LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

FTC, DOJ Merger Pressure And How To Bear It Under Biden

By **Bryan Koenig**

Law360 (November 18, 2022, 2:08 PM EST) -- The Biden administration's competition officials have now been fully in place for a year, and antitrust merger professionals are adjusting to their new, aggressive approach and attempts to rewrite the rules of U.S. enforcement.

Since Lina Khan took the helm as chair of the Federal Trade Commission on June 15, 2021, and Jonathan Kanter was sworn in as assistant attorney general for the Antitrust Division at the U.S. Department of Justice on Nov. 16, 2021, the agencies have been putting certain deals under a closer microscope, challenging more transactions and often shunning settlements that let merging parties move forward by proposing divestitures.

As the enforcers' policies have evolved, the attorneys who navigate deals are handling a greater propensity by the DOJ to challenge deals outright rather than accept settlements, a general FTC policy requiring parties to problematic transactions to obtain prior approval the next time they carry out a merger, and a far more skeptical take on corporate justifications for a range of tie-ups.

"Clients need to anticipate that the review of their transaction may take longer. May be more difficult than under previous administrations. And frontload the antitrust analysis, including fix-it first remedies, such that they should consider whether to fix it first before even filing," said Timothy Cornell, the head of Clifford Chance LLP's U.S. antitrust practice.

The sharp pendulum shift toward more in-depth probes and away from facilitating transactions, even the most benign ones, has left enforcers bruised along the way.

The agencies have endured concerns from congressional Republicans, plummeting FTC staff morale and a series of high-profile litigation losses. Litigation has been especially tough for the DOJ, which has notched only one major win in a litigated merger challenge, against Penguin Random House LLC's planned $2.18 billion purchase of rival publisher Simon & Schuster.

Enforcers Raising New Concerns

For all the policy changes, Vinson & Elkins LLP antitrust practice chair Darren Tucker said that private practitioners' roles have changed little despite the enforcers' tougher line. Lawyers for merging parties are still doing due diligence, mulling potential areas of enforcer concern and interest, as well as possible risks, and developing a strategy to engage with agency staffers.

"But certainly there are cases that touch on more hot-button issues or subjects," Tucker said, where "there might be more scrutiny than past administrations, Republican or Democratic."

Particular industries that seem to interest enforcers, Tucker said, include technology and health care, as well as deals with significant labor market implications.

The greater interest in areas beyond consumer welfare, including labor impacts, has helped make merger probes more costly to navigate, Cornell said.

"The second requests seek a broader scope," he said, referring to in-depth merger probes.

Long-term buyer strategy has also drawn special interest among enforcers, Tucker noted. Enforcers have repeatedly expressed potential concerns with so-called roll-up strategies, through which companies buy up swaths of an industry one relatively small transaction at a time, sometimes through deals so small they don't trigger reporting requirements under the Hart-Scott-Rodino Act.

Earlier this month, the FTC put potential roll-up strategies on notice with a policy statement envisioning sweeping powers to target "unfair methods of competition." The agency said such violations could include a series of mergers that individually might not violate antitrust law but could cumulatively gobble up competitors and yield "the harms that the antitrust laws were designed to prevent."

If roll-up, labor or high-interest industry concerns pop up in a transaction, Tucker said attorneys need to do a "deeper dive" to mull potential enforcer interest.

And roll-up strategy concerns require attention even for deals that don't trigger reporting thresholds, according to Cornell.

"They need to treat their below-threshold transactions with a lot more caution," the Clifford Chance antitrust practice head said. "There's a lot of noise out there about rollups that they should consider."

According to Tucker, the Biden-era agencies have also shown an increased interest in the kind of boilerplate language baked into merger agreements in which companies try to allocate antitrust risk, such as through specific divestiture commitments and breakup fees.

"We've seen both agencies scrutinize these provisions and actually take the position that their mere existence" demonstrates a recognition by the parties that their deal is anti-competitive, Tucker said.

Tucker pointed specifically to the DOJ's challenge of Assa Abloy's $4.3 billion proposed purchase of Spectrum Brands' hardware and home improvement division, namely the mid-September complaint's discussion of how the companies negotiated their deal.

"[I]n the summer of 2022, Assa Abloy and Spectrum effectively conceded that their proposed transaction would harm competition by proposing a 'remedy' to antitrust enforcers that would involve Assa Abloy selling off parts of its business units that that sell residential door hardware in the United States," the DOJ said in the complaint. "Selling that incomplete package of assets would not replicate the intensity of competition that exists today."

According to Tucker, a former FTC attorney, merging parties now need to be careful in how they discuss and negotiate risk allocation, after years of discussions on whether that language could or would be held

against them. "That is a very significant shift," he said of the Assa Abloy complaint.

Tucker said he's seen less use generally of boilerplate risk allocation language in merger agreements recently, driven by "diminished predictability" of what deals will draw extra attention, thanks to enforcer aggressiveness.

To handle that uncertainty, Tucker said attorneys need to go beyond specific theories of harm that have guided past reviews.

