



United States: Government Investigations

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In summary

US antitrust authorities have remained extremely active in their enforcement efforts and this article addresses several types of government investigations by the DOJ and FTC, including litigated merger challenges, mergers abandoned owing to enforcement challenges, settled mergers and non-merger enforcement efforts. Litigated merger challenges involve challenges to transactions from the DOJ or FTC that are adjudicated through administrative proceedings and federal courts. Mergers abandoned owing to enforcement actions are transactions that are abandoned after the agency investigates or files a complaint. Settled mergers are enforcement actions in which the agency negotiates a settlement with parties to allow the merger to go forward, but often require the divestiture of certain assets. Finally, non-merger enforcement includes actions taken by the FTC or DOJ against anticompetitive behaviour unrelated to a transaction, such as price-fixing.

Discussion points

- Use of structural remedies
- Increased activity from state attorneys general
- Strong FTC dissents
- Increased scrutiny of large technology companies
- Criminal indictments in labour markets
- First loss of hospital merger case

Referenced in this article

- Department of Justice
- Federal Trade Commission

Federal Trade Commission actions

Litigated merger challenges

Jefferson/Einstein

On 14 September 2018, Thomas Jefferson University and Albert Einstein Healthcare Network announced that they had entered into an agreement to merge. [1] On 27 February 2020, the FTC issued an administrative complaint alleging that the proposed merger would reduce competition in the market for inpatient general acute care hospital services and inpatient acute rehabilitation services in Philadelphia County and Montgomery County, Pennsylvania. [2] At the same time, the FTC filed a joint complaint with the Pennsylvania Attorney General in federal district court requesting a temporary restraining order and preliminary injunction to prevent the parties from consummating the merger and to maintain the status quo until the administrative proceeding. [3]

Jefferson and Einstein both offered inpatient general acute care services, which includes a broad range of medical and surgical diagnostic and treatment services that require an overnight hospital stay. [4] The FTC's complaint alleged that the proposed merger would result in the parties controlling at least 60 per cent of the inpatient general acute care market in Northern Philadelphia and at least 45 per cent of the inpatient general acute care market in Montgomery County. [5] Jefferson and Einstein both also provided inpatient rehabilitation facilities. [6] The FTC's complaint alleged that the proposed merger would result in the parties controlling at least 70 per cent of the inpatient acute rehabilitation market in the Philadelphia area. [7] The FTC alleged that the proposed merger would make it difficult for a commercial insurer to market a health plan to employers and their employees living or working in the Philadelphia area that excluded all of the inpatient general acute care hospitals and inpatient acute rehabilitation facilities owned by Einstein and Jefferson. [8]

On 8 December 2020, Judge Gerald J Pappert of the Eastern District of Pennsylvania denied the FTC's request for a preliminary injunction stating that the FTC's alleged markets wrongly focused on patients rather than the insurers that would feel the immediate impact of any price increase. [9] The FTC appealed the district court order and filed for an emergency stay, but on 22 December 2020, the Third Circuit refused to issue the emergency stay. [10] In the FTC's first loss of a hospital merger case since 1999, [11] the FTC voted unanimously on 15

March 2021 to dismiss its appeal to the Third Circuit of the district court decision declining to preliminarily enjoin the merger and to dismiss its administrative complaint. [12]

Altria/Juul

On 20 December 2018, Altria Group, Inc announced that it would acquire a 35 per cent stake in Juul Labs, Inc for US\$12.8 billion. [13] On 1 April 2020, the FTC issued a complaint alleging that Altria's acquisition of this large minority stake in Juul, along with a series of agreements that the parties entered into in connection with the investment, constituted an unreasonable restraint of trade and lessened competition. [14]

Altria and Juul were competitors in the market for closed-system e-cigarettes for several years. [15] The FTC's complaint alleged that, by mid 2017, Altria's e-cigarette was the second most popular brand by market share, but by the end of 2017, Juul had become the leading e-cigarette manufacturer, beating Altria. [16] The FTC alleged that Altria dealt with this competitive threat by agreeing not to compete in return for a substantial ownership interest in Juul. [17] The deal made Altria Juul's largest shareholder, allowed Altria to appoint an observer to Juul's board of directors and permitted Altria to appoint three members of Juul's board after converting its non-voting shares to voting securities. [18] The FTC alleged that Altria's investment in Juul and its nearly simultaneous decision to exit the e-cigarette market eliminated current and future head-to-head competition between the parties. [19] An administrative trial began on 2 June 2021, [20] in which the FTC is seeking to force Altria to divest its stake in Juul and terminate the companies' non-compete agreement. Altria argues that the noncompete agreement allows Altria's existing e-cigarettes to remain on the market and only prevents Altria from developing new e-cigarette products while Altria had access to detailed information on JUUL's products and research. [21] The administrative law judge will make an initial decision, and then the FTC's commissioners will vote on the matter.

