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Federal Trade Commission

Prepared Remarks

DISPARATE IMPACT: WINNERS AND LOSERS FROM THE NEW M&A POLICY

Commissioner Noah Joshua Phillips
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Thanks, Jan, for the kind introduction, and our hosts, Berkeley Law 's p22.3mon60.7 (n412.3 (21)re

https://www.ftc.gov/_system/files/documents/public_statements/1524321/phillips___-_competing_for_companies_5-31-19_0.pdf.

competition, block or remedy them , and—in keeping with Ronald Coase [2]—otherwise reduce transaction costs and minimize distortions to the market.

But to the new leadership at the antitrust agencies and their fellow travelers, that view is anathema. Their view of M&A boils down to three ideas. First, M&A generally produces little social value and a great deal of social cost. [3] Second, the costs include a wide swath of ills including lessened competition but also disadvantaged labor, [4] inflation, [5] and undermined democracy.[6] You name the problem, and there's a good chance some prominent

[2] R.H. Coase, The Nature of the Firm, 4 ECONOMICA 386 (1937); R.H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960).

[3] See, e.g., Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks Regarding the Request for Information on Merger Enforcement 2 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf ("While the current merger boom has deliver/252Wdiiv_ofes(f)6.7 (or)11 ( )13.3 (i)2 (n)4.7 (v)10.7 (s)]TJ 0.004 Tc -0.002 Tw32.0607 0 T
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goals of Progressive antitrust reformers, to rein in the biggest companies, the gratuitous taxes on M&A being imposed by the antitrust agencies are regressive, hitting smaller companies the hardest. Policies designed in the name of "anti-monopoly" are disproportionately taxing companies that few would consider monopolies, making it harder for them to compete.

Taxing M&A

How are the agencies taxing M&A? Antitrust enforcement over the last fifteen months has been anything but vigorous—indeed, it has been sclerotic. By that I mean not just fewer cases being brought, but a longer process with fewer decisions being made. [11]

The merger review process is already expensive. Merging parties typically end up paying hefty sums in attorney and consultant fees, not to mention the time spent internally to comply with agencies demands. One study estimated the median cost of Second Request compliance at $4.3 million. [12] That is separate and apart from the up-front expense of negotiating deals and conducting due diligence. Full-phase merger investigations can last from several months to a year or more. Unanticipated delays can impose costs beyond fees and distraction, like having to extend deal financing or losing key employees and customers—or even losing out on the deal.

While supporters of agency leadership cheer what they hope will be a deterrent to merging generally, these kinds of costs are felt more heavily by smaller firms. And that disadvantages them relative to larger ones, to whom the costs look more like a rounding error. The fact is that mergers are a way for smaller firms to join forces to compete more effectively and efficiently against larger rivals. Combining can put financially struggling firms on firmer footing, or improve the terms on which they can borrow to grow their business. Advisers to traditional retail grocers on M&A made a recent submission detailing how

flee traditional grocers, resulting in lessened investment, store closing, and bankruptcy .[13] While those hostile to M&A might discount this narrative, antitrust reformers have not been shy about basing

transactions both by merging parties and divestiture buyers for 10 years. The Commission also threatens to impose restrictions for markets not at issue in the transaction .[21] The new policy warns merging parties that they are more likely to be slapped with prior approval provisions if they substantially comply with the FTC's compulsory requests in a full phase investigation. In marginally less ominous language, the Commission is saying: give up and don't make us investigate your merger, or we'll make you pay. [22] The Commission also holds out the prospect of pursuing prior approval remedies even after parties drop the offending deal, the precise embarrassing and wasteful conduct that led the agency to adopt a policy limiting prior approval requests in 1995 .[23]

Giving the Commission a veto over future M&A and all the time it wants to render it imposes significant obligations on merging parties , and innocent divestiture buyers. It slows and chills future M&A activity whether it lessens competition or not. Perhaps those hostile to M&A rest easier now that Hikma Pharmaceuticals, a $2 billion generic drug manufacturer, cannot buy another injectable skin steroid without permission. [24] They are surely relieved that 30-employee XCL Energy cannot buy more land to drill in Utah without government approval. [25] But these two are hardly Pfizer and ExxonMobil. And say what you will, but requiring Price Chopper and Tops to obtain the FTC 's permission before acquiring a supermarket in Vermont or upstate New York for the next 10 years is probably not keeping Amazon executives up at night. [26]

Meanwhile , after years of rhetoric claiming that antitrust enforcers are falling down on the job by insinuating that every large pharmaceutical deal or purchase by a large tech company must, somehow, be anticompetitive and unresolvable , are we not supposed to notice AstraZeneca's $39 billion acquisition of Alexion Pharmaceuticals, [27] Merck's $11.5

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[21] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf .

