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The U.S. Antitrust Merger Enforcement Agenda

In 2022, leadership at the U.S. antitrust agencies—the Federal Trade Commission and the Antitrust Division of the Department of Justice—pursued an aggressive enforcement agenda, while advocating for procedural and substantive changes to the antitrust laws. In addition to focusing on mergers involving competing firms, the agencies investigated and challenged transactions implicating other theories of harm, including vertical and conglomerate theories, potential and nascent competition, and monopsony (particularly involving labor markets). Although certain industries such as technology and pharmaceuticals continued to attract legal and political scrutiny, the push for increased enforcement was by no means limited to those sectors.

In December 2022, Congress [passed the Merger Modernization Act of 2022](#), which will significantly increase HSR filing fees and the antitrust agencies' available funding. Armed with more resources, 2023 may be a critical year for U.S. antitrust enforcers as they attempt to transform the antitrust laws through the courts and legislation, as well as indirectly through the adoption of new merger guidelines and informal and formal rulemakings.

Transacting parties should anticipate broad inquiries unrelated to consumer welfare, including those involving labor. While the extent to which these explorations will lead to legally supportable theories of harm remains unclear, they may add significant transaction costs and delay. In addition, as the agencies pursue less traditional theories of harm and are less willing to settle cases, transacting parties may choose to prepare for, and ultimately to litigate, an agency challenge. In 2022, the agencies' court records were mixed, with a number of notable losses in cases involving non-horizontal theories of harm and litigated fixes.

Agency Leadership Pursues Significant Policy Changes

Despite Lina Khan's appointment as FTC Chair in June 2021, the FTC lacked a Democratic majority until Alvaro Bedoya's confirmation in June 2022. Under Chair Khan's leadership, the new majority has empowered the FTC staff to pursue aggressive enforcement actions and policy changes. In November 2022, the FTC issued a [new policy statement](#) describing how it intends to enforce Section 5 of the FTC Act, which prohibits "unfair methods of competition." The policy statement focuses on "incipient threats to competitive conditions," including a series of transactions that "individually may not have violated the antitrust laws" and "acquisitions of a potential or nascent competitor." Last week, the FTC's Democratic majority relied on that expansive interpretation of Section 5 to support a controversial [proposed rulemaking](#) that would ban most employee non-compete agreements.

The FTC is not alone in pushing an aggressive enforcement agenda. Assistant Attorney General of the Antitrust Division Jonathan Kanter, who was confirmed in November 2021, onboarded new senior leadership with the goal of bringing more merger challenges. Since taking the helm, AAG Kanter has overseen seven merger challenges, including five through trial—a significant increase in litigated cases from prior administrations. The Antitrust Division is also newly focused on Section 8 of the Clayton Act, which prohibits most interlocking

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directorates between competing companies. Although no enforcement action has been brought to date, [the ongoing investigations](#) have resulted in a number of publicly announced director resignations. We expect the Section 8 enforcement initiative will continue in 2023.

Both agencies have become less willing to accept remedies in merger reviews to settle competition concerns. AAG Kanter has publicly articulated a high bar for accepting parties' settlement proposals, and the Antitrust Division did not enter into any formal merger settlement in 2022, preferring instead to litigate cases or allow parties to resolve concerns without a formal consent decree under the Tunney Act. Although the FTC is more willing to settle merger cases, FTC consents in 2022 involved substantial divestitures and, in certain instances, onerous terms. In October 2021, a divided FTC announced a [new policy](#) that requires settling firms to obtain "prior approval" for all future acquisitions affecting the same or related relevant markets; in 2022, those provisions were included in about half of the FTC's merger settlements.

Merger Cases in 2022

Antitrust litigation at the FTC and Antitrust Division was very active in 2022, including several challenges raising non-horizontal theories of competitive harm. As we have previously reported [here](#), [here](#) and [here](#), the results have been mixed and demonstrate that federal courts may constrain and temper some of the agencies' progressive policy objectives.

