Rate Uplift, Competitive Effects, Changing Guidelines—Is a Post-Merger Price Increase Necessarily Anticompetitive?

Rachel Rasp and Jeffrey Oliver

Antitrust enforcers are flirting with expansion of what constitutes "anticompetitive" price effects, including previously unexplored theories of harm. Namely, agencies have shown interest in price increases that are generated by merging parties' migrating contracts to the better of the parties' current contractual rates and terms. These types of post-merger price effects are common in some industries. Although there is no standard term for these effects, they may colloquially be referred to as "contract lift" or "rate uplift." This article examines concerns with antitrust enforcers' increasing reliance on rate uplift as proof of a merger's anticompetitive effects.

The increased focus on rate uplift occurs against the backdrop of the FTC's and DOJ's updated Merger Guidelines.[1] The updates continue a conceptual shift away from "horizontal" and "vertical" transaction analyses to an analytical framework of general competitive effects (benefits or harms). As close observers of merger enforcement are aware, these changes are not unexpected. In recent years, regulators have moved beyond their historic focus on structural inferences from a horizontal merger of direct competitors to examinations of the likely price or output effect from a transaction—whether horizontal, vertical, or complementary, or on the sell-side or buy-side of the transaction. That movement, in turn, has expanded the types of relevant anticompetitive effects from higher prices, collusion, and reduced output to include, among others, reduced innovation, reduced quality, and privacy concerns.[2]

Among these expanded types of anticompetitive effects are transitory price increases that, even though related to a merger, are not the result of any increase in market power. Recent enforcement actions, including inquiries into Standard General's abandoned acquisition of Tegna[3] in the broadcasting sector, as well as the recent FTC complaint against U.S. Anesthesia Partners in the healthcare sector,[4] have examined just such post-merger price increases caused by rate uplift—a post-transactional movement of the parties to the higher of the merging firms' pre-merger contractual rates. In markets in which prices are determined by periodic, multi-year contract negotiations between the provider of goods or services and its customers, merging parties that both supply a particular customer may receive different contract rates for the same or similar services provided to that customer. Post-merger, in some cases, the parties may see a temporary boost in

__Rachel Rasp__ is a Senior Associate and __Jeffrey Oliver__ is a Partner with Baker Botts L.L.P.

[1] 2023 Merger Guidelines, https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf

[2] *See*, for example, the updated Merger Guidelines Section 4.2.E., "Considerations for Innovation and Product Variety Competition," which addresses potential reductions in innovation, quality, and variety attributable to mergers.

[3] *See* Fed. Commc'n Comm'n, Hearing Designation Order In the Matter of Applications of SGCI Holdings III LLC; TEGNA, Inc.; and CMG Media Corporation, 38 FCC Rcd 1282 (2), https://www.fcc.gov/document/mb-issues-hearing-designation-order-related-tegna-transaction.

[4] *See* FTC Complaint, Federal Trade Comm'n v. U.S. Anesthesia Partners, Inc. and Welsh, Carson, Anderson & Stowe XI, L.P. et al., https://www.ftc.gov/system/files/ftc_gov/pdf/2010031usapcomplaintpublic.pdf.

revenue by utilizing existing contract provisions that allow the merged entity to migrate relevant customers to the contracts of the merging party with relatively more favorable rates or terms. Such contract provisions are often found in industries where customers contract with suppliers for access to a network of services, such as broadcasting or healthcare.

Courts have historically rejected attempts to characterize rate uplift as an anticompetitive effect of a merger

The likelihood of "anticompetitive effects" in a defined market is an essential element of a Section 7 merger challenge, but the outer boundaries of what constitutes an "anticompetitive effect" are not clearly defined. Generally speaking, an anticompetitive effect means that a particular transaction "would create an incentive for the merged parties to raise prices, lower quality, and innovate less."[5] In other words, the transaction would increase the combined firms' market power.

Historically, however, rate uplift alone has not been sufficient to establish the likelihood of a post-merger anticompetitive effect, even if the rate uplift is tied to the transaction under review.