"You have to put on your creativity hat and say, 'What are all the different ways my transaction could be scrutinized?'" he said.

Think Like A Plaintiff

Ankur Kapoor, a partner at Constantine Cannon LLP, says attorneys handling merger reviews need to think like plaintiffs attorneys, dealing with all possible antitrust theories, such as those focused heavily on impacts to future markets, including in deals where companies are accused of scooping up nascent competitors.

"Think about theories to not just vertical foreclosure or overlapping markets, but what might this merger do to competition in the future," Kapoor said.

Another area of interest, for both agencies but perhaps especially for the FTC, are transactions involving private equity firms. The FTC's Democrat majority used a June consent decree clearing private equity firm JAB Consumer Partners to buy a series of veterinary clinics to blast private equity roll-ups that allow investment firms to buy swaths of a market one tie-up at a time.

The DOJ also raised concerns that UnitedHealth's proposed buyer of a key Change Healthcare unit was a private equity firm. Those concerns were rejected along with the rest of the DOJ's challenge to the $13.8 billion merger.

"Generally private equity has gone from darling to devil … in terms of divestiture candidates," Cornell said.

Higher Bar for DOJ Settlements

For the DOJ, one of the biggest Biden-era changes has been Kanter's strong aversion to most merger clearance settlements, preferring to challenge potentially problematic transactions outright.

In fact, since Kanter announced the policy in a January speech, only one DOJ deal has been made public — a quiet settlement unacknowledged by the DOJ itself under which the department gave its assent for Federal Reserve and Federal Deposit Insurance Corp. approval of a merger between West Coast banks, on the condition they sell 10 branches.

"They have a very knee-jerk negative reaction," Hill Wellford, the head of Vinson & Elkins LLP's antitrust investigations team, said of consent decrees companies might propose to the DOJ.

Tucker says attorneys facing DOJ intransigence over their deals need to consider two possibilities: fix-it first remedies, in which parties try to divest overlapping assets, establish intercompany firewalls or

make other changes without DOJ input, or "plan for litigation right off the bat." If only a small part of a deal appears to raise antitrust concerts, Tucker said it may be in parties' interests to plan to litigate.

"The department has not had a great track record in bringing merger cases," Tucker said. "That may encourage parties to roll the dice."

Critics of the DOJ argue that the shift toward fix-it first remedies gives the department little or no control over the ultimate outcome that it could have otherwise negotiated through a consent decree.

In the DOJ's unsuccessful challenge to UnitedHealth's purchase of Change Healthcare for instance, the D.C. federal judge agreed that firewalls and a divestiture devised by the companies but panned by the department were sufficient to fix any competition concerns. In that case, however, the looming threat of a challenge helped convince the companies to divest the industry leader for so-called first-pass claims-editing technology to help insurers process claims for reimbursement, instead of the smaller business unit they'd originally proposed to sell off.

The DOJ's reluctance to cut merger clearance deals may have contributed to its extraordinarily busy litigation docket against a range of transactions, in largely unsuccessful court battles against deals in the sugar, government contracting, health insurance and publishing markets.

The DOJ can claim some victories, though. The threat of legal complaints did drive the abandonment of other deals, such as one in refrigerated container manufacturing.

But even its victories come at a cost in terms of the department's time and effort.

"All of those various matters place an increased tax on the time of staff," said Shawn R. Johnson, a Crowell & Moring LLP partner and co-chair of its antitrust and competition group.

The result, according to Johnson, is the agencies have less capacity in their initial 30-day probes before launching in-depth second requests for information.

Further straining agency resources are ongoing cases against Google and Meta, as well as a massive surge in recent years of notified transactions, although the number of new deals appears to be going down.

The agencies' workload "puts a premium on being proactive," Johnson said. He asserted that attorneys need to be ready to engage with enforcers "as quickly as possible," doing their legwork in advance of agency scrutiny, all in order to avoid a second request.

FTC Clamps Down on Future Deals

The DOJ policy is not shared by the FTC, where consent decree approach "sure looks like it's business as usual," said Kevin Hahm, a partner with Hunton Andrews Kurth LLP and a former FTC official.

Instead of avoiding consent decrees, the FTC has preferred giving itself more power over transactions through the resurrection of a general policy **to** insist on prior approval whenever it cuts a merger clearance deal. Revival of the blanket policy gives the agency veto power over future deals those companies ink in related industries, typically for a 10-year period.

The FTC also has made a dramatic use of warning letters telling merging parties that even if the initial waiting period has ended and the companies can close their transaction, they are doing so at their own risk, because the agency can always contest the deal later.

Prepare for More Changes

The next major anticipated step for the enforcers are new merger guidelines expected to be proposed in the coming months, after the FTC already disavowed Trump-era vertical merger guidelines and the DOJ expressed severe reservations with the existing version. Until new guidelines are in place enshrining agency thinking, Cornell said to look at what enforcers have said and done in speeches and enforcement actions.

"You listen to the other guidance out there. And formulate your analysis accordingly," he said.

--Editing by Nicole Bleier.
