International
Comparative
Legal Guides

Practical cross-border insights into mergers and acquisitions

Mergers and Acquisitions 2023

17th Edition

Contributing Editors:
Lorenzo Corte & Scott Hopkins
Skadden, Arps, Slate, Meagher & Flom (UK) LLP

ICLG.com

Expert Analysis Chapters

Q&A Chapters

Q&A Chapters Continued

Key Drivers and Trends: Deal-making in an Era of Heightened Antitrust Enforcement


Andrew M. Wark


Margaret T. Segall

Cravath, Swaine & Moore LLP

Introduction

In 2022, the global M&A market retreated from a record-shattering deal boom in 2021 but continued at robust levels, as companies adjusted to rapidly evolving macroeconomic and regulatory environments. In the United States, companies considering M&A transactions have faced a changing antitrust landscape, as the antitrust enforcement agencies under the Biden Administration have increased their scrutiny of M&A transactions and altered both their enforcement practices and procedures in merger reviews.

U.S. Antitrust Environment

Under the Biden Administration, leadership at both the Federal Trade Commission (the "FTC") and the Antitrust Division of the Department of Justice (the "DOJ") have increased scrutiny of M&A activity and begun reform of the merger review process to keep pace with changes they perceive in the broader economy. The agencies have sought to shift the focus of antitrust enforcement and merger reviews beyond the "consumer welfare" standard that had been followed by the agencies and courts in recent decades, toward what has been referred to as a "neo-Brandeisian" view of antitrust policy. The agencies are focused on using the antitrust laws to address what they view as neglected theories of competitive harm in evaluating mergers, including the impact of mergers on labor markets, data aggregation strategies by digital platforms, elimination of nascent competitors through "killer acquisitions" and serial acquisitions (or "roll-up" plays) by private equity firms. The FTC has withdrawn the 2020 Vertical Merger Guidelines[1] (and the DOJ has expressed concerns about these guidelines), and the agencies are in the process of issuing updated merger guidelines. In doing so, the FTC and DOJ have publicly stated that in seeking to modernize their policies, the agencies are "particularly interested in aspects of competition the guidelines may underemphasize or neglect, such as labor market effects and non-price elements of competition like innovation, quality, potential competition or any 'trend toward concentration.'"[2] The FTC's ability to implement changes in antitrust policy only accelerated in 2022, with the Senate's confirmation of Commissioner Alvaro Bedoya in May 2022 securing a Democratic majority among the FTC commissioners.

The FTC and the DOJ have each demonstrated a commitment to pursuing these theories of harm in merger reviews, including by issuing "second requests" that are broader in scope than past investigations and that may seek information relating to multiple theories of competitive harm. The agencies have also demonstrated an increased willingness to test these theories of harm in litigation. For example, the FTC and the DOJ have been increasingly active in seeking to block mergers based on vertical concerns (including three recent litigation challenges brought by the FTC). While the litigated vertical merger challenges have so far been unsuccessful in court, highlighting the challenges the agencies face in seeking to expand antitrust jurisprudence, the DOJ was successful in blocking Penguin Random House's proposed acquisition of Simon & Schuster based on a "labor monopsony" theory of harm. The FTC has also pushed the boundaries of a "potential competition" theory of harm in its challenge to Meta's proposed acquisition of Within Unlimited (although this challenge was rejected by the U.S. District Court in early 2023).

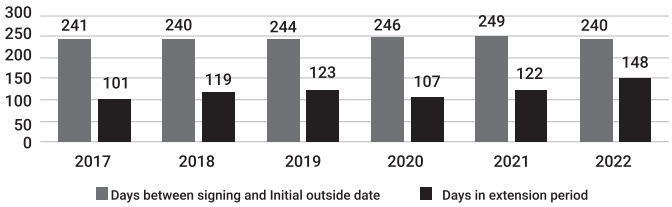
Further, both the FTC and DOJ have expressed skepticism regarding settlements and merger remedies. While in recent years, the agencies had shown a preference for structural remedies (i.e., divestiture requirements) over behavioral remedies, current leadership at both the FTC and the DOJ have expressed a view that merger remedies, including divestitures, are largely inadequate, and that the antitrust agencies should more frequently litigate to block deals they view as problematic outright, even if the parties have offered concessions.[3] In practice, the agencies have demonstrated this willingness to litigate to attempt to block mergers outright, despite divestitures or other remedies offered up by the parties, including the DOJ's unsuccessful challenge to UnitedHealth Group's acquisition of Change Healthcare (where the DOJ raised both horizontal and vertical concerns and objected to the parties' proposed divestiture to a private equity firm to address horizontal concerns) and the FTC's pending challenge to Microsoft's proposed acquisition of Activision (where the FTC has rejected the parties' proposed concessions, including making games available on other platforms).