Evidence of anticipated rate uplift as a result of a merger, or evidence of rate uplift from past mergers, has been used to bolster an agency's other evidence of anticompetitive effects. Historically, however, rate uplift alone has not been sufficient to establish the likelihood of a post-merger anticompetitive effect, even if the rate uplift is tied to the transaction under review. Although a contractual rate uplift post-merger is in the everyday sense a "price increase," it is not—standing alone—the type of price increase with which antitrust law is traditionally concerned. That is because it does not involve an increase in market power as a result of the merger, even if evidence of the potential increase is unequivocal and tied directly to the merger.

The temptation to believe that rate uplift falls within that definition is understandable; after all, the merger led to a post-merger price increase. Indeed, the recent investigation by the DOJ and the Federal Communications Commission (FCC) of Standard General's proposed acquisition of broadcast television company Tegna appears to have equated a price increase that results from contractual rate uplift with a price increase that constitutes a competitive harm. The investigation is illustrative of both renewed enforcer interest in rate uplift and, potentially, a growing desire to treat rate uplift as a genuine competitive harm in and of itself.

Broadcast television stations, such as the ones owned by Tegna, negotiate with cable and satellite companies on retransmission fees, which are rates charged to pay-TV providers (such as cable or satellite companies) by the broadcasters for permission to retransmit the signals of the local broadcast stations. One of the primary concerns in the FCC review of the Tegna deal was the potential for higher post-merger pay-TV prices—but not necessarily resulting from an increase in market power. Instead, the concerns focused on pre-existing retransmission consent contract clauses ("after-acquired" clauses) that would allow the merged parties to charge the higher contracted fees negotiated by Standard General's owned stations,[6] which in turn could lead the cable and satellite companies to pass on some of the costs of the higher rebroadcasting fees to their subscribers. Such after-acquired clauses are common in broadcasting, as Standard General and Tegna pointed out in public filings related to the merger investigation.[7] The FCC frequently viewed such contractual broadcasting price increases as insufficient reason to oppose a

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[5] *Federal Trade Comm'n v. Hackensack Meridian Health Inc.*, Civil Action No. 20-18140, 2021 U.S. Dist. LEXIS 158158, at *66 (D.N.J. Aug. 4, 2021), citing *Saint Alphonsus Med. Ctr.-Nampa Inc.,* 778 F.3d at 786.

[6] *See* Hearing Designation Order, Applications of SGCI Holdings III LLC; TEGNA, Inc.; and CMG Media Corporation, 38 FCC Rcd 1282 (2), https://www.fcc.gov/document/mb-issues-hearing-designation-order-related-tegna-transaction.

[7] *See* Application for Review, filed by SGCI Holdings III LLC, TEGNA Inc., CMG Media Corp., https://www.fcc.gov/ecfs/document/1031712841672/1.

transaction—approving, for example, deals between Nexstar/Media General and Tribune/Nexstar despite arguments that existing contractual after-acquired clauses would lead to higher rebroadcast fees.[8]

Mergers in the healthcare industry have similarly come under enforcer scrutiny for post-merger price increases attributable to contractual rate uplifts. In *Washington v. Franciscan Health,* a hospital system was sued by the Washington state Attorney General (AG) on a theory that the hospital had completed multiple acquisitions of smaller, lower-priced physician groups with the strategy of raising the rates charged by the smaller physician groups to insurance companies.[9] The AG presented strong evidence that the merging parties were close competitors, anticipated rate increases from the most recent in the series of small acquisitions, and would have an 80% market share post-transactions in at least one market. Additionally, in at least one of the prior tuck-in acquisitions, rates increased post-merger.

The court acknowledged that prices could increase as a result of the mergers, however, the court concluded that the AG failed to show that such price increases would, in fact, be the result of a substantial lessening of competition. The defendants contended that the AG's concerns about increased post-transaction prices after one particular acquisition were actually caused by a number of physicians deciding to switch their payer contracts to Franciscan's higher contracted rates post-transaction. The State's economist admitted that a rate uplift, "standing alone, is not evidence that the transaction is anticompetitive."[10] The Court noted that the AG neither countered the argument that the price increase, standing alone, was not evidence that the merger was anticompetitive, nor provided any expert analysis finding that such price increase constituted anticompetitive effects resulting from the acquisition.[11]

Some litigated cases successfully challenged by the FTC have involved rate uplift. However, in those instances, the problem was not the rate uplift itself, but rather the acquisition of durable market power.

