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BLOG

FTC Broadens Scope of Considerations in Merger Reviews

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On September 28, 2021, the Federal Trade Commission (FTC) announced additional changes to its merger review process that Bureau of Competition Director Holly Vedova stated would make the process “more rigorous.” In practice, it appears likely that the announced changes will further increase the already substantial burden associated with an in-depth antitrust investigation of a proposed transaction. While a number of the announced changes were technical and simply aligned the FTC’s Second Request practices with those of the Department of Justice (DOJ), the FTC also announced that future Second Requests may examine new theories of harm previously not considered during U.S. merger investigations. The announcement from Vedova also injects additional uncertainty into the U.S. merger review process, following a number of recent changes implemented by the DOJ and FTC, including (1) a temporary suspension of grants of early termination that has now lasted 18 months; (2) the FTC’s new practice of issuing “warning letters” to merging parties when the agency believes it has not had sufficient time or resources to fully investigate a transaction; and (3) the recent withdrawal by the FTC of the 2020 Vertical Merger Guidelines.

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), companies are required to report mergers and acquisitions exceeding certain size thresholds to allow the FTC and the DOJ time to review the transaction before the parties close. Once both parties have submitted their HSR filings, the reported transaction cannot close for up to 30 days while the enforcement agencies decide whether to seek additional information—a process commonly known as a “Second Request.” When a Second Request is issued, the 30-day HSR waiting period stops and restarts only after the parties substantially comply with the Second Request. Only after the 30-day HSR waiting period expires or is terminated may the parties close the notified transaction.

In her September 28 blog post, Vedova announced that future Second Requests issued by the FTC may include requests for information regarding how the proposed transaction “may affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete.” Indeed, reporting already indicates that parties received questions from FTC staff regarding unionization, environmental issues, and corporate governance practices prior to the September 28 announcement. Pursuing such lines of inquiry marks a departure from decades of U.S. antitrust merger enforcement under administrations of both parties.

Under existing precedent and agency practices, the DOJ and FTC analyze whether a proposed transaction likely will harm consumers, namely by higher prices or reduced output or quality. Vedova’s September 28 announcement makes clear that the FTC may consider a broader set of possible harms when investigating whether a proposed transaction is likely to substantially lessen competition under the antitrust laws. Such theories of harm are consistent with FTC Chair Lina Khan's longstanding critique in her academic writings that the DOJ and FTC have historically ignored what she views as harms of increased concentration that go beyond price effects, as well as President Biden's comprehensive Executive Order on Promoting Competition in the American Economy, which suggested that the FTC and DOJ consider the effects of proposed transactions on labor markets. (See here for a discussion of the complications associated with assessing the effects of a merger on labor markets.)

Absent further guidance, it is unclear how the FTC will assess whether a proposed transaction is unlawful under these theories of harm, making it difficult for businesses considering transactions and the attorneys advising them to determine whether a particular transaction is likely to draw scrutiny from the FTC. Further, unless the DOJ adopts a similar framework, the FTC's application of these novel theories of harm may further bifurcate the U.S. merger review process. Typically, whether the DOJ or FTC reviews a particular transaction depends largely on which agency has greater experience in a particular industry. Although the process by which each agency reviews a proposed transaction differs based, in part, on its statutory authority (particularly if the reviewing agency seeks to block the transaction), the substantive standards applied by each agency have largely been the same. As a result, whether it is the DOJ or FTC that reviews a transaction has not generally been seen as outcome determinative. Vedova's announcement, however, makes clear that the FTC is charting a new course and will begin scrutinizing aspects of a transaction previously not considered by either agency during a merger review. What standards the FTC will apply to assess these novel theories of harm—and whether the DOJ will follow suit—is unclear.

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