HARVARD
BUSINESS LAW
REVIEW

INCREASED ANTITRUST MERGER ENFORCEMENT: CONSIDERATIONS FOR YOUR NEXT DEAL

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I. Introduction

Antitrust merger enforcement has become increasingly aggressive in recent years with the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) (collectively, the U.S. antitrust authorities) demonstrating that they are ready to litigate to block deals they believe will harm competition. Political figures, from President Barack Obama and President-Elect Donald J. Trump to senators, have called for government action to protect and promote competition.[1] Indeed, a recent speech by the head of the Antitrust Division made clear that the government will not shy away from bringing cases even when enforcers might lack "particularized and quantified proof of consumer harm" or a precise "measur[e] [of] the effect on

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[1] In April 2016, President Obama issued an executive order for federal agencies to "identify specific actions" to detect abuses, enhance competition, and reduce burdens on competition. Exec. Order No. 13,725, 81 Fed. Reg. 23,417, 23,417–18 (Apr. 15, 2016), https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers. Some politicians have sharply criticized consolidation in various sectors of the economy. *See, e.g.*, Senator Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program Event (June 29, 2016), http://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf; Letter from Senator Al Franken et al. to Tom Weeler, Fed. Commc'n Comm'n Chairman, and Eric Holder, Att'y Gen., Dep't of Justice (April 21, 2015), http://www.franken.senate.gov/files/documents/150421ComcastTWC.pdf.

price and output"—instead, "experience" and other evidence such as "company documents and customer testimony" can be sufficient.[2] This suggests that robust agency scrutiny of potential mergers and acquisitions is likely to continue in the future.

While an increasing number of mergers have been challenged and blocked in federal court,[3] some are prevailing at trial or managing to find a path to clearance without litigation.[4] This Article reviews the trends that have emerged in federal merger enforcement and discusses some key differences between deals that have been cleared and those that have faced government opposition. In particular, the antitrust authorities are focusing on (1) the use of narrow price-discrimination markets to analyze competition, (2) the credibility of future competition, and (3) the complexity of any remedy package. Understanding how the antitrust authorities analyzed and reached different conclusions in these areas is critical for assessing the antitrust risks of future transactions and forming the best strategy to obtain antitrust clearance.

II. Standards Applied in Federal Merger Investigations

Mergers and acquisitions are governed by section 7 of the Clayton Act, 15 U.S.C. § 18. This provision prohibits acquisitions of "the whole or any part of the stock in any line of commerce . . . [where] the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[5] The DOJ and FTC are the primary government enforcers of section 7.[6] Their review of acquisitions is facilitated by the Hart-Scott-Rodino Act (HSR Act), which requires merging parties to give notice of their merger to the DOJ and FTC, if valued above certain thresholds, and to observe a waiting period before closing.[7] The HSR Act also allows the U.S. antitrust authorities to request additional information from the parties and extend the waiting period to evaluate whether or not to challenge the transaction.[8]

The DOJ and FTC also have published the *Horizontal Merger Guidelines* (*Guidelines*), which set forth the government's framework for analyzing acquisitions.[9] According to the *Guidelines*, the U.S. antitrust authorities undertake a fact-specific inquiry into each merger that considers all evidence relevant to potential competitive harms, including market shares, head-to-

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[2] Renata Hesse, Acting Assistant Att'y Gen., Dep't of Justice Antitrust Div., And Never the Two Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement, Remarks at the 2016 Global Antitrust Enforcement Symposium (Sept. 20, 2016), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening.

[3] Complaint at 4–5, FTC v. Sysco Corp., 83 F. Supp. 3d 271 (D.D.C. 2015) (No. 1:15-cv-00256(APM)); Complaint at 3, 12, FTC v. Staples, Inc., 2016 WL 2899222 (D.D.C. Dec. 9, 2015) (No. 15-2115(EGS)).

[4] FTC v. Steris Corp., 133 F. Supp. 3d 962, 971–72, 982 (N.D. Ohio 2015); FED. TRADE COMM'N, FTC FILE NO. 141-0168, ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT, *IN RE* REYNOLDS AMERICAN INC. AND LORILLARD INC. 3 (2015), https://www.ftc.gov/system/files/documents/cases/150526reynoldsanalysis.pdf.

