

Biggest Merger Review Developments Of 2021 So Far

By **Matthew Perlman**

Law360 (July 30, 2021, 1:38 PM EDT) -- The year started off with two high-profile deals abandoned in the face of pressure from U.S. enforcers determined to stop so-called killer acquisitions. Now, antitrust practitioners are waiting for decisions on a number of pending merger challenges. Here, Law360 looks at the major developments so far in 2021 as the new administration gears up for a busy second half.

Killed Acquisitions

Procter & Gamble Co. called off its planned purchase of women's shaving supply company Billie Inc. in early January, about a month after the Federal Trade Commission moved to block the deal over concerns the consumer goods giant was acquiring a potentially disruptive competitor.

The commission said Billie had experienced significant growth in sales during its two-year existence before the deal was cut by targeting Generation Z and millennial women. Billie's marketing included attacking the industry practice of charging more for women's razors than comparable men's razors, what the commission termed the "pink tax."

P&G had already launched its own direct-to-consumer website that would have competed against Billie when the deal was cut, and the move also halted Billie's planned expansion into brick-and-mortar stores, the FTC said.

About a week later, Visa abandoned its proposed \$5.3 billion purchase of Plaid, following a U.S. Department of Justice merger challenge alleging the debit card giant was scooping up "a nascent competitive threat" to its dominance in online debit transactions in the country.

The DOJ pointed in its complaint to Plaid's plan to leverage the connections it has built to 11,000 U.S. banks and more than 200 million consumer bank accounts in creating a new online debit service. The merger, according to the agency, was meant by Visa to at least partly "eliminate this existential risk."

That case challenged the merger directly, but it also included a claim under Section 2 of the Sherman Antitrust Act, which prohibits monopolistic practices.

Paul Cuomo, a partner with Baker Botts LLP, told Law360 that both the Billie and Plaid deals involved a hot topic in antitrust at the moment — the acquisition of emerging competitors — and said it's significant that each agency had some success.

"They were abandonments, not court successes, but they both blocked deals on a nascent competition-type theory," he said. "It's certainly interesting and noteworthy."

One catalyst behind the focus on nascent-competition deals was Facebook's acquisitions of then-potential competitors Instagram and WhatsApp in 2012 and 2014, respectively, deals now being challenged in enforcement actions brought by the FTC and a contingent of state enforcers.

But Alexis J. Gilman, a partner with Crowell & Moring LLP and a former assistant director at the FTC, told Law360 that the Billie and Plaid cases show the agencies have concerns around deals for nascent competitors beyond the tech sector.

"It's very clear that what may have started as a concern about those types of transactions in the tech space is certainly spilled over to affect how the agencies are looking at transactions in other industries," Gilman said.

Those cases were all brought during the previous administration, and Cuomo noted that the FTC and DOJ are currently reviewing their joint guidance on mergers to see if they're "overly permissive" in response to President Joe Biden's executive order in July on competition policy. This suggests there could be more cases targeting these types of deals in the future, he said.

The FTC also now has a Democratic majority, headed by its progressive new chair, Lina Khan, who is known for advocating aggressive enforcement that she has already begun to pursue. Jonathan Kanter, a founding partner at The Kanter Law Group PLLC, who is known for promoting an aggressive approach as well, has now been nominated to fill the top antitrust role at the DOJ.

Gilman said these developments suggest the first half of this year should be seen as the floor when it comes to merger enforcement.

"It could be a pretty significant ramp-up before we come close to reaching the ceiling," he said.

The DOJ also succeeded in blocking a more traditional deal this year, as Aon PLC called off its planned \$30 billion megamerger with Willis Towers Watson in late July. U.S. enforcers challenged the deal in March, saying the move to combine the world's second- and third-largest insurance brokers by revenue raised concerns over the markets for a number of different insurance brokerage services.

Cuomo told Law360 it was interesting to see the DOJ continuing to push that case even after enforcers in Europe cleared the deal with conditions. The European Commission approved the move in July after the companies agreed to unload Willis' reinsurance arm to broking rival Arthur J. Gallagher for \$3.57 billion.

