochem Wire will maintain competition in PRA services. In addition, the DOJ requires OPIS to end a 20-year non-compete with GasBuddy, a crowd-sourced retail gas price information app that has provided OPIS with pricing data for resale to commercial customers. The non-compete has effectively prevented GasBuddy—which the DOJ views as being well positioned to enter the retail gas price data market—from launching a data service that would compete with OPIS. The DOJ press release indicates that "[t]he remedy also demonstrates the department's commitment to curtail the anticompetitive use of non-compete agreements." The release further noted the complaint alleged the merger would have eliminated significant head-to-head competition between S&P's Platt division and IHS's businesses in providing PRA services for refined petroleum products, coal and petrochemicals. In these markets, PRA price assessments are often used as a price term in supply agreements and as the basis for settling hedging instruments, such as futures contracts. In the United States, S&P and IHS are two of the three largest competitors in PRA services for refined petroleum products and coal, and are two of the four largest competitors in PRA services for petrochemicals. Additional remedies were required by the EC and the UK's Competition and Markets Authority.