[5] Clayton Act § 7, 15 U.S.C. § 18 (2012).

[6] *See* 15 U.S.C. § 26 (2012). Other federal agencies, such as the Surface Transportation Board and the Federal Communications Commission, have jurisdiction to enforce section 7 in their respective areas of expertise. *See* 15 U.S.C. § 21(a) (2012).

[7] *See* 15 U.S.C. § 18a (2012).

[8] *Id.*

[9] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

head competition between the merging parties, whether the merger is eliminating a "maverick" that has been driving competition (including through innovation), the presence of actual anticompetitive effects, and the ability of the merged entity to price discriminate against "certain targeted customers."[10]

III. Key Enforcement Trends

A. Narrow Price-Discrimination Markets

Recent merger cases demonstrate that the U.S. antitrust authorities are willing not just to investigate, but also to litigate market definition issues centered around a narrow set of customers subject to price discrimination. U.S. antitrust authorities typically define markets narrowly and are more likely to engage in an extended investigation if they believe a particular class of customers might be harmed by a merger—that is, if there is a group of customers for whom the merged firm can raise prices.[11] Price-discrimination markets are not new—the 2010 *Guidelines* specifically discussed such markets and noted that the anticompetitive effects from a merger might vary significantly for different customers if there are some for whom the merged firm can profitably raise prices because of the customers' particular needs.[12] In recent cases, district courts have accepted such narrow markets, validating the U.S. antitrust authorities' analysis and putting future merging parties on notice to carefully examine a deal's potential impact on all types of customers in assessing its risks.

Three recent cases, in particular, highlight the increased importance regulators are placing on price-discrimination market definitions. First, in its 2015 challenge to Sysco's acquisition of US Foods, the two largest food distribution companies, the FTC focused on the acquisition's impact on national customers (for example, large chain restaurants).[13] Given the specific purchasing needs of such customers—a supplier with a national distribution footprint, private-label products, a system to ensure consistency of ordering, pricing, and products, and a "high level[] of customer service"[14]—the FTC found that Sysco and US Foods were the only two "broadline" competitors who could serve as a "one stop shop" for these national customers.[15]

The court accepted the FTC's national market definition, relying on the long-standing Supreme Court case *Brown Shoe*, which provides a set of indicia or factors to test and define the boundaries of markets.[16] As the court summarized, application of this test frequently includes an analysis of "the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, *the existence of special classes of customers* who desire particular products and services, 'industry or public recognition' of a separate market, and how the defendants' own materials portray the 'business reality' of the market."[17] The court was

[10] *Id.* at §§ 2.1, 3.
[11] *Id.* at § 3.
[12] *Id.*
[13] Complaint at 4–5, FTC v. Sysco Corp., 83 F. Supp. 3d 271 (D.D.C. 2015) (No. 1:15-cv-00256(APM)).
[14] *Id.* at 3.
[15] *Id.* at 4–5.
[16] FTC v. Sysco Corp., 113 F.Supp.3d 1, 23 (D.D.C. June 26, 2015) (citing Brown Shoe Co. v. United States, 370 U.S. 294 (1962)).
[17] *Id.* at 23–33 (emphasis added).

persuaded by the FTC's market definition, in large part, based on broadline customers' testimony.[18]

Second, in its case against Staples' acquisition of Office Depot, two of the largest office-supply companies, the FTC also staked out a narrow customer-specific market definition, alleging the merger would harm "business-to-business" customers, rather than the more common concerns related to "direct-to-consumer" customers.[19] In doing so, the FTC similarly emphasized such customers' "distinct" needs,[20] including, again, a national distribution footprint, private-label product offerings, product consistency, and a "high level[] of customer service."[21] The FTC alleged that the combined firm would have accounted for 70% of the narrow business-to-business office supply market, giving rise to a presumption of anticompetitive effects from the merger under the *Guidelines*.[22] The court found in favor of the FTC, also relying on the *Brown Shoe* standard.[23] And in reaching its decision, the court relied on the merging parties' internal documents that recognized a category of large, business-to-business customers as a distinct group.[24]