Illumina/GRAIL

On 21 September 2020, Illumina, Inc announced that it would acquire GRAIL, Inc in a transaction valued at US\$7.1 billion. [22] On 30 March 2021, the FTC issued a complaint alleging that the proposed acquisition threatens to diminish innovation in the US market for multi-cancer early detection tests. [23] At the same time, the FTC filed a complaint in the US District Court for the District of Columbia seeking a temporary restraining order and preliminary injunction to stop the deal pending an administrative trial. [24]

GRAIL makes non-invasive, early detection liquid biopsy tests that can screen for multiple types of cancer in asymptomatic patients at very early stages using DNA sequencing. [25] The FTC alleged that Illumina is the dominant provider of DNA sequencing that is a viable option for these multi-cancer early detection tests in the US. [26] The FTC alleged that the proposed acquisition would allow Illumina to raise prices for DNA sequencing instruments, impede

GRAIL's competitor's research and development efforts or refuse or delay executing licence agreements that all multi-cancer early detection test developers need to distribute their tests. [27]

On 20 April 2021, the European Commission announced that it was investigating Illumina's acquisition of GRAIL, despite the fact that the transaction did meet the jurisdictional thresholds either at the EU level or for any particular member state. [28] Following its preliminary investigation, the European Commission expressed concerns that the acquisition would impact the development and supply of NGS-based cancer detection tests. [29] The European Commission has until 29 November 2021 to make a decision. [30]

Following the European Commission's announcement, the FTC authorised staff to dismiss its federal court complaint for a preliminary injunction and temporary restraining order. [31] The FTC stated that it had sought preliminary relief in federal court to prevent the parties but closing pending the administrative litigation, but that preliminary relief was no longer necessary once Illumina and GRAIL could not complete the transaction without obtaining clearance from the European Commission. [32] The administrative trial is still scheduled to begin on 24 August 2021. [33]

Mergers abandoned due to enforcement actions

Peabody Energy/Arch Coal

On 19 June 2019, Peabody Energy Corporation and Arch Coal, Inc announced that they had entered into an agreement to combine the companies' Powder River Basin and Colorado assets in a joint venture. [34] On 26 February 2020, the FTC issued an administrative complaint alleging that the proposed joint venture would eliminate competition between Peabody and Arch Coal, two major competitors in the market for thermal coal in the Southern Powder River Basin and the two largest coal-mining companies in the US. [35] At the same time, the FTC sought a temporary restraining order and preliminary injunction to block the transaction. [36] On 29 September 2020, the US District Court for the Eastern District of Missouri granted the FTC's request for a preliminary injunction, [37] and the parties announced that they had abandoned their transaction. [38] In a press release issued by the FTC, Ian Conner, Director of the Bureau of Competition, commented that 'Peabody and Arch Coal's decision to abandon their joint venture will preserve competition in the market for thermal coal, which is sold to power-generating utilities that provide electricity to millions of Americans. The joint venture likely would have raised the price of coal to the utilities and ultimately to consumers.' [39]

Procter & Gamble/Billie

On 8 January 2020, The Procter & Gamble Company announced plans to acquire Billie Inc, a direct-to-consumer company selling women's razors and body care products. [40] On 8 December 2020, the FTC issued an administrative complaint and authorised staff to seek a temporary restraining order and preliminary injunction to block the proposed acquisition. [41] The complaint alleged that P&G is the market leader for women's and men's wet shave razors, and Billie's objective was to 'shake up the women's shaving category'. [42] The complaint alleged that the proposed acquisition would eliminate substantial and growing head-to-head competition in the already highly concentrated wet shave razor market. [43] On 5 January 2021, P&G and Billie abandoned their proposed acquisition. [44]

Settled mergers

Danaher/GE Biopharma

On 25 February 2019, Danaher Corporation announced that it had entered into an agreement with General Electric Company to acquire General Electric's Biopharma business for US\$21.4 billion. On 19 March 2020, the FTC approved a consent decree by a vote of 3:2, allowing the acquisition to proceed, subject to divestitures of several assets. [45]

