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U.S. Antitrust Agency Merger Enforcement Roundup and Commentary

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FTC Alleges Harm to Innovation Competition and Sets Aside Two Controversial Merger Settlements; DOJ Accepts a Weakened Competitor Defense in One Merger and Accepts Divestitures in Another

The Trump Administration continues to differentiate its merger enforcement policy from the Biden Administration's, largely but not entirely suggesting a more balanced evaluation of mergers and greater acceptance of divestitures to address competitive concerns. In the past few months:

- The Federal Trade Commission ("FTC" or "Commission") challenged a proposed combination of Edwards Lifesciences Corporation ("Edwards") and JenaValve Technology ("JenaValve"), two medical device companies, neither of which has yet commercialized a product in the alleged "overlapping" market.
- The Department of Justice ("DOJ") abandoned, prior to trial, the previous administration's challenge to American Express Global Business Travel's ("GBT") proposed acquisition of CWT Holdings ("CWT"), apparently accepting the parties' argument that CWT was unlikely to continue to be a significant competitor in the future, absent the merger.
- The FTC set aside two merger settlements of the previous administration which it deemed contrary to the public interest.
- The DOJ settled, prior to trial, the previous administration's challenge to UnitedHealth's proposed acquisition of Amedisys, Inc.

FTC Challenges Edwards Lifesciences' Acquisition of JenaValve Technology, Alleging Harm to Innovation Competition

The FTC is seeking a preliminary injunction to enjoin Edwards' proposed acquisition of JenaValve, pending the FTC's in-house administrative trial on the transaction. Edwards, through its ownership of JC Medical and JenaValve are both engaged in the development of a transcatheter aortic valve replacement ("TAVR") device for the treatment of aortic regurgitation ("AR"), a potentially fatal heart condition. Edwards and JenaValve are characterized as horizontal competitors because both firms have a product in clinical trials; however, neither firm has commercialized a TAVR-AR device nor has either firm received Food and Drug Administration ("FDA") approval to sell a TAVR-AR device. Nevertheless, the FTC challenged the proposed combination, alleging that it will eliminate existing head-to-head innovation and quality competition between the two firms in the market for TAVR-AR devices.

The FTC's willingness to litigate this matter is aggressive and novel. The FTC has raised innovation concerns in many merger matters, but outside of mergers involving pharmaceutical products, it rarely alleges merger-related harm in a market where neither party has commercialized a product in the "overlapping" relevant market. (For a compendium of such cases for the period 1993-2022, see Bilal Sayyed, Actual Potential Entrants, Emerging Competitors and the Merger Guidelines.) The major innovation cases of the Biden Administration were more limited. The Commission's challenge builds on the Fifth Circuit's previous acceptance of the FTC's theory of harm to innovation in its criticized but ultimately successful challenge to Illumina Inc.'s consummated acquisition of Grail, Inc. (a

vertical transaction). See Illumina (Grail) v. Federal Trade Commission, 88 F.4th 1036 (5th Cir. 2023) (vacating the Commission's order and remanding for reconsideration; the parties subsequently agreed to unwind the transaction). But in *Illumina (Grail)*, both parties were already operating in their respective relevant and related markets. The FTC's previous challenge during the Biden Administration to Sanofi's proposed (and subsequently abandoned) acquisition of an exclusive license from Maze Therapeutics (2023) alleged the transaction would eliminate the introduction of a new (but nascent) competitive threat to Sanofi's existing monopoly product.