The companies' efforts to appease the DOJ, however, were not successful.

Administrative Cases

The FTC has two big merger cases pending in its administrative court going into the end of the year: its challenge of tobacco giant Altria's completed \$12.8 billion purchase of a minority stake in electronic cigarette company Juul Labs Inc., and Illumina's planned \$8 billion purchase of cancer detection company Grail.

Filed in April 2020, the Juul case alleges that Altria's acquisition of a 35% stake in the outfit was part of an illegal agreement between the companies not to compete for the sale of electronic cigarettes. Altria allegedly shut down its own Nu Mark e-cigarette operations in the weeks before striking the deal.

The FTC also contends the merger agreement included a noncompete provision preventing Altria from launching similar products for at least six years.

The companies argue that while Altria and Juul once competed in the market for electronic vaporizers, Altria's so-called "cigalike" products, which resemble traditional cigarettes, were simply beaten by Juul's more popular pod products that look like a USB drive.

Cory Talbot, a partner with Holland & Hart LLP, told Law360 that the argument is almost like a variation of the failing firm defense, where companies contend a merger is needed to ensure a business remains a float.

"I'm not surprised that the agencies didn't buy that," Talbot said. "I think we've seen over the last couple of years the agencies have been very skeptical" of this type of argument, noting instances when enforcers said companies "miraculously recovered" after claiming to be on the brink of failure.

FTC staff argued the Juul case in front of Administrative Law Judge D. Michael Chappell in a trial that kicked off July 2. It was the agency's first fully virtual in-house proceeding, held remotely due to the COVID-19 pandemic.

The commission's other major pending administrative challenge is of DNA sequencing giant Illumina's planned reacquisition of Grail, a cancer detection business it founded and spun off several years ago.

The FTC moved in March to block the deal over concerns that it would diminish innovation in the U.S. market for tests that screen for multiple types of cancer at very early stages through DNA sequencing. Illumina does not make similar cancer tests, but enforcers are concerned because it provides the DNA sequencing Grail and its competitors rely on.

The agency initially asked a federal court for a preliminary injunction to prevent the move from closing while it carried out the in-house trial. But the FTC dropped that effort after the European Commission opened its own investigation of the deal.

Gilman said the challenge will be tricky because the FTC has not litigated a purely vertical merger, or a deal between companies at different points in the supply chain, in several decades. There's also recent precedent from a DOJ vertical merger challenge that the agency will have to contend with, he said.

The last litigated challenge to a vertical deal was brought by the DOJ when it failed to block AT&T's acquisition of Time Warner, a rejection affirmed by the D.C. Circuit in February 2019.

Illumina and Grail have also offered to maintain long-term supply contracts and make other concessions in an effort to ease the concerns enforcers raised about their deal. Gilman said courts will take the offers into account when making a decision on the challenge.

"I think it's going to be a tough case for the agency," Gilman said.

In Court

One of the FTC's highest-profile pending cases is its enforcement action accusing Facebook of monopolizing the personal social networking market through its acquisitions of Instagram and WhatsApp and restrictions placed on third-party developers.

The agency filed suit in December in D.C. federal court, along with a contingent of state-level enforcers that filed a parallel case with similar allegations. The cases are not pure merger challenges, but they seek remedies up to including divestitures.

U.S. District Judge James E. Boasberg delivered a huge blow to those efforts in June, issuing orders dismissing the case from state enforcers in its entirety and tossing the FTC's complaint with leave to amend.

Gilman said it will be interesting to see how the FTC moves ahead, especially with a Democratic majority and Khan now serving as commission chair. The agency can choose to amend its complaint to address the concerns Judge Boasberg raised about how enforcers defined the market Facebook allegedly dominates. The commission could also choose to take the case through its administrative process instead.

"Obviously, it's not the way that the FTC wanted to kick off their revamped approach to tackling antitrust issues in the tech space," Gilman said of the dismissal. "It just shows how challenging these issues and these cases can be."

The FTC received additional time from the court in July to file its amended complaint. The state-level enforcers also filed a notice of appeal in late July, as they look to take their case to the D.C. Circuit.

