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While federal and state enforcement agencies have continued to win some merger challenges, they have also suffered high-profile defeats in *AT&T/Time Warner*, *Sprint/T-Mobile* and other deals.

A range of outcomes on merger challenges

Recent developments and strategic implications

By Arthur J. Burke, Jesse Solomon, Micah G. Block, Janet Jones-Duffey and Keith Dore

In the United States, enforcement agencies generally lack authority to block mergers on competition grounds unilaterally. Instead, they typically must sue to enjoin a deal (in contrast to, e.g., China, where the agency itself may block a transaction on its own). Since the 1980s, the government has steadily won merger challenges that proceeded to trial. For example, during the eight-year Obama administration, the federal antitrust agencies won over two dozen litigated challenges, while incurring few losses. In recent years, however, government merger challenges have resulted in much more variable results at trial. While federal and state enforcement agencies have continued to win some merger challenges, they have also suffered high-profile defeats in *AT&T/Time Warner*, *Sprint/T-Mobile*, *Evonik/ PeroxyChem* and other deals. What accounts for these divergent outcomes, and what are the strategic implications for merger clearance?

DIVERGENT OUTCOMES

U.S. Agency Victories on Traditional Theories of Harm

U.S. agencies have won four merger challenges at trial since 2018. The Federal Trade Commission won in *Tronox/ Cristal*, *Otto Bock/Freedom Innovations* and *Sanford Health/ Sanford Bismarck/Mid Dakota Clinic*. And the Department of Justice successfully challenged *Novelis/ Aleris*. Each time, the agency pursued a traditional theory of harm, claiming essentially that a merger of head-to-head competitors eliminated meaningful existing competition in a concentrated market.

DIVERGENT OUTCOMES

Merger Challenges Lost

Against these four wins are four notable losses by U.S. agencies since 2018. It is difficult to generalize across these cases and each turned on somewhat unique circumstances.

In *Sprint/T-Mobile*, a consortium of state attorneys general pressed its challenge to the horizontal merger to trial — even though the DOJ had already settled its investigation with a divestiture that the parties could then hold up as a "fix" against the states' lawsuit. Although the theory of harm was familiar, the states' decision to litigate a merger challenge without the support of the federal antitrust authorities — and in opposition to a federal settlement — broke new ground. The district court rejected the challenge, concluding that the deal generated substantial efficiencies and the divestiture the DOJ had obtained mitigated potential harms. *New York v. Deutsche Telekom AG*, 19-cv-5434 (S.D.N.Y. Feb. 11, 2020).

In two other agency losses, federal enforcers pursued less common litigation theories. In *Evonik/ PeroxyChem*, the FTC challenged a horizontal deal between suppliers of hydrogen peroxide based on a complex supply-side "swing theory" of competitive harm. *Fed. Trade Comm'n v. RAG-Stiftung*, 19-

cv- 2337 (D.D.C. Feb. 3, 2020). The district court rejected the challenge, finding that the FTC's supply-side substitution argument oversimplified the relevant market by trying to encompass all "non-electronics" hydrogen peroxide. More prominently, the DOJ litigated a vertical challenge for the first time in 40 years when it sued to block the $108 billion *AT&T/ Time Warner* transaction. That challenge failed, too. The district court emphasized the pro-competitive benefits of vertical integration in video programming and distribution. *United States v. AT & T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd sub nom. United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

In the fourth agency loss, the DOJ claimed to be pursuing a traditional horizontal theory of harm regarding airline booking services in *Sabre/ Farelogix*. But the district court found that the agency had failed to identify a proper product market in which the merging parties were competitors and, accordingly, had not proven a reasonable probability of antitrust harm. *United States v. Sabre Corp.*, 19-cv-1548 (D. Del. Apr. 7, 2020). The DOJ is appealing this decision. Notably, the United Kingdom's Competition and Markets Authority issued a decision blocking this transaction shortly after the district court's ruling.

Strategic Considerations

U.S. agencies have lost merger challenges in both horizontal and vertical deals. While it may be easy to chalk up the DOJ's *AT&T/Time Warner* loss to the vertical nature of the transaction, the seven other transactions that U.S. agencies litigated were all horizontal. We expect that agencies will continue to take the long-standing view that horizontal mergers are more likely to harm competition than vertical deals, but the loss in AT&T/Time Warner does not sound the death knell for scrutiny of vertical deals.

U.S. agencies have been willing to depart from traditional theories; courts have so far been reluctant to follow. Although traditional challenges persist, the agencies have repeatedly advanced novel theories of competitive harm in recent years, with a particular focus on innovation. *AT&T/Time Warner* and *Otto Bock/Freedom Innovations* are prime examples. In both deals, the agencies argued that the deal would reduce, impede, or slow efforts to innovate in the parties' respective spaces. The agencies have also pursued complicated and novel models of competitive effects, including a particular type of bargaining model in *AT&T/ Time Warner* and a complex theory about switching between various grades of hydrogen peroxide in *Evonik/PeroxyChem*. More evidence of this trend toward evolving views on antitrust doctrine appears in the agencies' January 2020 decision to release a revised draft of their vertical merger guidelines for the first time in 35 years. Meanwhile — and perhaps unsurprisingly — courts have generally continued to adhere to traditional articulations and applications of U.S. antitrust law, even as some plaintiffs push for change. For example, courts in every case referenced here have focused on traditional approaches to establishing a market definition and antitrust harm, even as the agencies have tried new approaches more consistent with their own Horizontal Merger Guidelines.

FTC leaders have been relatively united on litigations. Strikingly, out of more than 10 cases in which the FTC voted to issue an administrative complaint since 2018, a Commissioner voted no in only two instances — one in *Fidelity National Financial/ Stewart Information Services* and a second in *Peabody Energy/ Arch Coal*, both by Republican Commissioner Christine S. Wilson. As noted, several of the FTC complaints involved novel theories of competitive harm. This suggests an openness to non-traditional theories across the political spectrum at the Commission. It should be noted, however, that there have been some significant disagreements among the Commissioners relating to merger settlements.

Looking Forward

Dealmakers have historically faced great pressure to settle or abandon agency challenges. This pressure arises in part from the practical impact of merger challenges on deal timelines, particularly for public companies under pressure from shareholders to close deals and yield the benefits, and for companies whose ability to obtain financing for a deal turns on closing within a particular timeline. Historically, the agencies' strong litigation records have also dissuaded parties from traversing agency challenges. One open question arising out of these recent cases is whether the agencies' mixed record of success might embolden more parties to litigate rather than abandon deals — for example, as recently as January 2020, Illumina abandoned its proposed $1.2 billion acquisition of PacBio. It is also possible that in the reverse, agencies may be deterred from pursuing lawsuits that may yield uncertain results. Now, with antitrust at the forefront of public discourse, the range of outcomes over the past several years defies any notion of a formulaic playbook for antitrust enforcement going forward. ■

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