

Stop the Presses: DOJ Sues to Prevent Monopsony Resulting from Penguin Random House Acquisition of Simon & Schuster

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On Tuesday, November 2, 2021, the Antitrust Division of the U.S. Department of Justice (“DOJ”) filed a lawsuit in the U.S. District Court for the District of Columbia seeking to block an acquisition by Penguin Random House, LLC of its rival Simon & Schuster, Inc. In the complaint, the DOJ alleges that the proposed merger would likely harm competition in the U.S. publishing industry and facilitate coordination between the largest U.S. publishers. This case is the most recent example of the DOJ’s declared focus on monopsony theories where the law protects sellers in markets where buyers of good and services gain leverage, and lower the amount that they pay to sellers, simply due to the buyer’s increased size after a transaction.

Background on the parties and U.S. publishing industry

Penguin Random House is a subsidiary of Bertelsmann SE, an international media and services company, and is based in New York City. Penguin Random House is the largest U.S. trade book publisher, publishing over 2,000 new titles each year in the U.S. and also selling distribution services to third-party publishers. In 2020, Penguin Random House earned over \$2.4 billion in U.S. publishing revenues.

Simon & Schuster is the wholly-owned subsidiary of ViacomCBS, an international media and entertainment company, and is headquartered in New York City. Simon & Schuster is the fourth-largest U.S. trade book publisher, publishing over 1,000 new titles annually in the U.S., and earning over \$760 million in U.S. publishing revenues in 2020.

According to DOJ, Penguin Random House and Simon & Schuster are two of the “Big Five” book publishers in the United States. Authors seeking to publish books in the U.S. typically submit manuscripts to some or all of the Big Five publishers, as those publishers are best positioned to provide authors with the best chance of success, favorable advance and other financial terms, and the ability to bring a book to market and create an audience. In contrast, smaller publishers lack the similar resources and capabilities of the Big Five publishers, and are limited in their ability to compete

for the publishing rights to anticipated top-selling books. Smaller publishers have less sources of revenue and lack scale in book sales, which limits their ability to pay the high advances offered by Big Five publishers required to secure publishing rights to top-selling books and to absorb financial losses from books that fall below sales expectations.

On November 25, 2020, Bertelsmann and ViacomCBS announced that Penguin Random house would acquire Simon & Schuster from ViacomCBS in an all-cash deal valued at approximately \$2.175 billion.

DOJ's complaint

The government's complaint alleges that the proposed merger violates Section 7 of the Clayton Act and will eliminate competition in two relevant U.S. product markets:

1. **Publishing rights to books from authors:** the complaint alleges that the combination will eliminate competition in the market for publishing rights to books from authors, or what the complaint refers to as "content acquisition." In this market, authors sell the rights to publish their works in the United States, and receive individually negotiated advances which allows each publisher to bid higher or lower depending on its evaluation of the competition for each particular work.
2. **Publishing rights to anticipated top-selling books:** the complaint also alleges another, smaller market for the publishing rights to top-selling books. The complaint notes that authors of anticipated top-selling books generally command higher advances. Authors of such works are generally limited to publishing through a Big Five publisher given their advantages over smaller publishers. The complaint notes that given the individualized nature of the negotiations over advances, publishers can target authors of anticipated top-selling books by offering lower advances, while authors of such works are limited in their selection of publisher to the Big Five publishers.

The government alleges that the combination would eliminate head-to-head competition between Penguin Random House and Simon & Schuster which would provide the combined firm with "outsized influence" over which books are published and how much authors are paid. The complaint also alleges that the acquisition would facilitate coordination between the combined firm and the remaining "Big Five" publishers.

- With respect to the elimination of head-to-head competition between Penguin Random House and Simon & Schuster, the complaint notes that the combined firm would account for nearly half the market for the acquisition of U.S. publishing rights to anticipated top-selling books, with its nearest competitor less than half its size. The complaint notes that Penguin Random House and Simon & Schuster compete closely to acquire the rights to anticipated top-selling books, as they are often the top two bidders and frequently lose to one another. As a result of this head-to-head competition, authors of anticipated top-selling books have been able to secure higher advances and other favorable terms. The government's complaint alleges that the elimination of this head-to-head competition would create a monopsonist that could use its dominance to pay lower prices to the authors.
- The government also alleges that the acquisition would facilitate coordination between the combined firm and the remaining Big Five publishers. The complaint alleges that the U.S.

publishing industry is already conducive to coordinated behavior given the concentration of large firms, and noted examples of terms of author contracts, such as royalty rates, being fairly standardized across the industry over time. Furthermore, the complaint highlighted the Big Five's history of collusion, citing to its 2012 complaint filed in the Southern District of New York against the five publishers alleging a price-fixing conspiracy with Apple Inc. to increase the prices of e-books. The district court found that the defendants had engaged in a price-fixing conspiracy in violation of Section 1 of the Sherman Act, a judgment that was affirmed by the Second Circuit.

Takeaways

The government's complaint is notable in that it challenges a transaction that may result in upstream anticompetitive effects instead of the usual harm to consumers of a product. While the government frequently challenges mergers that might result in a monopoly—a market condition which raises prices for buyers—here the challenge seeks to prevent a monopsony, or a market condition in which dominant buyers will charge anticompetitive prices from sellers. This case could be a significant development in how the antitrust agencies approach monopsony merger enforcement

The complaint follows President Biden's [Executive Order](#) from July 2021 in which he affirmed this administration's focus on the harmful effects of both monopolies and monopsonies. Other examples of recent monopsony enforcement include the DOJ's charges against employers colluding with each other with regard to employees' wages or employment status (in which the employers are the "buyer" of the employee's services). Our summary of those cases and other recent developments in antitrust and labor markets can be found [here](#).

Another interesting part of the complaint is the presence of Big Tech in a complaint focusing on the U.S. book publishing industry. Penguin Random House has released public statements that the merger will provide a "counterweight" to Amazon's buying power. In dismissing this argument, the government's complaint highlights statements by Penguin Random House executives that the acquisition is consistent with their "[g]oal" to be an "[e]xceptional partner for Amazon." Given the government's recent focus on antitrust issues presented by Big Tech firms, this argument—and its accompanying allegations of Amazon's buying power—could be worth watching as the case develops.

Finally, the complaint dismisses the merits of a resolution proposed by Penguin Random House to remedy potential competitive harms from the transaction in which the combined firm would still continue to bid against each other for authors' works up to an unspecified amount. The government characterized this as an "unenforceable promise" and noted that the proposal would defy economic sense in that it would require the post-merger firm to compete with itself to reduce its profits. It will be worth noting how the court handles this argument, as it could provide insight into what types of proposed remedies are sufficient to address any competitive harms resulting from a merger between rivals.

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