The FTC's competitive effects theory in *Edwards/JenValve* contrasts with the theory in the FTC's unsuccessful challenge to Meta Platforms' ("Meta") proposed acquisition of Within Unlimited ("Within") (in 2022/2023) and its unsuccessful challenge to Steris Corporation's proposed acquisition of Synergy Health ("Synergy") (in 2015). In both matters, only one of the merging parties was an active participant in the relevant market; the other, according to the FTC, was a potential future competitor. In *Meta/Within*, the Commission alleged that the proposed acquisition would eliminate the potential for future actual competition from Meta as an entrant to the market for Virtual Reality Dedicated Fitness Apps, but for the acquisition (The FTC also alleged that the acquisition would eliminate the existing competitive impact of Within's perception of Meta as a potential or future entrant into the same market). In *Steris/Synergy*, the Commission alleged that the proposed acquisition would eliminate the potential for future actual competition from Synergy as a new entrant into the U.S. market for contract radiation sterilization services. The district courts found that the Commission failed to show with a reasonable probability that Meta and Synergy – the potential future entrants – would enter the relevant market. Both district courts required the Commission to show a greater than 50% likelihood that the alleged potential entrant would, in fact, enter the relevant market. See *Federal Trade Commission v. Meta Platforms, Inc.*, 654 F. Supp. 3d. 892 (N.D. Cal. 2023) (requiring a showing of well north of 50%) and *Federal Trade Commission v. Steris Corporation*, 133 F. Supp. 3d 962 (N.D. Ohio 2015) (requiring a showing of a "preponderance of the evidence").

In *Edwards/JenaValve*, the FTC could have alleged that the merger would eliminate potential competition between the two merging parties (or between one or both merging parties and existing competitors). Only rarely has the FTC or DOJ litigated to completion a challenge to a transaction where neither firm operated in the relevant market at the time of challenge. While the U.S. Supreme Court has indicated such challenges are within the scope of the Clayton Act's prohibition of anticompetitive mergers, see *United States v. Penn-Olin Chemical Company*, 378 U.S. 158 (1964), neither agency has been able to make out the necessary factual record to enjoin or unwind such a transaction, including in the later district court trial in the *Penn-Olin* matter.

Neither Edwards nor JenaValve sells a TAVR-AR device nor has received FDA approval to sell such a device. The FTC's complaint attempts to avoid the relatively high hurdle of showing a greater than 50% chance of future entry into the market by one or both firms – the standard adopted in the most recent potential competition cases – by identifying both firms as current participants in the relevant market because they are conducting clinical trials of the safety and efficacy of their TAVR-AR devices in development. Without a need to show a reasonable probability of future entry, the Commission's litigation can focus on the potential for competitive harm from the transaction. The parties will likely argue that the Commission attempts a sleight of hand; without showing that at least one of the two combining firms has a reasonable probability of bringing a TAVR-AR device to market, there can be no loss of actual or potential competition. Competition to innovate or innovation towards a failed product is not something the courts or the Commission should protect, they may argue. Thus, the Commission may be required to show a reasonable probability that at least one of the firms will commercialize a TAVR-AR device.

The Commission faces an additional hurdle that may have led it to focus on innovation effects. With neither company presently engaged in the sale of a TAVR-

AR device, establishing credible price effects from the transaction would be difficult. Hence, the Commission's allegations that the combination, by combining the only two firms in clinical trials for an TAVR-AR device, would slow the pace of innovation towards a marketable product and would lower the quality of any product the combined firm brings to market. Whether the presence of one firm is influencing the other firm's development efforts is a factual question – a tough factual question – but the courts are unlikely to require precise measurement of how much of an influence. This may be an easier hurdle than showing future price effects where there is no history of price competition and, given that both devices are in clinical trials, potentially only very speculative estimates of future prices. For example, where the quality of the devices differs substantially, or patients with different characteristics respond materially better to one device, the amount of price competition between the two devices, if successful in coming to market, may be very low to none. The Commission's focus on innovation and quality effects in *Edwards/JenaValve* may be sensible litigation strategy because of that difficulty.

Since the administration of President Bill Clinton, both the FTC and the DOJ have emphasized the importance of protecting innovation competition in their review of mergers, but they have historically avoided litigating novel theories of harm. Mergers, however, may also improve the prospects of successful innovation and of an innovative product coming to market. According to the antitrust agencies:

A merger of two innovative firms may lead to an increase in innovative activity relative to the status quo and these merger-specific efficiencies may outweigh the potential for harm due to an elimination of competition between them. . . . Sometimes, reduced incentives to innovate may not be a cause for competitive concern if the merger increases the merged firm's ability to conduct R&D more successfully. Non-Price Effects of Mergers – Note by the United States (June 6, 2018) at 12.