For example, in *In re Evanston Northwestern Healthcare Corp.*, the FTC reviewed an already consummated hospital merger between Evanston Hospital and Highland Park (collectively, "ENH"). The FTC observed, and the merged parties did not dispute, that there had been a large post-merger rate increase in reimbursement rates charged by the hospitals to payers. Despite more recent attempts by the antitrust agencies to revive rate uplift as an independent theory of competitive harm discussed below, the FTC recognized that "[n]ominal price increases . . . do not by themselves establish the exercise of market power."[12] In a decision affirming the initial decision of an ALJ, the FTC concluded that the transaction violated Section 7 of the Clayton Act because

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[8] Fed. Commc'n Comm'n, "In the Matter of Applications for Consent to Transfer Control of License Subsidiaries of Media General, Inc., from Shareholders of Media General, Inc. to Nexstar Media Group, Inc., et al., DA 17-23, Memorandum Opinion and Order," 32 FCC Rcd. 183, 197 (Jan. 11, 2017), available at https://docs.fcc.gov/public/attachments/DA-17-23A1.pdf; Fed. Commc'n Comm'n, "In the Matter of the Applications for Tribune Media Company, et al., FCC 19-89, Memorandum Opinion and Order," 34 FCC Rcd. 8436 (Sept. 13, 2019), available at https://docs.fcc.gov/public/attachments/FCC-19-89A1.pdf.

[9] Note that the AG also relied on a novel theory that the separate acquisitions could and should be analyzed jointly to show anticompetitive effect, such that a prior merger could be found anticompetitive because of the effects of the subsequent merger. This theory was rejected by the district court. *See* Washington v. Franciscan Health Sys., 388 F. Supp. 3d 1296, 1300 (W.D. Wash. 2019).

[10] *Washington v. Franciscan Health Sys.*, 388 F. Supp. 3d 1296, 1302-03 (W.D. Wash. 2019) (emphasis supplied).

[11] *Id.*

[12] *In re Evanston Northwestern Healthcare Corp.,* 2007 FTC LEXIS 210, *170, 2007-2 Trade Cas. (CCH) P75,814 (Fed. Trade Comm'n Aug. 6, 2007). Note, however, the FTC did not reach the question of, and thus also did not endorse, whether it would credit such a defense if the evidence as a whole suggested that what the defendants claimed about charging rates below competitive levels was true.

the evidence as a whole tended to show that the price increases were due to ENH's ability to exercise market power and increased bargaining leverage as a result of the merger.[13] The FTC pointed to, among other things, evidence showing that senior officials at Evanston anticipated that the deal would provide "greater leverage to raise prices," and that prices did, in fact, increase post-transaction.[14]

Interestingly, rate uplift was asserted by ENH as a defense to the FTC's finding of market power. ENH contended that the price increase was not a result of a reduction in competition or enhanced bargaining leverage;[15] rather, during due diligence, Evanston learned that it had been charging rates below competitive levels. ENH claimed that most of its merger-related price increases simply reflected its efforts to raise Evanston Hospital's prices to the market competitive rates that Highland Park received.[16] The FTC found against the hospital, finding that the post-transaction price increases were the result of market power, while never explicitly addressing the contention that post-merger price increases were a result of contract transitioning.

Recent FTC merger-enforcement actions have attempted to use rate uplift theories of anticompetitive harm, with some success.

Recent FTC success in asserting rate uplift as an anticompetitive harm

Recent FTC merger-enforcement actions have attempted to use rate uplift theories of anticompetitive harm, with some success.