Impact of Antitrust Environment on Deal-making

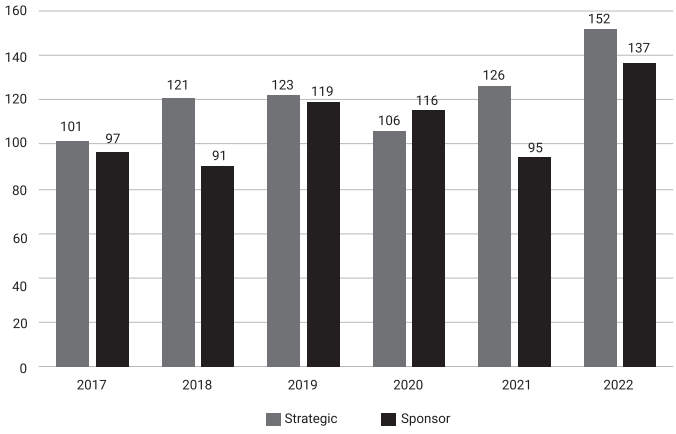
These changes in merger review and enforcement policies have in turn impacted deal-making activity and negotiations in 2022. Based on the agencies' prior statements and enforcement activity, parties should anticipate that the agencies will follow through on investigating new or seldom applied theories of harm, and may not limit their inquiries based on past agency and judicial precedent. This means that parties should anticipate a higher likelihood of receiving a "second request" (and a lengthier process to comply with any "second requests"), even in transactions that may not have attracted scrutiny in prior Administrations, and should ensure that the regulatory provisions in the transaction agreement (including the outside date) are calibrated accordingly. This potentially includes private equity transactions, as the FTC and the DOJ have made numerous statements signaling their intent to scrutinize acquisitions by private equity firms more closely, including serial "roll-up" transactions by private equity portfolio companies.[4]

Parties should also anticipate that, even where settlement is possible, the agencies will impose more stringent requirements for divestiture packages and buyers, potentially resulting in prolonged divestiture processes and negotiations with the agencies where remedies are required. Additionally, parties to complex transactions that are likely to require remedies should anticipate the possibility that, notwithstanding any remedy commitments, the FTC and the DOJ may be unwilling to settle or approve potential remedies (even divestitures), in which case the parties may be forced to litigate. Parties should keep all of these risks in mind when negotiating the regulatory provisions of transaction agreements, including the interaction of antitrust efforts commitments, commitments to litigate, outside dates and reverse termination fees.

Data from announced transactions in 2022 suggests that parties are adjusting their timing expectations in light of the current antitrust environment. For example, while the average number of days between signing and the initial outside date in publicly announced U.S. M&A deals has been relatively steady at approximately eight months between 2017 and 2022, the average "extension period" available if the parties have not obtained regulatory approvals by the initial outside date has noticeably increased from approximately three-and-a-half months in 2020 to approximately five months in 2022.[5]



This trend is even more pronounced in transactions with strategic buyers, which saw the average "extension period" rise from approximately 106 days in 2020 and 126 days in 2021 to approximately 152 days in 2022, and in U.S. domestic transactions, which saw the average "extension period" rise from approximately 102 days in 2020 and 126 days in 2021 to approximately 155 days in 2022. This data supports a conclusion that the longer contractual timelines for parties to obtain regulatory approvals in 2022 is being driven in significant part by the U.S. antitrust environment.[6]



Updates to Merger Review Procedures and Related Deal Terms

In furtherance of this increased scrutiny of M&A activity, the FTC and the DOJ have enacted a number of procedural changes that have impacted merger reviews and, in turn, specific terms of M&A agreements. In early February 2021, the FTC and DOJ announced that the agencies had temporarily suspended granting early terminations of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") during the transition to the Biden Administration given the unprecedented volume of M&A transactions at that time, meaning that parties to any transaction requiring notification under the HSR Act would be required to wait until the expiration of the full statutory waiting period in order to close the transaction.[7] That suspension remains in effect, and there is no indication that the agencies intend to lift that suspension, despite the slowdown in deal-making activity in 2022. Additionally, given resource constraints on the agency's capacity to investigate all reported transactions during the statutory waiting period, in August 2021, the FTC increased dramatically the issuance of "pre-consummation warning letters" – also called "close-at-your-own-risk letters" – to parties to certain transactions shortly before the HSR waiting period expires.[8] These letters state that the FTC's investigation remains open and ongoing, and remind parties that inaction by the FTC before the expiration of the waiting period should not be construed as affirmative approval and that the FTC retains the right to challenge transactions before or after their consummation.

In response to this practice, parties negotiating an M&A agreement requiring an HSR notification should be cognizant of the circumstances under which any HSR-related closing conditions would be satisfied. Particular attention is required in agreements that include a closing condition related to the absence of pending or threatened regulatory investigations or challenges. In such agreements, parties have, in some cases, affirmatively addressed whether the FTC's standard form "close-at-your-own-risk letter" would, on its own, result in a failure of a closing condition (and if so, the circumstances under which the condition would later be satisfied, given that the FTC is not under any affirmative obligation to later inform the parties if it has completed its investigation).

In October 2021, the FTC announced that, going forward, the FTC would include "prior approval" provisions in all divestiture orders, requiring the acquiror to obtain prior approval from the FTC before closing *any* future transaction affecting the relevant market(s) at issue for a minimum period of 10 years.[9] In one instance, the agency also applied a prior approval provision to transactions outside the relevant market. This prior approval requirement would apply to future transactions regardless of transaction size (i.e., transactions below the HSR notification thresholds would become subject to FTC approval) and shift the procedural requirements for clearance of future transactions, as the FTC would need to grant affirmative approval and would not be subject to statutory waiting periods and other procedural elements of the HSR Act in evaluating such transactions.