The Commission's complaint in this matter should be recognized as an aggressive use of Clayton Act Section 7's prohibition of anticompetitive mergers, but also as continuing the evolution of the antitrust agencies' focus on innovation effects in mergers. Going forward, merging parties must consider seriously standalone innovation claims as a potential hurdle for completion of their merger, even where price effects are unlikely or de minimis. It is possible, however, for innovation efficiencies to save an otherwise anticompetitive merger.

DOJ Accepts "Weakened Competitor Defense" in Abandoning Biden Administration Challenge to Global Business Travel Group's Proposed Acquisition of CWT Holdings

In the July 2025 Quorum, we described the DOJ's acceptance of a "weakened competitor defense" in closing its investigation of the proposed merger of T-Mobile and UScellular. The Trump Administration's DOJ appears to have again accepted that a party in a high-profile transaction was not likely to be a significant future competitive threat, although this time without publicizing it.

In the last days of the Biden Administration, the DOJ filed suit to permanently enjoin GBT's proposed acquisition of CWT. The DOJ alleged that the merger would "extinguish fierce head-to-head competition" between GBT and CWT in the U.S. market for the sale of business travel management services to global and multinational customers, threatening to harm "scores of businesses crucial to the U.S. economy." The trial was scheduled for September 8, 2025. However, on July 30, 2025, the DOJ stipulated to a voluntary dismissal of its complaint "in the exercise of its prosecutorial discretion." The DOJ gave no explanation of its reason for dismissal, but a corresponding proceeding in front of the United Kingdom's Competition and Markets Authority ("CMA") suggests that the parties had a strong claim to a weakened competitor defense.

In July 2024, the CMA indicated that the transaction "[gave] rise to a realistic prospect of a substantial lessening of competition" in the worldwide market for business travel agency services to global multinational customers and, in August 2024, referred the matter for an in-depth investigation. In November 2024, the CMA published an interim report confirming the earlier conclusion and initiating a discussion of remedies. In February 2025, the CMA indicated it might reach a

different conclusion as to the competitive effects of the merger. In March 2025, the CMA closed its investigation, after the CMA Inquiry Group failed to find (by the required two-third majority) an expected substantial lessening of competition. The CMA investigatory group found, among other things, that "while CWT remains a competitor to GBT, it is a materially weakened competitor and is likely to continue to further weaken in the future." CWT's "financial difficulties during and following the Covid-19 pandemic have had a material adverse impact" and its "financial performance remains weak and is likely to continue to further weaken in the future." The CMA noted that CWT did not claim to be an "exiting" or failing firm. Consistent with CWT's weakened state, the CMA investigatory group noted that other firms were stronger competitors than CWT and would remain so after the transaction.

The Biden Administration's DOJ had evidence of the weakened financial condition of CWT at the time it filed the complaint but, as detailed in its complaint, rejected this evidence as insufficient to undercut CWT's competitive impact and, in the alternative, argued that CWT had other, less anticompetitive alternatives to a transaction with GBT. Most of the evidence it cited in support of these positions was from mid-to-late 2023 and likely of questionable relevance. Its rejection was in keeping with the Biden Administration's general unwillingness to publicly accept a weakened competitor defense, as captured in the 2023 Merger Guidelines at section 3.1: "Although merging parties sometimes argue that a poor or weakening position should serve as a defense even when it does not meet [the elements of a failing firm defense], the Supreme Court has 'confined the failing company doctrine to its present narrow scope.'" The Biden Administration would "evaluate evidence of a failing firm consistent with this prevailing law." The Trump Administration appears to be adopting a different, more nuanced position and one more aligned with individual firm and market realities.

