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United States Antitrust Enforcement Agencies Seek to Overhaul Regulatory Approach to Anticompetitive Mergers and Acquisitions

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At a high level, the US Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) have laid out clear intentions to reform the antitrust regulatory regime. Their stance has serious implications for the success of future transactions.

It is no secret to commentators and stakeholders that the Biden Administration has ushered in a period of antitrust enforcement that is notably aggressive when compared with past administrations. In a speech delivered on 18 January 2022, Assistant Attorney General (AAG) Jonathan Kanter stated that DOJ's overarching goal is to reshape the regulatory landscape to better re?ect dynamic markets.

The agencies have laid out an aggressive enforcement plan both in their conduct and public comments which includes i) aggressively regulating mergers and acquisitions (M&A) generally, ii) increasing scrutiny of private equity transactions, and iii) pursuing litigation against merging parties rather than consent decrees.

HOSTILITY TOWARDS M&A DEALS IS HERE TO STAY

The FTC and DOJ have taken aggressive steps to slow the pace of M&A transactions. In a panel discussion at the American Bar Association 2022 Antitrust Spring Meetings, Commissioner Noah Phillips, offering his own views rather than the Commission's (but nonetheless delivering some "inside baseball"), indicated that this broad strategy was intended to "throw sand in the gears" and raise costs, thereby deterring transacting parties from pursuing M&A deals.

The agencies began this offensive last year, issuing a joint statement on 4 February 2021 that indicated there would be an overhaul of the merger review process, and instituting a moratorium on the early termination programme for Hart-Scott-Rodino (HSR) merger reviews. Prior to this suspension, early termination was commonplace for mergers that did not merit further review owing to a lack of clear anticompetitive effects; early termination was granted in 73.5% of instances it was

requested by parties in 2019. Despite the suspension of the early termination programme initially being characterised as temporary, there are no signs or expectations of it being lifted in the foreseeable future.

In addition to delaying the time to close M&A deals, the agencies have begun issuing “Close at your Risk” letters after the termination of the statutory HSR 30-day waiting period. These letters indicate that the agencies may continue to investigate and bring an enforcement action even after the deal is closed. In an interview with the *New York Times*, FTC Chairwoman Lina Khan, stated “…our investigation is ongoing, and they shouldn’t take the lapse of that expiration period as a sign of somehow the FTC approving the deal.” Commissioner Phillips stated, at the Spring Meeting, that these letters seek to add “red tape” to the transactional process and possibly result in companies having second thoughts and backing out of the deal. In a speech on 25 February 2022, at the George Mason Antitrust Law Review Symposium, he noted that of the 50+ letters that had been sent since August 2021, he was not aware of any active investigation for those impacted transactions.

Lastly, and most importantly, the agencies are in the process of issuing revised Horizontal and Vertical Merger Guidelines to purportedly better address conduct in present day dynamic markets. Kathleen O’Neil, the Senior Director of Investigations and Litigation for the DOJ Antitrust Division, indicated during a Spring Meeting panel that the new guidelines will place greater emphasis on direct evidence such as

- Past head-to-head competition resulting in lower prices, more innovation, or higher quality
- Evidence that premerger coordination will worsen through the elimination of a maverick ?rm
- Evidence that the rationale for the transaction is the elimination of competition

Chairwoman Khan has also explained that the guidelines will place greater scrutiny on deals that eliminate nascent or potential competition and negatively impact labour markets.

PRIVATE EQUITY IN THE CROSSHAIRS

As part of this increased scrutiny, agency leadership has directly called out private equity as an area that must be regulated more strictly. In an interview with the Financial Times, AAG Kanter stated that the motives of private equity ?rms are often “designed to hollow out or roll-up an industry and essentially cash out,” which “is often very much at odds with the law, and very much at odds with the competition we’re trying to protect.” Chairwoman Khan further ramped up the rhetoric, in a different interview with the Financial Times, warning of “life and death consequences” when Wall Street controls large sections of the economy.

DOJ leadership has also made claims, without specifying parties or improper conduct, that private equity ?rms have been de?cient in notifying the agencies of proposed deals, with Deputy Assistant Attorney General (DAAG) Andrew Forman stating that DOJ is aware of “HSR ?ling de?ciencies in the private equity space.” It is unclear what DAAG Forman was referring to, but practitioners believe it may relate to improper North American Industry Classi?cation System code classi?cations, failure to provide certain Item 4 documents (which are used by companies to analyse competition aspects of a transaction and must be shared with the government), and the reporting of associate entities that overlap with the target.

Chairwoman Khan and AAG Kanter have stated that this focus on private equity will manifest through the following regulatory action:

- The agencies will focus on bringing enforcement actions where they identify that a private equity ?rm is engaging in a “roll-up strategy”, which occurs when a single ?rm has engaged in serial acquisitions within the same industry.

- Kanter stated that DOJ will bring more enforcement actions for “interlocking directorates,” which are de?ned as a single ?rm, often a private equity ?rm, appointing officers and directors at multiple competitors.

- The FTC and DOJ will scrutinise private equity ?rms acting as divestiture buyers under consent orders. This heightened scrutiny of divestitures is a result of what Kanter called “concentration creep”, whereby the divested assets are acquired by a buyer that does not effectively deploy them, allowing the former owner to continue aggregating market power.

LITIGATION RATHER THAN NEGOTIATION

These aggressive tactics are not intended to cease or be molli?ed with a negotiated consent order; in fact, the agencies have made it clear that they prefer to litigate to block alleged anticompetitive transactions rather than accepting a ?x. In her *New York Times* interview, Chairwoman Khan explained that “we’re de?nitely focusing our resources on litigating.” Further, AAG Kanter stated that consent decrees should be “the exception, not the rule.” Consent decrees are viewed unfavourably by the present US antitrust leadership, given their belief that these settlements are often ineffectual because divested assets are frequently not properly deployed.

The agencies believe antitrust jurisprudence is lagging behind market realities. By litigating more frequently, it serves the goal of moving the law forward by generating judicial opinions supporting aggressive enforcement. In a signi?cant departure from past practice, at the Spring Meeting, Principal Deputy AAG of the Antitrust Division, Doha Mekki, stated that, in order to get to court quicker, DOJ may ?le suit while an investigation is still pending and before merging parties certify substantial compliance in instances where the potential anticompetitive harm is clear.

Given budgetary constraints, the agencies will have to be selective when determining which matters they litigate, but merging parties should be prepared to confront the government in court. At a minimum, even if the agencies don’t ultimately litigate, merging parties will face increasing costs and challenges to closing their deals when pursuing transactions presenting potential horizontal and vertical issues.

The future is not, however, entirely bleak. Despite these enforcement changes, there is still plenty of latitude to get deals consummated through robust antitrust advocacy that socialises the agencies to the bene?ts of the deal, dispels concerns of anticompetitive effects, and conveys a conviction to litigate with the government if the parties’ positions are not reasonably considered.

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