In light of this policy, many M&A agreements negotiated in 2022 have specifically addressed whether the acquiror would, or would not, be required to agree to a "prior approval" requirement in a divestiture order in order to obtain approval for the transaction. Parties should carefully consider when drafting and negotiating the regulatory efforts provisions of M&A agreements whether the regulatory efforts standard as drafted would require the acquiror to agree to such a requirement, and how this requirement interacts with the acquiror's obligations (if any) to agree to divestitures in order to obtain regulatory approvals. Target companies should also confirm, either through due diligence or representations and warranties in the definitive transaction agreements, whether the acquiror is subject to any "prior approval" requirement from prior transactions, as such requirements may extend the timeline necessary for securing antitrust approvals and increase the risk that approvals may not be obtained.

Outlook for 2023

Looking forward into 2023, we expect heightened scrutiny of M&A transactions to continue and further agency rulemaking to impact deal-making. To begin the year, on January 5, 2023, the FTC proposed a new rule that would effectively ban employment-related noncompete provisions and restrict the ability of a buyer in an M&A transaction to enter into so-called "deal noncompete" agreements with members of target management who are selling their equity interests in the target company in the transaction. Under the proposed rule, acquirors would only be able to enter into "deal noncompete" agreements with employees who hold (and are disposing of) at least a 25-percent ownership interest in the target company. The proposed rule has garnered substantial attention, with commentators noting the potential for significant legal challenges to the rule if adopted, and it remains to be seen whether the proposed rule will be adopted in its current form (and, if adopted, whether the rule would be upheld).

The FTC and DOJ are also expected to publish updated merger guidelines in 2023, which will likely have a material impact on merger reviews and enforcement actions. These guidelines will likely signal further shifts in the agencies' focus on merger reviews and enforcement priorities, requiring companies and their advisors to further adjust their pre-signing risk assessment when evaluating M&A transactions and negotiating regulatory provisions of transaction agreements.

Endnotes

1. Press Release, "Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary", issued by the FTC on September 15, 2021 (https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary).
2. Request for Information on Merger Enforcement, issued by the FTC and the DOJ, January 18, 2022 (https://www.justice.gov/opa/press-release/file/1463566/download).
3. See, e.g., comments by DOJ AAG Jonathan Kanter (January 24, 2022); comments by FTC Chair Lina Khan (August 6, 2021).
4. See, e.g., Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding JAB Consumer Fund/SAGE Veterinary Partners (June 13, 2022) (https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioner-rebecca-kelly-slaughter-commissioner-alvaro-m-bedoya) (stating that private equity acquisitions "distort incentives in ways that strip productive capacity, degrade the quality of goods and services and hinder competition").
5. Based on FactSet data. Data includes U.S. deals valued at over $100 million in transaction value. Deals were only included in the calculations of average extension periods if FactSet provided an exact period or date for the end of the extension period.
6. Based on FactSet data. Data includes U.S. deals valued at over $100 million in transaction value. Deals were only included in the calculations of average extension periods if FactSet provided an exact period or date for the end of the extension period.
7. Press Release, "FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination", February 4, 2021 (https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination).
8. FTC Statement, "Adjusting merger review to deal with the surge in merger filings", August 3, 2021 (https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings).
9. FTC Statement, "Statement of the Commission on the Use of Prior Approval Provisions in Merger Orders", October 25, 2021 (https://www.ftc.gov/legal-library/browse/statement-commission-use-prior-approval-provisions-merger-orders).

Andrew M. Wark is a partner in Cravath's Corporate Department. He focuses his practice on public and private M&A, shareholder activism defense and general corporate matters. Mr. Wark has also represented numerous companies and boards of directors regarding shareholder activism. He received a B.S. from Duke University in 2010 and a J.D. from Columbia Law School in 2013, where he was a Harlan Fiske Stone Scholar and a Staff Editor of the *Law Review*. Mr. Wark joined Cravath in 2013 and was elected a partner in 2020.

Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
USA

Tel: +1 212 474 1592
Email: awark@cravath.com
URL: www.cravath.com

Margaret T. Segall is a partner in Cravath's Litigation Department and a member of the Antitrust Practice. Ms. Segall's practice focuses on transactional matters, antitrust regulatory approval, government investigations and general antitrust counseling. She has advised a wide variety of clients in diverse industries, including aerospace and aviation, pharmaceuticals, life sciences, consumer products, media, manufacturing and technology.
She received an A.B. degree *magna cum laude* from Harvard College in 2003 and a J.D. degree *cum laude* from Harvard Law School in 2008, where she was a member of the Board of Student Advisors and the *International Law Journal*. Ms. Segall joined Cravath in 2008 and was elected a partner in 2016.

Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
USA

Tel: +1 212 474 1231
Email: msegall@cravath.com
URL: www.cravath.com

Cravath, Swaine & Moore LLP

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: glg global legal group