

Clients & Friends Memo

Antitrust Enforcement Mid-Year 2023 Review

July 27, 2023

The year 2023 is proving to be a milestone year for antitrust enforcement. Less so for novel cases and investigations and more so for the generational changes being proposed by the enforcement authorities for merger analysis, HSR notification requirements, and competitor information exchanges. Here is a round-up of those and other significant enforcement activities.

- **Merger Guidelines.** On July 19, 2023, the Federal Trade Commission (FTC) and Department of Justice (DOJ) proposed a new set of joint FTC/DOJ Merger Guidelines to replace the Guidelines currently in force. The structure of the proposed new Guidelines differ radically from all prior Guidelines. Instead of taking an economically analytical approach to merger analysis, the proposed new Guidelines contain 13 doctrinaire principles, presented as 13 “Guidelines,” that are intended to guide future enforcement analysis. Moreover, the proposed Guidelines revert to the much lower market concentration ratio thresholds for a challenge last used in the Agencies’ 2010 Merger Guidelines. For more detail on the proposed new Guidelines, see [FTC and DOJ Jointly Issue Draft Merger Guidelines](#) and [FTC/DOJ Press Release](#).
- **HSR Form.** On June 27, 2023, the FTC issued a notice of proposed rulemaking announcing its intention to substantially overhaul the HSR notification process. The new Form is intended to require submission of substantially more information than is currently required. The FTC’s goal is to gain greater transparency into the identity of the parties and the nature of proposed transactions. The FTC estimates that the cost of compliance may increase four-fold. Most commentators have said that number is substantially understated. Although the FTC partially justifies that new requirements by reference to premerger requirements in other jurisdictions, most if not all of those jurisdictions offer a “short form” alternative for transactions that do not involve product or service overlaps, which constitute the majority of proposed transactions subject to HSR notification. The FTC did not propose a short form alternative. See [FTC Press Release](#).
- **Information Sharing.** First DOJ and more recently the FTC have withdrawn previously issued guidance and formal guidelines (*e.g.*, Joint FTC/DOJ Healthcare Guidelines) that had explained how the government would analyze information sharing between competitors and in industrywide benchmarking and that provided certain “safe harbors” for such endeavors.

Although the move was prompted by the Agencies' concerns over the increasingly widespread use of algorithms that may be used as price signaling devices, the action will affect virtually all competitor information exchanges. Because the nature of such exchanges are fact specific, we encourage parties to information exchanges or proposed benchmarking projects to seek advice of experienced antitrust counsel before moving forward in this relatively uncertain space.

- **Litigated Verdicts.** In 2023, with one notable exception, the Agencies continue to lose significant cases that they litigate to verdict.
 - **Microsoft/Activision (FTC).** On July 11, 2023, the FTC was handed a stinging defeat by Judge Jaqueline Scott Corley of the United States District Court for the Northern District of California, who declined to block Microsoft's proposed acquisition of video game maker Activision Blizzard and rejected virtually every argument advanced by the Agency. The Court of Appeals for the Ninth Circuit subsequently denied the FTC's application to maintain a preliminary injunction pending appeal, clearing the way for the parties to close the deal. The outcome of the case continues a line of federal court rebukes to FTC and DOJ vertical challenges, especially in Big Tech deals.
 - **JetBlue/American Airlines (DOJ).** In the one bright spot for the government so far in 2023, Judge Leo T. Sorokin of the United States District Court for the District of Massachusetts ruled on May 19, 2023 in favor of the DOJ's motion to enjoin the continued joint venture between American Airlines and JetBlue, holding that the companies' "Northeast Alliance" involved so much integration between the airlines so as to constitute an unlawful *de facto* merger. The parties have since abandoned the Alliance.
 - **Meta/Within Unlimited (FTC).** On February 3, 2023, Judge Edward J. Davila of the United States District Court for the Northern District of California denied the FTC's motion to preliminarily enjoin Meta's proposed acquisition of its alleged virtual reality potential competitor Within Unlimited. In ruling against the FTC, the judge rejected the government's market definition analysis. Nevertheless, the judge did reaffirm the validity of the government's potential competition theory, but he rejected the government's application of the facts in this case to that theory. The FTC had stated publicly that the case was an important test of the Agency's ability to police the acquisition and elimination of nascent competitors of Big Tech platforms.
 - **Assa Abloy/Spectrum Brands (DOJ).** Although not litigated to verdict, the DOJ's February 2023 settlement with Swedish hardware and lock manufacturer Assa Abloy has been widely seen as a defeat for the DOJ. In that case, the parties proposed a set of divestitures and succeeded in forcing the DOJ to "litigate the fix" despite current DOJ policy against negotiating consent decrees. As it became increasingly apparent that the judge overseeing the case was not persuaded that the transaction would result in a substantial

lessening of competition given the proposed fix, the DOJ settled the case in exchange for a negotiated divestiture package. The case continues a trend of court decisions that acknowledge the effect of a proposed fix on the potential competitive effects analysis. The Agencies, by contrast, continue to argue unsuccessfully that such cases should be tried exclusively on the existing record and not on the basis of a proposed fix.

- **Environmental, Social and Governance (ESG).** Republican-led State Attorneys General (AGs) investigations into alleged “cartel” activity of financial institutions’ climate-related lending and investment decisions continues unabated in 2023 and perhaps has picked-up additional steam. On March 30, 2023, 21 State AGs sent a [letter](#) to 53 leading asset managers, including banks and insurers, warning that the Asset Managers’ participation in the Climate Action 100+ and Net Zero Asset Manager (NZAM) organizations may constitute conspiracies in restraint of trade in violation of federal and state antitrust laws. The letter warned specifically that the “ongoing agreements between asset managers to use American’s savings to push political [ESG] goals during the upcoming proxy season” may be unlawful. It goes on to state that “[w]e also have concerns that horizontal agreements related to voting and engagement through organizations such as Climate Action 100+ and NZAM unreasonably restrain and harm competition. As noted above, NZAM members commit to ‘[i]mplement a stewardship and engagement strategy, with a clear escalation and voting policy, that is consistent with our ambition for all assets under management to achieve net zero emissions by 2050.’” The letter cites similar concerns about insurance companies allegedly conspiring to base underwriting decisions on race rather than purely actuarially justified risk. The letter was followed over the next several weeks by the issuance of a flurry of CIDs to asset managers. To date, no case has been filed. The Republican-controlled U.S. House Judiciary Committee is involved in its own similar investigations.

- **Changes in Make Up of FTC.** Republican Commissioner Christine S. Wilson resigned in March 2023 from the FTC issuing a resignation letter that was highly critical of FTC Chair Lina Khan and her fellow Democratic Commissioners. Her resignation left the FTC with three Democratic Commissions and no Republican or Independent Commissioners. On July 3, 2023, President Biden nominated two individuals to fill the open Republican seats on the Commission. The nominees are Andrew N. Ferguson, currently serving as Solicitor General of the Commonwealth of Virginia, and Melissa Holyoak, currently serving as the Solicitor General of Utah.

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If you have any questions, please feel free to contact the following Cadwalader attorney.

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