Several 2021 FTC cases carried into 2022, including a challenge to a hospital merger (*Hackensack Meridian Health/Englewood Healthcare*), which the FTC won. The FTC also challenged three consummated transactions and one proposed merger before the FTC's administrative law judge ("ALJ"). In one of these proceedings, *NVIDIA/Arm*, which involved vertical theories of harm in a developing industry, the transacting parties abandoned the transaction soon after the Commission authorized a challenge. In two other ALJ proceedings—*Altria/JUUL* and *Illumina/GRAIL*—the FTC suffered rare losses in its own in-house court. *Altria/JUUL* involved a substantial minority investment and allegations that the investment had eliminated potential competition by Altria in the market for e-cigarettes. The ALJ concluded that the FTC failed to prove anticompetitive harm resulting from the transaction. In *Illumina/GRAIL*, the FTC alleged that Illumina would have the incentive and ability to impair entry by and deter innovation from rival firms. The ALJ concluded that the parties' proposed behavioral remedies, which included long-term supply agreements, adequately addressed the FTC's concerns. Both cases are now on appeal before the full Commission. In the last pending case from 2021 (*Axon/Safariland*), trial has been stayed pending an appeal to the U.S. Supreme Court on the question of whether federal district courts (as opposed to the courts of appeals) have the authority to evaluate constitutional challenges to the FTC's structure and procedures.

As for 2022 cases, the FTC filed three challenges to hospital system mergers in federal court, and in each case the parties abandoned their proposed deals shortly after suit was filed. The FTC brought three additional deal challenges: (1) *Lockheed/Aeroflot*, a vertical defense industry case, in which the parties also abandoned the deal after an administrative complaint was filed; (2) *Meta/Within*, which remains pending and in which the FTC has focused on potential lost competition in a nascent market for virtual reality applications; and (3) *Microsoft/Activision*, which involves vertical theories of harm from the combination of a "high-

performance” gaming console and multi-game content library and cloud gaming subscription service provider with a developer and publisher of high-quality gaming content.

The Antitrust Division began 2022 with three pending merger challenges: (1) *U.S. Sugar/Imperial Sugar*, which alleged harm to the market for the production and sale of refined sugar to wholesale customers in the Southeast and Georgia; (2) *Penguin Random House/Simon & Schuster*, a monopsony case, which alleged harm to top-selling authors, not consumers; and (3) the proposed alliance between American Airlines and JetBlue, which the Division argues is tantamount to a merger. Of the pending 2021 cases, the DOJ lost one (*U.S. Sugar/Imperial Sugar*), won one (*Penguin Random House/Simon & Schuster*), and tried the third and is awaiting a court decision (*American Airlines/JetBlue*). In *U.S. Sugar/Imperial Sugar*, the parties prevailed by arguing that the government’s geographic market definition was too narrow and did not reflect the commercial realities of the sugar industry. DOJ has appealed the *U.S. Sugar* judgment.

The DOJ brought four new federal court challenges in 2022: an alleged merger to monopoly, *Verzatec/Crane*, which the parties abandoned shortly after suit was filed; two which the DOJ lost—*Booz Allen/EverWatch* and *UnitedHealth/Change*; and *Assa Abloy/Spectrum*, which is scheduled for trial in April 2023. In *Booz Allen/EverWatch*, the court rejected the government’s contention that competition for a single government contract constituted an appropriate relevant market, and in *UnitedHealth/Change*, the district court decision, which the DOJ has appealed, squarely rejected each of the DOJ’s claims of horizontal and vertical competitive harm, particularly after accounting for the parties’ proposed divestiture. As in *UnitedHealth/Change*, the parties in *Assa Abloy/Spectrum* have proposed a divestiture which they believe addresses the DOJ’s alleged competitive concern for residential locks; the reviewing court will undoubtedly consider that remedy in evaluating the deal’s competitive effects.

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Transacting parties in strategic deals should anticipate and plan for searching inquiries and associated delays in U.S. antitrust reviews. More than ever, early engagement with counsel will best position dealmakers to navigate the evolving regulatory environment. Thoughtful and well-executed regulatory strategies will maximize the chances of a deal’s successful closing.

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