Lastly, the 2015 acquisition of Trulia by Zillow,[25] two online real estate portals, demonstrates that although the U.S. antitrust authorities may investigate whether a proposed deal might harm a particular class of customers, narrow price-discrimination markets are not always present. After a six-month review, the FTC cleared the Zillow/Trulia acquisition without requiring divestitures. In its closing statement, the FTC noted that it did scrutinize the deal for potential impact on price-discrimination markets.[26] The FTC specifically considered whether real estate portals were a relevant market to certain groups of real estate agents willing to pay to list on the merging parties' websites.[27] The FTC ultimately concluded that while there was some evidence supporting narrow price-discrimination markets, it was "inconclusive," in part, because there was no evidence of actual price discrimination prior to the merger.[28] While this transaction was able to close, the FTC's statement clearly identified that price-discrimination markets were top of mind in the agency's analysis.[29]

As these recent cases indicate, courts have been receptive to the government's arguments that mergers might harm certain classes of customers. However, as the Zillow/Trulia investigation demonstrates, if parties can show that there is no evidence of price discrimination

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[18] *Id.* at *28.

[19] Complaint at 3, 12, FTC v. Staples, Inc., 2016 WL 2899222 (D.D.C. Dec. 9, 2015) (No. 15-2115(EGS)) [hereinafter Staples/Office Depot Complaint].

[20] FTC v. Staples, Inc., No. 15-2115(EGS), 2016 WL 2899222, at *10–11 (D.D.C. May 17, 2016).

[21] Staples/Office Depot Complaint, *supra* note 19, at 13.

[22] *Id.* at 16–17.

[23] *Staples*, 2016 WL 2899222, at *25–26.

[24] *See id.* at *9–10.

[25] *See* Press Release, Zillow Announces Acquisition of Trulia for $3.5 Billion in Stock (July 28, 2014), http://investors.zillowgroup.com/releasedetail.cfm?releaseid=862266.

[26] *See* FED. TRADE COMM'N, FTC FILE NO. 141-0214, IN THE MATTER OF ZILLOW, INC. AND TRULIA, INC. (2015), https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf.

[27] *See id.*

[28] *See id.*

[29] *See id.*

before the merger, there is a better chance that the U.S. antitrust authorities will close the investigation and clear the deal.

Given the U.S. antitrust authorities' success in *Staples* and *Sysco*, the enforcers are likely to continue to closely investigate narrow market definitions in future mergers. As such, there are several issues counsel and merging parties should consider heading into a new deal.

First, anticipate that the DOJ or FTC will define narrow customer segments, even if they represent a relatively small portion of a company's business. The *Staples* court noted that "[a]ntitrust laws exist to protect competition, even for a targeted group that represents a relatively small part of an overall market."[30] The FTC was not only willing to bring a case where the alleged market represented only 1.4% of the parties' overall sales, but also successful in blocking the transaction based on that narrow market definition.[31]

Second, determine if there is evidence that either party is pricing differently to specific segments of customers. Counsel and merging parties should seek to understand as early as possible in the merger process whether there is any particular business channel or subsegment of customers who may be especially vulnerable to post-merger price increases, even if those customers or lines of business are ancillary to the deal rationale.

Third, do not assume that the U.S. antitrust authorities will discount harms to sophisticated customers. The U.S. antitrust authorities have recognized that the strength and sophistication of merging parties' buyers can mitigate a merger's potential anticompetitive effects.[32] But, as demonstrated in *Sysco* and *Staples*, even where customers are large corporations and arguably can protect themselves, the FTC successfully has blocked mergers by defining the relevant market around the provision of products and services to such customers and focusing on price-discrimination markets.

B. Future Competition

Another trend in recent merger enforcement is the high level of proof expected by the U.S. antitrust authorities, as well as courts, for any party asserting claims of future competition.[33] Arguments without evidence of concrete steps to enter or minimal foothold entry in the relevant

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[30] FTC v. Staples, Inc., No. 15-02115 (EGS), 2016 WL 2899222, at *16 (D.D.C. May 17, 2016).