Also complicating the FTC's next move is that Facebook has asked for Khan to be recused from matters related to the company over her past work and public statements criticizing it.

Meanwhile, the FTC is awaiting a ruling from a New Jersey federal court on its bid for a preliminary injunction to halt the merger of Hackensack Meridian Health Inc. and Englewood Healthcare Foundation, two Bergen County health care systems.

The commission alleges the combined system would control three of six inpatient general acute care hospitals in Bergen County, New Jersey, saying the move would result in higher rates for insurers and lower incentives to improve the quality of care.

The hospitals have countered that the commission is ignoring nearly all of the more than two dozen competitors that are less than 15 miles from Englewood, including a number of "world-renowned New York City hospitals" that are just across the Hudson River.

The case is significant because it's the FTC's first hospital merger challenge since it lost a bid to block the merger between Philadelphia-area health care systems Jefferson Health and Albert Einstein Healthcare Network. The district court found in December that the government's alleged markets in that case wrongly "focus more on patients" than the insurers that will feel the immediate impact of any price increase.

The commission abandoned the Philadelphia-area challenge in March after the Third Circuit refused to issue an emergency stay.

Talbot told Law360 he doesn't see the Philadelphia case as a turning point for the FTC's efforts on hospital mergers, but that enforcers may have "overstepped" in that instance. With the Bergen County case, he said, the commission is relying more on its traditional approach to health care deals.

"I think they went too far in Philadelphia; it'll be interesting to see what the judge does" with Bergen County, Talbot said.

Looking Ahead

The most significant development for merger reviews during the first half of 2021 might be the gearing up of the new administration, with President Biden's executive order on competition policy and his selection of aggressive leaders for the antitrust agencies.

Gilman said that Khan represents a "progressive and transformational" view of antitrust and that this approach is likely going to have a big effect on the way the FTC views mergers, calling her selection to lead the commission "a blast of wind in the direction of much more active and aggressive merger review and enforcement."

The nomination of Kanter to head the DOJ's Antitrust Division speaks similarly, Gilman said, considering his history in the tech space where he frequently represented clients opposing Google.

"He's certainly viewed by the progressives as one of their own," Gilman said.

Another looming issue heading into the end of the year is the continued suspension of early terminations. In February, the FTC and DOJ announced a "temporary" halt of their normally common practice of ending merger reviews early for transactions that clearly raise no competitive concerns so that enforcers can review the process.

The agencies cited the transition to a new administration, the "unprecedented volume" of merger filings received at the start of the year and the ongoing pandemic as reasons for reviewing the procedure.

But heading into the final stretch of 2021, there's been no indication about when or if early terminations will resume.

"That is something that continues to be an issue," Cuomo told Law360, noting that he is asked about the suspension by clients on a near-daily basis.

Gilman said there's also been rumblings that with Khan now in place, there have been more second requests from the FTC for additional information from merging parties and that it is becoming more difficult for companies to convince agency staff that deals are not problematic.

If those reports are accurate, Gilman said, that means "more time and cost to obtain merger clearance" generally.

A stark indication of this more aggressive approach to mergers could emerge through the agency's review of Amazon.com Inc.'s planned \$8.45 billion purchase of Metro-Goldwyn-Mayer Studios Inc., or MGM Studios. Reports have indicated that the FTC requested more information about the move, which would add more than 4,000 films and 17,000 TV shows to Amazon's streaming collection.

Like Facebook, Amazon has also asked Khan to recuse herself from all matters related to the company.

Rani Habash, a partner with Dechert LLP, told Law360 that the deal might be an opportunity for the commission to employ the vertical merger guidelines issued last year in a potential challenge, though he said it would be hard for the agency to get around how dynamic and competitive the video entertainment market is.

Vertical mergers are also generally more difficult to challenge, he said, because courts take greater account of the cost-savings that are generated when a supply chain gets consolidated than when two competitors merge.

"As it stands right now, courts have a whole body of case law to follow, so if a theory strays too far outside of precedent, the FTC could have a difficult time winning," Habash said.

--Editing by Philip Shea.