Although the Trump Administration did not identify a reason for its dismissal of its earlier complaint – and some senators speculated that "undue influence" had led the DOJ to dismiss its complaint – it is highly likely that, faced with the prospect of judicial consideration of the same evidence provided to the CMA, the DOJ accepted either that CWT was a weakened competitor or that it would have difficulty rebutting evidence to that effect that the parties would have introduced at trial (and had, in fact, submitted to the court following filing of the complaint). *The current administration's disposition of this matter is additional evidence that the leadership of the antitrust agencies has adopted a more balanced evaluation of mergers than the previous administration. Defenses or countervailing factors that would have been ignored in the Biden Administration's antitrust agencies may find a more receptive audience in the Trump Administration.*

FTC Reopens and Sets Aside Two Controversial Merger Settlements

The FTC reopened and set aside the final consent orders in the Chevron/Hess (2025) and ExxonMobil/Pioneer Natural Resources (2024) mergers. The consent orders had prohibited Chevron from nominating, designating, or appointing Hess' Chief Executive Officer John B. Hess to Chevron's board of directors and, among other things, prohibited ExxonMobil ("Exxon") from nominating, designating, or appointing Pioneer's CEO Scott Sheffield to Exxon's board of directors or as serving as an advisor to the board or Exxon's management. Chevron, Hess and Mr. Sheffield had petitioned the Commission to reopen and modify the final consent order.

Section 5(b) of the FTC Act authorizes the Commission to, after notice and opportunity for hearing, modify a prior order whenever it believes: (a) that conditions of fact or of law have changed so as to require such action; or (b) if the public interest so requires. In its review, the Commission found that the underlying complaints in the *Chevron/Hess* and *Exxon/Pioneer* merger matters failed to plead a violation of antitrust law. According to the Commission, the orders were contrary to the public interest and should be reopened and set aside. See *Commission Orders Reopening and Setting Aside Chevron/Hess* and *Exxon/Pioneer* orders.

In the July 2025 Quorum, we suggested that parties subject to consent orders requiring prior approval of future transactions seek to reopen and modify those

orders, because the Commission has moved away from prior approval clauses in merger settlements. The two matters discussed above are additional evidence that the Commission continues to make aggressive efforts to reverse areas in which it believes the Biden Administration overreached in its application of the FTC Act.

DOJ Resolves Complaint Prior to Trial, Accepting Divestitures in UnitedHealth/Amedisys *Merger & Obtains $1.1 Million Civil Penalty for HSR Violation*

In November 2024, the DOJ, along with the states of Maryland, Illinois, New Jersey and New York sued to enjoin the proposed merger of UnitedHealth Group, Inc. ("UnitedHealth") and Amedisys, Inc. ("Amedisys"), "two of the largest home health and hospice service providers in the country." The proposed merger was "presumptively anticompetitive and illegal in hundreds of local markets across America." It would (according to the DOJ's complaint) also reduce competition for nurses, leading to lower wages and worse working conditions. Prior to filing for an injunction, the DOJ rejected the parties' offer to divest home health and hospice locations in hundreds of local markets to "a much smaller competitor" owned by two private equity firms. VitalCaring, the proposed buyer of the offered assets was, according to DOJ "an unproven company with only three years of operational experience, poor financial performance and potentially catastrophic legal exposure" for its CEO's alleged breach of fiduciary duty in forming VitalCaring while CEO of her previous employer. DOJ's complaint also alleged that Amedisys erroneously and inaccurately certified substantial compliance with the DOJ's Request for Additional Information ("Second Request"), failing to produce over 2.5 million documents until its inaccurate compliance was discovered by the DOJ.

In August, the DOJ and the parties reached a settlement requiring the divestiture of 164 home health and hospice locations across 19 states, accounting for over $500 million in annual revenue. The divested assets were to be sold to two buyers (neither of whom was VitalCaring). The DOJ also required Amedisys to pay a civil penalty of $1.1 million for its erroneous certification of compliance with the Second Request. The settlement(s) are subject to court review, to confirm the settlements are consistent with the public interest.

The administration has moved over the summer to clear its merger litigation docket. In June it settled its late January challenge to Hewlett-Packard Enterprises' proposed acquisition of Juniper Networks (discussed in the July 2025 Quorum), reportedly over the objection of the Antitrust Division's leadership. In July, it dismissed the Biden Administration's challenge to the GBT/CWT merger (as discussed above) and in August, it settled the Biden Administration's challenge to the UnitedHealth/Amedisys merger (as discussed here). The Administration claims it is not anti-merger, but that it has returned to the more balanced approach of the first Trump Administration. The acceptance of merger settlements in lieu of litigation is strong evidence of the administration's position.