[31] Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 14, FTC v. Staples, Inc., 2016 WL 2899222 (D.D.C. May 17, 2016) (No. 15-02115 (EGS)), http://www.appliedantitrust.com/14_merger_litigation/cases_ftc/staples2015/1_ddc/staples_ddc_pi_opp3_16_2016redacted.pdf.

[32] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf ("Powerful buyers are often able to negotiate favorable terms with their suppliers . . . . The [a]gencies consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices.").

[33] Consideration of future competition is always relevant to merger analysis, though it can take many forms. In the past, the antitrust agencies have challenged deals where one company seeks to acquire another company that is poised to enter a relevant market as a new competitor. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Issues Administrative Challenge to Polypore International, Inc.'s Consummated Acquisition of Microporous Products L.P. and Other Anticompetitive Conduct (Sept. 10, 2008), https://www.ftc.gov/news-events/press-releases/2008/09/ftc-issues-administrative-challenge-polypore-international-incs (announcing the FTC's decision to challenge Polypore International's acquisition of Microporous Products, which had been "preparing to enter" the relevant market).

market are more likely to be rejected as mere speculation.

In Staples' proposed acquisition of Office Depot, the parties argued that regional competitor W.B. Mason and recent entrant Amazon would be able to expand their business-to-business sales and replace any competition lost as a result of the merger.[34] The FTC, however, argued that entry would not be successful, and the court agreed. It found particularly persuasive the testimony of regional competitor W.B. Mason that it was not interested in expanding into the national market.[35] With respect to Amazon, the court was troubled that it had an online sales model that had never actually won a bid in response to a business-to-business customer's Request for Proposal (RFP).[36] The court concluded that it would be "sheer speculation" to expect Amazon to compete with Staples/Office Depot within three years.[37] The court also expressed concern that the structure of Amazon—a marketplace with third-party vendors who each controlled their own product price—would make it difficult for the retailer to bid for large corporate contracts; the court concluded that Amazon's model was "at odds" with the RFP method business customers used.[38]

In contrast, the FTC in 2013 cleared Office Depot's acquisition of Office Max without divestitures because the "explosive growth of online commerce . . . had a major impact on this market."[39] In that investigation, the FTC's focus was on retail customers, and the FTC found that stores were losing sales to online retailers and frequently were forced to match their lower prices.[40] The key distinction between the two cases is that in Office Depot/Office Max, online competitors already enjoyed some success as competitors in the retail office supply market, so their future competition was given significant weight.

The U.S. antitrust authorities' treatment of online competition in other contexts further illustrates how the similarity of offerings will be key in determining whether to credit future online competition arguments. For example, in the 2015 Dollar Tree/Family Dollar merger, the FTC rejected arguments that online retailers were competitively significant.[41] The FTC determined that the "primary appeal" of dollar stores was a "combination of value and convenience," which could not be met by internet-based retailers given the time required to process and ship online orders.[42] Similarly, in the 2015 merger between two subprime consumer

[34] FTC v. Staples, Inc., No. 15-02115 (EGS), 2016 WL 2899222, at *2, *24–25 (D.D.C. May 17, 2016).

[35] *See id.* at *24–25. The determination that a regional competitor was insufficient to replace the lost competition is similar to the conclusion in the Sysco/US Foods litigation. *See* FTC v. Sysco Corp., 113 F.Supp.3d 1, 40–41 (D.D.C. 2015). In Sysco/US Foods, the FTC alleged, and the court agreed, that regional competitors were insufficient to constrain national competition on their own. *Id.* And while there was an organization through which regional competitors could jointly bid for national contracts, the court found it to be an ineffective alternative to the merging parties because of inherently higher costs and logistical complexities. *Id.*

[36] *Staples*, 2016 WL 2899222, at *22–24.

[37] *Id.* at *24.

[38] *Id.* at *23.