The FTC was concerned that the proposed acquisition would substantially lessen competition in the US in highly concentrated product markets for ten products that companies use to manufacture biopharmaceutical drugs. [46]

Under the consent decree, Danaher agreed to divest to Satorious AG all rights and assets to research, develop, manufacture, market and sell microcarrier beads, conventional low-pressure liquid chromatography columns, conventional low-pressure liquid chromatography skids, single-use low pressure liquid chromatography skids, chromatography resins, low-pressure liquid chromatography continuous chromatography systems, single-use tangential flow filtration systems and label-free molecular characterisation instruments. [47] On 31 March 2020, Danaher announced that it closed the transaction. [48]

Eldorado Resorts/Caesars Entertainment

On 24 June 2019, Eldorado Resorts, Inc and Caesars Entertainment Corporation announced that they had entered into a merger agreement to create the largest US gaming company in a transaction valued at US\$17.3 billion. [49] On 26 June 2020, the FTC approved a consent decree by a vote of 3:1:1, allowing the acquisition to proceed, subject to certain divestitures. [50]

The FTC was concerned that the proposed acquisition would harm competition for casino services in the South Lake Tahoe area of Nevada and the Bossier City-Shreveport area of Louisiana. [51]

Under the consent decree, Eldorado agreed to divest both its only casinos in South Lake Tahoe and Bossier City-Shreveport to Twin River Worldwide Holdings and to sell its Kansas City casino within 14 months of the deal's closing. [52] Commissioner Rohit Chopra voted no, and in his dissenting statement, he expressed his reservations about the terms of the settlement. He stated that the FTC should not enter into risky settlements with delayed divestitures and should only agree to settlements when divestitures will quickly restore competition eliminated by the merger. [53] On 20 July 2020, Caesars announced that it closed the transaction. [54]

Non-merger enforcement efforts

Louisiana Real Estate Appraisers Board

On 31 May 2017, the FTC filed an administrative complaint against the Louisiana Real Estate Appraisers Board alleging that the Board unreasonably restrained price competition for appraisal services in Louisiana. [55] The FTC alleged that the Board prevented appraisal management companies and appraisers from arriving at appraisal fees through negotiations and through the operation of the free market. [56] The FTC complaint also alleged that the Board required appraisal fees to equal or exceed the median fees identified in survey reports commissioned by the Board. [57] On 10 April 2018, the FTC issued a summary decision rejecting the Board's affirmative defense that the Board is immune from federal antitrust liability. [58] On 19 April 2018, the Board filed a petition for review of the 10 April order with the Fifth Circuit relating to state action immunity, and on 20 April 2018, the Board submitted to the FTC a motion to stay the administrative proceedings pending judicial review by the Fifth Circuit. [59] On 6 June 2018, the FTC denied the motion to stay, [60] but on 11 June 2018, the Board filed a motion to stay the administrative proceeding pending appeal with the Fifth Circuit. [61] On 17 July 2018, the Fifth Circuit granted the Board's motion to stay the proceedings. [62] On 28 February 2019, the Fifth Circuit found that the Board's petition was premature and dismissed its petition for lack of jurisdiction, stating that courts of appeals only have jurisdiction to review final orders, and lifted the stay. [63] On 14 April 2021, shortly before the administrative trial was set to begin, the parties withdrew the matter from adjudication for the purpose of considering a proposed consent decree. [64] On 11 June 2021, the FTC entered a settlement, which prohibited the Board from adopting a fee schedule for appraisal services or taking any other actions that have the effect of raising, stabilising or fixing compensation levels for appraisal services. [65] The proposed settlement also required

the Board to rescind its rule in the Louisiana Administrative Code which empowered it to fix compensation levels for appraisal services. [66]

Facebook

On 9 December 2020, the FTC sued Facebook, Inc, alleging that the company had illegally maintained its personal social networking monopoly by systematically acquiring and eliminating threats to its monopoly and imposing anticompetitive conditions on software developers. [67] According to the FTC's complaint, Facebook is the world's dominant personal social networking service and has monopoly power in a market for personal social networking services. [68] The complaint alleged that Facebook acquired Instagram in April 2012 and WhatsApp in February 2014 because it feared they would threaten its social networking monopoly. [69] The complaint further alleged that Facebook has imposed anticompetitive conditions on third-party software developers' access to application programming interfaces that allow developers' apps to interface with Facebook. [70]

