

## EDITOR'S NOTE

# Whither Merger Enforcement?

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**D**ESPITE THEIR CURRENT UTILITY or future promise, neither an AI chatbot nor a map app on your phone can reliably tell you where merger enforcement is headed today. Human judgment, informed by years of study and experience, may be a better tool for the task. This issue of *ANTITRUST* features several articles designed to give our readers different perspectives on what has been happening with merger enforcement and where it might be headed.

In July the Federal Trade Commission and the U.S. Department of Justice released a draft update of their merger guidelines. James Keyte identifies three goals that merger guidelines should serve: transparency as to the agencies' actual investigation and enforcement; explanation of any new analytical frameworks that the agencies might be using; and consistency with current case law or principled extension of current law. Keyte discusses how well or how poorly the draft serves these goals and explains his grading: high marks on transparency, a medium score on explaining analytical techniques, and "a disturbingly low score on keeping Section 7 guidance within current legal standards and principles." The agencies have invited review and comment (the period runs through September 18), and we encourage our readers to consider submitting comments.

Next, Matt Reilly, Rich Cunningham, and Ben Wallace discuss another major development in merger enforcement: the agencies' reduced willingness to consider remedies. If only part of a transaction creates anticompetitive effects, then a remedy can sometimes be designed to address those effects while still letting the rest of the transaction proceed. Reilly, Cunningham, and Wallace note that divestitures are deeply ingrained in modern merger practice, but both the FTC and DOJ have recently demonstrated reluctance to accept merger remedies. As the authors note, however, the agencies and the parties are not the only ones at the table. Courts have shown an increased willingness to entertain

proposed remedies and to permit the merger parties to "litigate the fix."

Economists Yi Cheng and Fei Deng discuss antitrust analysis of digital platforms. Their article includes discussion of FTC/DOJ challenges to recent and past mergers in this space. They explain that traditional economic tools for assessing competitive effects of mergers (such as upward pricing pressure indices and merger simulation) can and should be modified because of the distinctive characteristics of a platform.

Where Keyte and Reilly/Cunningham/Wallace explored specific aspects of merger enforcement policy, Sean Royall puts the FTC's merger enforcement into the broader context of the FTC's evolution. Royall suggests that the agency is in a particularly volatile period of its evolution. The Supreme Court has significantly limited the FTC's use of disgorgement remedy in cases under Section 13(b) of the FTC Act (even though it was a very useful tool for the FTC), and the agency's use of administrative trials is under constitutional threat (even though the FTC recently has been relying more on that process). Royall likens the FTC to an organism fighting to survive and thrive in a disrupted environment, and he argues the FTC is in the process of remaking itself, including in its merger enforcement efforts.

One possible direction for merger enforcement in the United States might involve consideration of concerns outside the scope of traditional competition analysis or national security issues. Competition lawyers might object that this effort would be inherently subjective and standardless, as well as potentially beyond the competence of competition agencies. But is that true? Anna Beligiorno-Nettis invites us to consider the Australian approach. She reports that Australia's legislation has created two processes for approving mergers: one process that focuses on competition issues, and another that considers whether the transaction will produce "net public benefits." She explores the definition, measurement, and duration of public benefit under Australian law, and she shows how the process worked in three specific cases.

Earlier this summer, the FTC announced its proposal for a substantial revision of the premerger notification form that parties to reportable transactions must file under the Hart-Scott-Rodino Act—and although this issue of *ANTITRUST* does not include an article specific to the proposed notification form, law firms and others have published extensively about it. The challenge for a notification program is to identify the potentially problematic transactions (however "problematic" may be defined) without imposing unreasonable costs and burdens on the vast remainder that clearly present no competition issues. The FTC acknowledges that the proposed revision will significantly increase the amount of time required to complete the notification form—"approximately 12 to 222 additional hours per filing, depending on the complexity of the filing at issue."<sup>1</sup> Some of the additional information that the proposal requires is

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now statutorily required (foreign subsidies and national defense), and some reflects the new enforcement focus on labor markets. But will the rest of the burden significantly reduce the number of false negatives—problematic transactions that the current process fails to identify? Even if the new reporting requirements identified twice the number of transactions that the agencies should consider investigating, the requirements would still be burdening nearly 3,000 transactions with substantial additional cost and compliance burden.<sup>2</sup> The comment period for the proposed reporting requirements has been extended to September 27, and we encourage our readers to consider submitting comments.

Moving beyond the world of merger enforcement, this issue includes two articles on important consumer protection issues. Robert Cunningham and Darby Hobbs explore the right to repair—and the extent to which manufacturers, by agreement or otherwise, can restrict the ability of purchasers to repair the purchased product. After defining the issue and exploring the arguments and considerations on both sides, they describe current enforcement efforts and state legislation. They conclude with a prediction of where the scope of this right might land in the future.

Robert Langer and Alundai Benjamin expand on Sean Royall's observations about the FTC's 2022 statement withdrawing the agency's 2015 statement on unfair methods of competition. They observe that the 2022 statement is a departure from the FTC's effort to provide guidance about the scope of the agency's authority over unfair methods of

competition. They also explain their view that the FTC seems to be trying to establish a position that federal courts have rejected many times. They note, however, that even if rejected by federal courts, the FTC's 2022 statement may influence the construction of states' "little FTC Acts."

Finally, what would a summer issue of this magazine be without that mainstay of summer culture: the sequel. Spencer Weber Waller reprises his previous exploration of antitrust in American pop culture, describing the appearance (perhaps just cameos!) of antitrust in movies, television, podcasts, and board games.

The permeation of antitrust into popular culture tells us that there remains popular—and likely political—support for the antitrust mission. What the popular culture cannot tell us is exactly where the enforcers and the courts will take the antitrust mission in the coming years. This magazine will continue its role as your antitrust travel guide. ■

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<sup>1</sup> *Premerger Notification; Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42178, 42208 (Jun 29, 2023).

<sup>2</sup> The most recent Hart-Scott-Rodino Annual Report shows that the two agencies received clearance to investigate only 7.9% of all reported transactions—that is, 270 investigations out of 3,413 reported transactions. FEDERAL TRADE COMMISSION, BUREAU OF COMPETITION AND U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2021, APP. A., TAB. III (Feb. 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p110014fy2021hsrannualreport.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf). For a broader statistical set, see Table 1 and 2 in L. Billman and S. Salop, *Merger Enforcement Statistics: 2001–2020*, 85 ANTITRUST L.J. 1 (2023).