[39] FED. TRADE COMM'N, FTC FILE NO. 131-0104, STATEMENT OF THE FEDERAL TRADE COMMISSION CONCERNING THE PROPOSED MERGER OF OFFICE DEPOT, INC. AND OFFICE MAX, INC. (2013).

[40] *Id.*

[41] FED. TRADE COMM'N, NO. 141-0207 N.4, ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT, *IN THE MATTER OF DOLLAR TREE, INC. AND FAMILY DOLLAR STORES, INC.* (2015), https://www.ftc.gov/system/files/documents/cases/150702dollartreeanalysis.pdf.

[42] *Id.*

loan companies, Springleaf and OneMain, the DOJ concluded that online banks were unlikely to act as a significant competitive constraint post-merger.[43] Although the DOJ noted that online lenders had successfully entered the market for loans made to prime borrowers, the online lenders "face[d] challenges in meeting the needs of and mitigating the credit risk posed by subprime borrowers."[44] The DOJ focused on three main reasons that online lenders were unlikely to compete directly with Springleaf or OneMain: (1) lack of close customer relationships, (2) inability to conduct in-person meetings that may reduce fraud or risk, and (3) a slower loan application, processing, and distribution speed.[45]

The need for substantial evidence in support of future competition arguments extends to the government as well, in particular when it alleges a transaction will eliminate such future competition. In 2015, the FTC filed a complaint to block the merger between Steris and Synergy—two medical sterilization providers—but ultimately lost its challenge.[46] The FTC argued that Synergy was an "actual potential entrant" into the x-ray sterilization industry, which the FTC alleged would have competed directly with Steris' gamma radiation sterilization method.[47] The FTC cited internal Synergy documents, dating back to 2012, in an effort to prove that the business had moved from "planning to implementation," obtained a number of customer letters of interest, and was poised to have a "large and lasting competitive impact" on the sterilization market.[48] The merging parties disagreed that entry was likely, in part relying on Synergy documents reflecting a lack of customer support for expansion into x-ray sterilization and a low projected rate of return—3%, rather than the targeted 15%—and the court agreed.[49] Indeed, Synergy discontinued its x-ray sterilization project in early 2015, which the court found was unrelated to the merger.[50] After failing to block this transaction, the FTC acknowledged "just how difficult a potential competition case is to win."[51] But it made clear it would still consider bringing them where there is strong evidence entry would occur but for the merger, such as approved capital investment plans as opposed to mere evidence of the capability to enter.[52]

Given these cases, it is important to consider the extent to which the merger's success relies on arguments of future competition and the quality of evidence supporting such claims.

First, it is clear the U.S. antitrust authorities (and courts) require a significant amount of evidence that the future competitor has plans to enter and that it is likely to be successful upon entry. Even when merging parties point to large, successful companies like Amazon as competitive constraints, if those companies have neither expressed an interest in competing for

[43] Competitive Impact Statement at 6, United States, et al. v. Springleaf Holdings, Inc., et al., No. 1:15-cv-01992 (RMC) (D.D.C. Nov. 13, 2015), https://www.justice.gov/opa/file/793141/download.
[44] *Id.*
[45] *Id.*
[46] FTC v. Steris Corp., 133 F. Supp. 3d 962, 963, 984 (N.D. Ohio 2015).
[47] Complaint at 6, 17, FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015) (No. 1:15-cv-01080-DAP).
[48] *Id.* at 7–8.
[49] FTC v. Steris Corp., 133 F. Supp. 3d 962, 971–72, 982 (N.D. Ohio 2015).
[50] *Id.* at 981, 984 (noting that "problems . . . plagued the development of x-ray sterilization" since 2012).
[51] *See* Maureen Ohlhausen, Comm'r, Fed. Trade Comm'n, Antitrust Tales in the Tech Sector: Goldilocks and the Three Mergers and Into the Muir Woods, 8–9 (Jan. 26, 2016), https://www.ftc.gov/system/files/documents/public_statements/910843/160126skaddenkeynote.pdf.
[52] *Id.*

the business at issue nor had any success on recent entry, the U.S. antitrust authorities (and the courts) are likely to give less weight to entry and expansion arguments.