Separately, but in coordination with the FTC, a bipartisan coalition of 48 state attorneys general also filed suit against Facebook. [71] On 28 June 2021, Judge James E Boasberg of the US District for the District of Columbia dismissed the state enforcers' action entirely and dismissed the FTC's complaint with leave to amend. [72] Judge Boasberg found that the delay between the state enforcers' 2020 filing and Facebook's acquisitions of Instagram in 2012 and WhatsApp in 2014 exceeded the general four-year statute of limitations. [73] In the FTC case, Judge Boasberg found that the FTC failed to show that Facebook has a monopoly power in the personal social networking market and did not include any metric or methods used to calculate Facebook's share of the market. [74] Judge Boasberg stated, 'although plaintiff is correct that it is not required to identify every alleged competitor in its pleadings, its choice to identify essentially none is striking'. [75]

DOJ actions

Mergers abandoned due to enforcement actions

Visa/Plaid

On 13 January 2020, Visa Inc announced that it had agreed to acquire Plaid Inc in a transaction valued at US\$5.3 billion. [76] On 5 November 2020, the DOJ filed a civil antitrust suit to enjoin the acquisition alleging that the transaction would enable Visa to eliminate a nascent but competitive threat to its online debit business, thereby enhancing or maintaining its monopoly. [77] The DOJ alleged that Visa controls 70 per cent of the online debit transactions market, and Plaid's new debit service would enable consumers to pay for goods and services online with money debited from their bank accounts. [78] The complaint alleged that Visa's

CEO viewed the acquisition as an ‘insurance policy’ to protect against a ‘threat to our important US debit business’. [79] On 12 January 2021, Visa and Plaid announced that they abandoned their planned merger. [80]

Aon/Willis Towers

On 9 March 2020, Aon plc and Willis Towers Watson announced an agreement to merge in transaction valued at US\$80 billion. [81] On 16 June 2021, the DOJ filed a civil antitrust suit alleging that the merger of two of the ‘Big Three’ insurance brokers would substantially lessen competition in five markets: property, casualty and financial risk broking for large customers; health benefits broking for large customers; actuarial services for large single-employer defined benefit pension plans; the operation of private multicarrier retiree exchanges; and reinsurance broking. [82] To resolve antitrust concerns by the European Union and the DOJ, Aon has agreed to certain divestitures: Willis Re, Willis’s broking reinsurance arm, and a set of Willis’s corporate risk and broking and health and benefits services; [83] its pension consulting, pension insurance broking pensions administration and investment consulting business in Germany; [84] its US retirement business; [85] and its Aon Retiree Health Exchange business. [86] However, the DOJ said the divestitures agreed to by the firms did not go far enough to maintain competition in two markets: property, casualty and financial risk broking for large customers and health benefits broking for large customers. [87] On 26 July 2021, Aon and Willis announced that the firms have agreed to terminate their merger. [88]

Settled mergers

Anheuser-Busch/Craft Brew

On 11 November 2019, Craft Brew Alliance, Inc and Anheuser-Busch InBev SA/NV announced an agreement for Anheuser-Bush to purchase the remaining Craft Brew shares that it does not already own in a merger transaction valued at US\$220 million. [89] Anheuser-Busch currently holds a minority ownership stake in Craft Brew. [90] Anheuser-Bush owns numerous major beer brands including Bud Light, Budweiser, Busch Light, Natural Light, Michelob Ultra, Stella Artois and Golden Road. [91] Craft Brew owns several beer brands including Widmer Brothers, Omission, Redhook and Kona. [92] On 18 September 2020, the DOJ announced its proposed settlement requiring Craft Brew and Anheuser-Busch are required to divest Craft Brew’s entire Kona Hawaii business to PV Brewing Partners, including a new 100,000-barrel capacity brewery currently under construction and the granting of perpetual, exclusive license of the Kona brand for brewing, distribution and sale of Kona beer in Hawaii. [93] The DOJ was concerned that the proposed transaction would substantially lessen competition in the Hawaii beer market. [94] The DOJ’s complaint alleged that if the transaction was allowed

to proceed, Craft Brew and Anheuser-Busch would have a combined share of approximately 41 per cent of the Hawaii beer market. [95]

Stone Canyon/Morton

On 5 October 2020, Stone Canyon Industries Holdings announced that it had entered into an agreement to acquire K+S Aktiengesellschaft's Americas salt business, including Morton Salt, for US\$3.2 billion. [96] On 19 April 2021, the DOJ filed a proposed settlement that would require Stone Canyon to divest its entire evaporated salt business in order to proceed with their proposed acquisition of Morton. [97] The DOJ was concerned that the merger would eliminate competition between US Salt, a wholly owned subsidiary of Stone Canyon, and Morton in the markets for evaporated salt (including pharmaceutical-grade salt, round-can table salt and bulk evaporated salt). [98] On 30 April 2021, Stone Canyon announced that they closed the transaction. [99]