In *FTC v. Hackensack Meridian Health*, the FTC successfully argued that the potential for post-merger rate uplift was evidence of an anticompetitive effect. Hackensack Meridian Health (HMH) sought to acquire rival hospital Englewood Health. The district court concluded, and the Third Circuit affirmed, that, based on structural presumptions, the proposed merger was likely anticompetitive. A clause in HMH's contracts permitted HMH to raise rates at newly acquired facilities to match rates at HMH's similar existing facilities ("Acquisition Clauses"). As the court put it, "the FTC points to the Acquisition Clauses as proof of a likely price impact."[17] The court ruled against the merger, finding that, "because HMH has historically been able to negotiate higher rate increases than Englewood, the reasonable inference is that HMH will be able to do so after the merger (with the benefit of having added Englewood to its portfolio)."[18] While it is unclear in the text, the court appears to have taken the Acquisition Clauses in *Hackensack* as partial evidence of existing market power that would only increase post-transaction.

Rate-uplift theories were similarly used by the FTC in its September 2023 complaint in a Texas federal court against a large anesthesiology group, U.S. Anesthesiology Partners (USAP), and its private-equity owner. The complaint alleged multiple antitrust violations, including price-fixing and market allocation. Of particular interest was a series of anesthesiology-practice acquisitions after which USAP moved the acquired groups to its own significantly higher contract-reimbursement rates with payers—even across geographic markets. The FTC alleged that, with each practice

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[13] *In re Evanston Northwestern Healthcare Corp.,* 2007 FTC LEXIS 210, *3-4, 2007-2 Trade Cas. (CCH) P75,814 (Fed. Trade Comm'n Aug. 6, 2007).

[14] *Id.* at 39.

[15] *In re Evanston Northwestern Healthcare Corp.*, 2007 FTC LEXIS 210, *33-34, 2007-2 Trade Cas. (CCH) P75,814 (Fed. Trade Comm'n Aug. 6, 2007).

[16] *Id.* at *3-4.

[17] *FTC v. Hackensack Meridian Health, Inc.*, 2021 U.S. Dist. LEXIS 158158, at *49 (D.N.J. Aug. 4, 2021) affirmed at *F.T.C. v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 172-75 (3d Cir. 2022).

[18] *Id* at *75-79.

acquisition, "USAP raised the acquired group's prices to USAP's (often much) higher price."[19] The complaint against USAP, which recently survived a motion to dismiss,[20] describes at length each instance of this practice across multiple Texas geographies. Nevertheless, it is clear upon reading the full complaint that the rate uplift itself is not what would establish a violation of the Clayton Act; rather, the FTC is alleging that the defendants used acquisitions to increase market power, "wielding its increasingly dominant market position to net tens of millions of dollars in additional profits"[21] by "increase[ing] '[n]egotiating leverage with' payors."[22]

The FTC is explicit in its assertions that the acquisitions have created significant structural changes in multiple Texas geographies that have allegedly granted USAP durable pricing power. The complaint alleges that there are significant barriers to entry in the provision of anesthesiology services to hospitals, and there "are no close substitutes for patients undergoing procedures requiring anesthesia."[23]

Takeaways

No court and no agency enforcement action has relied solely on a mere contractual rate change as an anticompetitive price increase. This is appropriate, given that a contractual rate change post-transaction, absent an increase in market power, is not the type of effect with which the antitrust laws are concerned.

Antitrust practitioners across industries would benefit from following these cases carefully and remaining diligent in their deal analyses regarding any potential rate uplift. Rate uplift is of particular concern where a deal has other significant structural issues, but practitioners should also be prepared to remind antitrust enforcers that contractual provisions that allow for rate uplift are insufficient as a theory of competitive harm. ●

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[19] FTC Complaint at ¶ 5.

[20] *See* Memorandum Opinion and Order, May 13, 2024, *FTC v. U.S. Anesthesia Partners, Inc., et. al,* 4:23-CV-03560 (granting co-defendant Welsh Carson's motion to dismiss but denying USAP's motion to dismiss).

[21] FTC Complaint at ¶ 5.

[22] Id. at 92.

[23] Id. at 271.