Second, it should not be assumed that internet-based competitors offering the same products and services as the merging parties are necessarily competitive constraints. In both *Staples* and *Springleaf*, the regulators were not convinced that internet-based companies could adequately compete with brick-and-mortar stores, whether because of how pricing is set (for example, Amazon's marketplace allows third-party vendors to set individual prices)[53] or how features of the market might disadvantage online companies (for example, online subprime lenders unable to meet customers face-to-face).[54] Accordingly, merging parties who seek to rely on arguments of internet-based competition should ensure that there are no market realities that might prevent online businesses from fully competing in the relevant market.

Finally, it is important to consider whether the U.S. antitrust authorities or the courts will consider the merging parties as competitors, even if the parties are not currently competing today. The FTC's recent loss in *Steris* illustrates that a merger challenge based on potential competition between the two businesses faces high evidentiary hurdles. FTC Commissioner Maureen Ohlhausen noted the Steris/Synergy case "ought to give the agency pause in pursuing potential competition cases in the future."[55] However, the U.S. antitrust authorities routinely have required divestitures where products are likely to be in future competition with each other, and such a position is likely to continue. As a result, it is important to consider future product innovation and product pipelines when advising on a transaction.

C. Preference for Simple Remedies and Divestiture Packages with a Proven Track Record of Success

As a final consideration, U.S. antitrust authorities have become increasingly critical of remedy settlement packages that are complex and would not create competitors of the same scale. Yet, where the parties have crafted comprehensive remedy proposals, the U.S. antitrust authorities still are willing to accept them to resolve competition concerns if the divestiture creates a player ready to compete on "day one" post-merger.

During the DOJ's investigation of the merger of Halliburton and Baker Hughes, two of the largest oil-field services providers, the parties offered a divestiture package to address the DOJ's concerns. Though the package represented up to $7.5 billion in sales, the DOJ rejected it as "wholly inadequate" and filed suit to block the transaction in April 2016.[56] Indeed, the DOJ characterized the proposed fix as "among the most complex and riskiest remedies ever contemplated in an antitrust case" as it was a "collection of assets selected from various . . . business lines," rather than a stand-alone business unit.[57] The DOJ also was concerned that the divestiture structure would leave the buyer dependent on Halliburton for "crucial" services and

[53] FTC v. Staples, Inc., No. 15-02115 (EGS), 2016 WL 2899222, at *23 (D.D.C. May 17, 2016).
[54] Competitive Impact Statement, *supra* note 43, at 6.
[55] *Id.* at 9.
[56] Complaint at 5, United States v. Halliburton Co., No. 1:16-cv-00233-UNA (D.D.C. April 6, 2016), https://www.justice.gov/atr/file/838661/download.
[57] *Id.* at 4.

thus, unable to compete independently.[58] And there were gaps in the package's scope and scale such that the DOJ felt it would not "replicate the [lost] competition."[59] Not only did the proposed divestiture not cover several key product areas, but the DOJ also had concerns that the divested business would "be less efficient, have less research and development . . . and be less able to offer integrated solutions" than the pre-merger parties.[60]

Similarly, in July 2016 when the DOJ challenged the merger of Aetna and Humana, two of the largest health insurance companies, it expressed concerns regarding the parties' proposed divestiture. The companies offered to divest Humana's Medicare Advantage business, which the DOJ criticized as merely pieces of contracts rather than a stand-alone business.[61] The DOJ also highlighted that the divestiture buyer would remain "dependent on Aetna—potentially for years—for providing basic services."[62] Ultimately, the DOJ concluded that no buyer of the proposed package would be able to compete as effectively or be as well positioned to expand as the two merging parties.[63]

In contrast, the day before suing Aetna and Humana, the DOJ approved the merger of two of the largest beer manufacturers in the world, AB InBev and SABMiller, with a remedy package that included not just divestitures but also conduct conditions.[64] From the outset, the parties committed to divesting SABMiller's equity and ownership stake in MillerCoors, a joint venture through which SABMiller operated in the United States, as well as other assets.[65] In the end, the parties further agreed to give MillerCoors international rights to the Miller brands of beer and perpetual, royalty-free licenses for certain products. The parties also committed to non-discriminatory practices in their distribution arrangements, which were aimed at protecting the distribution of independent craft beer brands.[66]