Non-merger enforcement efforts

Google

On 20 October 2020, the DOJ, along with 11 state Attorneys General, filed a civil antitrust lawsuit to stop Google LLC from unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the search and search advertising markets and to remedy the competitive harms. [100] The complaint alleged that Google has entered into a series of exclusionary agreements that forbid preinstallation of any competing search service; entered into tying arrangements that force preinstallation of its search applications and make them undeletable; enter into long-term agreements with Apple that require Google to be the default general search engine on the Apple's Safari browser and other Apple search tools; and used monopoly profits to buy preferential treatment for its search engine on devices, web browsers and other search access points. [101]

Subsequently, the Attorney General of Colorado, together with 34 other states, Puerto Rico, the District of Columbia and Guam, filed a similar lawsuit against Google on 17 December 2020. [102] The two lawsuits have since been consolidated for pretrial purposes in the United States District Court for the District of Columbia. [103] Separately, the Attorney General of Texas filed an antitrust lawsuit against Google on 16 December 2020. Now joined by 15 states and territories, the complaint alleged that Google's anticompetitive conduct in the online display advertising market includes entering into an anticompetitive agreement with Facebook, making misrepresentations to users and customers and suppressing competition. [104]

Human Resource Professionals

In 2016, the DOJ and FTC jointly issued the Antitrust Guidance for Human Resource Professionals stating their intent to ‘proceed criminally against naked wage-fixing or no-poaching agreements’. [105] Since then, the DOJ brought its first criminal wage-fixing indictment and first criminal no-poach indictment.

On 19 April 2021, a federal grand jury returned a superseding indictment charging Neeraj Jindal and John Rodgers, for conspiring to fix prices by paying lower rates to physical therapists and physical therapist assistants. [106] The indictment further charged Jindal and Rodgers with conspiring to obstruct an FTC investigation by making false and misleading statements and withholding and concealing information. [107]

On 5 January 2021, the DOJ obtained an indictment charging Surgical Care Affiliates LLC, which owns and operates outpatient medical care centers across the country, for entering into no-poach agreements. [108] The indictment alleged that Surgical Care entered into two separate bilateral conspiracies with other health care companies to suppress competition between them by agreeing not to solicit each other’s senior-level employees. [109]

On 15 July 2021, the DOJ obtained a two-count indictment charging DaVita Inc and its former CEO, Kent Thiry, for conspiring with Surgical Care Affiliates to agree not to solicit each other’s senior-level employees and with another health care company to allocate employee so that the other healthcare company would not solicit DaVita’s employees. [110]

Criminal cartel enforcement

The DOJ has been active in criminal cartel prosecution. The DOJ has been conducting an ongoing antitrust investigation into price fixing, bid rigging and other anticompetitive conduct in the broiler chicken industry. On 7 October 2020, the DOJ obtained a superseding indictment charging ten executives and employees for their role in a conspiracy to fix prices and rig bids for broiler chickens. [111] On 23 February 2021, Pilgrim’s Pride Corporation, one of the nation’s largest chicken producers, pleaded guilty and was sentenced to pay approximately US\$107 million in criminal fines [112] On 20 May 2021, the DOJ obtained an indictment charging Norman W Fries Inc, dba Claxton Poultry Farms (Claxton) with participating in the conspiracy.

The DOJ also has been conducting an ongoing investigation into market allocation, price fixing and bid rigging in the ready-mix concrete industry. On 3 September 2020, the DOJ obtained an indictment against Evans Concrete, LLC and four individuals for participating in the conspiracy to fix prices, rig bids and allocate markets for the sale of ready-mix concrete.[113]

On 4 January 2021, the DOJ charged Argos USA LLC with participating in the conspiracy.[114] The DOJ alleged that employees of Argos and other ready-mix concrete companies coordinated the issuance of price-increase letters to customers, allocated specific ready-mix concrete jobs in the coastal Georgia area, charged fuel surcharges and environmental fees and submitted bids to customers at collusive and noncompetitive prices.[115] The DOJ announced a deferred prosecution agreement requiring Argos to pay a US\$20 million criminal penalty.[116]

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Notes

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