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Axinn Antitrust Insight: Judges Skeptical of Recent Biden Administration Merger Challenges

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PRACTICE AREAS

Antitrust

Axinn Update

The Biden Administration—through the Federal Trade Commission ("FTC") and the Department of Justice Antitrust Division ("DOJ")—has been pursuing an ambitious antitrust enforcement agenda. But a string of recent, high-profile losses in court challenges to proposed mergers suggests that courts are skeptical of the Administration's more far-reaching efforts. Despite these defeats, leadership and staff at both the FTC and DOJ show no signs of slowing down.

Since the Beginning of 2021, A String of Setbacks in Federal Court

Since President Biden took office, the Administration has brought 15 merger challenges in federal district court or the FTC's administrative court. Of those, eight were abandoned by the parties after complaints were filed and two remain pending (comparable to the five abandoned deals from cases filed in 2020 and four abandoned deals from cases filed in 2019). Of the five challenges that have gone to a full hearing or trial thus far, the courts have rejected four, with one decision pending. The courts have not suggested that any of the four Administration defeats were close calls.

During that time, the Administration's two challenges to vertical deals were ultimately rejected by courts, as the merging parties "litigated the fix" and convinced courts that their proposed remedies would forestall any competitive harm. In the FTC's challenge of Illumina's acquisition of Grail, the FTC's Administrative Law Judge found that Illumina's proposed "open offer" to all U.S. oncology customers and "firewalls" would prevent Illumina from foreclosing rivals or raising prices. Likewise, in DOJ's challenge of UnitedHealth's acquisition of Change Healthcare, the court found the government's "data-misuse" vertical theories of harm were overcome by UnitedHealth's internal firewalls and contractual data protections. (UnitedHealth / Change also had a horizontal aspect, where the parties also successfully litigated a fix.)

The Administration has also filed complaints challenging horizontal mergers, litigating three through trial. In the two decisions thus far (still pending is *U.S. v. Penguin / Simon & Schuster*), the courts expressed deep skepticism of the Administration's approach—particularly in defining relevant markets—that the courts found did not match market realities. For example, in Booz Allen / Everwatch, the court rejected the DOJ's focus on a single NSA contract as the "market," describing it as "gerrymandering" inconsistent with market realities. Likewise, in DOJ's challenge to U.S. Sugar's acquisition of Imperial, the court found that the government's proposed geographic markets were "too narrow" and "ignore the commercial realities of sugar supply, namely that sugar flows freely throughout the country." In some cases, DOJ also seemingly relied on "hot" documents—e.g., emails from Booz Allen employees reacting to the deal announcement—that the merging parties were able to successfully explain away.

Losses Unlikely to Deter The Agencies

Notwithstanding these setbacks, leadership at both the FTC and DOJ continue to support vigorous enforcement efforts. AAG Jonathan Kanter has made clear that the DOJ's Antitrust Division is "not afraid to go to court." In recent Senate testimony and elsewhere, AAG Kanter has cited not only the Division's "obligation to enforce the antitrust laws as written," but also three potential benefits from the Division's commitment to "bringing difficult cases," whatever the result: (i) an increase in challenges resulting in abandoned deals, (ii) better and more comprehensive remedies, and (iii) increased deterrence for parties contemplating mergers that may have encountered less scrutiny in the past.

Of course, an enforcement strategy based even in part on the benefits of losing in court has risks. While the agencies' vigorous enforcement efforts may make some parties think twice about pursuing a tough deal, these recent Administration defeats may have the opposite effect. There is a very real chance that the Biden Administration's ambitious antitrust agenda may unintentionally create a roadmap, and even case law, that makes it harder for the Agencies to successfully challenge mergers in the future.

Key Takeaways

We continue to expect aggressive enforcement and willingness to try novel or unconventional theories in court from the Administration. For companies considering transactions, the potential for lengthy investigations and

possible court battles should continue to be factored into deal risk and reflected in the parties' commitments. Nonetheless, especially now, the possibility of a court challenge should not be seen as the last word on a transaction's legality. Crucially, in transactions where ex-U.S. agencies are involved and have the ability to effectively block a deal without judicial review, the skepticism of U.S. judges may be cold comfort.

As noted in a previous Axinn Antitrust Insight, the Biden Administration is also undertaking a comprehensive overhaul of the Merger Guidelines, with a draft expected for public comment later this year. By all accounts, these new Merger Guidelines will attempt to enshrine the Administration's expansive view of merger enforcement. Recent decisions suggest that the Merger Guidelines may face a rocky reception in the courts.