Similarly, in the merger of cigarette manufacturers Reynolds and Lorillard that closed in 2015, Reynolds negotiated a remedy up front.[67] Contingent on Reynolds' acquisition of Lorillard, Reynolds committed to sell a number of Reynolds and Lorillard brands and a manufacturing plant to a third cigarette manufacturer, ITG.[68] The FTC ultimately concluded that the divestiture not only addressed the competitive concerns raised by the merger, but also

[58] *Id.*
[59] *Id.* at 5.
[60] *Id.*
[61] Complaint at 20–21, United States. v. Aetna Inc., 2016 WL 3920816 (D.D.C. July 21, 2016) (No. 1:16-cv-01494), https://www.justice.gov/opa/file/877881/download.
[62] *Id.* at 21.
[63] *Id.*
[64] Competitive Impact Statement at 2, United States v. Anheuser-Busch, No. 1:16-cv-01483 (D.D.C. Jul. 20, 2016), https://www.justice.gov/opa/file/877511/download.
[65] Press Release, Department of Justice, Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition (July 20, 2016), https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer.
[66] Competitive Impact Statement, *supra* note 43, at 2.
[67] FED. TRADE COMM'N, FTC FILE NO. 141-0168, ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT, *IN RE* REYNOLDS AMERICAN INC. AND LORILLARD INC. 3 (2015), https://www.ftc.gov/system/files/documents/ cases/150526reynoldsanalysis.pdf.
[68] *Id.* at 3.

provided ITG "a robust opportunity . . . to grow its market share."[69] In particular, the FTC noted that the divested cigarette brands—Winston, Kool, Salem, and Maverick—were already accepted brands in the U.S. market and had a collective established market share of about 7%.[70] The FTC also noted that ITG had greater incentive to promote the growth of the divested brands than Reynolds because "incremental sales of these brands are unlikely to cannibalize sales from more profitable cigarette brands in its portfolio."[71]

Close agency scrutiny of any proposed divestiture is likely to continue in the future. While arguments on the merits may be strong, companies considering mergers may ultimately decide to settle for various reasons, including timing. In preparation for a potential investigation, companies should carefully evaluate a number of facets related to potential divestiture remedies in order to have a proposal be as effective as possible.

Parties should consider remedies early. As the approval in Reynolds/Lorillard demonstrates, negotiating a remedy concurrently with the original transaction can pay dividends. Such fix-it-first remedies are worth considering, particularly to ease agency review of a complicated merger. And even if a fix-it-first remedy is impractical, it is important to begin thinking about structural remedies early in the merger process.

Also, remedies need to be structured so the divested entity resolves the U.S. antitrust authorities' competition concerns and can effectively compete on day one. The U.S. antitrust authorities will look closely at any proposed remedy to ensure the competition lost from the transaction is replaced by a proposed divestiture. This will include scrutiny of both the size and the scope of the divestiture as well as the buyer's ability to effectively replace the lost competition. Where a divestiture package would not create a competitor able to compete in product scope and service offerings for the particular product and geographic markets at issue, the U.S. antitrust authorities are unlikely to accept that divestiture as a fix for any competitive concerns. Moreover, where assets are cobbled together and the divestiture does not position the proposed divestiture buyer to compete on day one and beyond, the U.S. antitrust authorities are unlikely to accept the proposed remedy.

IV. Conclusion

Merger review has been, and will continue to be, fact-specific. However, the recent cases that the DOJ and FTC have brought and won in federal court are informative on what it takes to get a deal done in today's regulatory environment.

As a result, parties should consider the antitrust issues up front, including narrow customer-centric product markets and the way in which future competition will affect the merger. By doing this, parties will understand these issues early and be better equipped to consider what remedies are workable from a business perspective as well as from an antitrust perspective.

[69] *Id.*
[70] *Id.*
[71] *Id.*