[22] Id. at 2 ("This should signal to parties that it is more beneficial to them to abandon an anticompetitive transaction before the Commission staff has to expend significant resources investigating the matter.")

[23] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips, supra note 20, at 4 n. 14.

[24] Decision & Order at 6, Hikma Pharmaceuticals/Custopharm, File No. 221-0001, Docket No. C-4762 (F.T.C. Apr. 18, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2210002C4762HikmaCustopharmOrder.pdf.

[25] Decision & Order at 19, EnCap/EP Energy, File No. 211-0158, Docket No. C-4760 (F.T.C. Mar. 25, 2022),

billion acquisition of Acceleron Pharma, [28] and Facebook's $1 billion acquisition of Kustomer, [29] each of which went through without any prior approval or other kind of obligation? [30]

Smaller companies are more likely to accede to prior approval requirements because they have less leverage and often need the deal more, and with a prior approval obligation their ability to engage in M&A will be less than their larger competitors. That is a competitive disadvantage to larger rivals.

And let's not forget the divestiture buyers. We are punishing the comp anies (often smaller ones) that have done nothing but step up to help resolve a competitive concern. This is what Commissioner Wilson and I dubbed "bonkers crazy". [31]

Who does all of this help? One answer, as with the termination of ET, is agency heads who do not wish to be associated with "clearing" mergers. Prior approval requirements deter consents, not mergers. Among other things, they scare off better buyers of assets. Without a consent, there is nothing for enforcers to approve. Sure, this strategy probably will push a few otherwise settleable matters into expensive, uncertain litigation and force staff to review prior approval applications for transactions that would not otherwise merit investigation. Fine, companies will fix it first. And, yes, th e agencies will be

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less effective and efficient as a result. But at least the leadership will be able to dodge some difficult and unpopular decisions. This is a political benefit, not a policy.

I am very concerned we are going to start seeing deals with divestitures but without consents. There are today murmurings in the private bar that the agencies are refusing to engage on remedies, and instead are conveying their competitive concerns and leaving it up to the merging parties to attempt a resolution. This is fixing it first with a wink and a nod—and no enforceable agreement with the government. As a result, the public loses out on the protections that a consent agreement provides—including, ironically, prior approval policy. Only agency heads, who get to avoid the appearance of blessing mergers, gain. Reading strident dissents about failed remedies for years, it never occurred to me that one solution might be neither blocking nor remediating deals at all.

Pre-Consummation Warning Letters

The final change to merger control I'll highlight is the promiscuous use of pre-consummation warning letters, sometimes called "close-at-your-own-peril letters". The point of HSR is to enable the antitrust agencies to review transactions, and block or remedy the anticompetitive ones, before they are consummated. [32] That is not always possible, of course. If the agencies do not expect to complete their review before the merging parties are free to consummate their deal, they will sometimes issue pre-consummation warning letters that typically inform the parties that the investigation is ongoing, may ultimately find that the merger is illegal, and the parties cannot avoid an enforcement action by consummating now.

When a merger presents legitimate competitive concerns and there is a good reason why the investigation will not be completed in time, I have no objection to issuing such letters. But last August, the Director of the FTC's Bureau of Competition announced a new practice of issuing these letters far more liberally. [33] By my count, of late, the FTC has sent warning letters in at least 60 investigations. Some of those are in matters where we haven't even begun to conduct an investigation. In others, the real investigation is over and we lack

[32] See PREMERGER NOTIFICATION OFF., FED. TRADE COMM'N, INTRODUCTORY GUIDE I: WHAT IS THE PREMERGER NOTIFICATION PROGRAM? 1 (Mar. 2009), https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf.

[33] Holly Vedova, Dir., Bureau of Competition, Adjusting merger review to deal with the surge in merger filings, FED. TRADE COMM'N COMPETITION MATTERS BLOG (Aug. 3, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

a reasonable basis to conclude the merger violates the law. But the letters say we're still investigating.

There is a bad government aspect to this. For those matters where we've decided there isn't a competitive issue to address, one of two things must be true. Either we are wasting staff's time and taxpayer dollars on needless investigation, or we are misrepresenting to parties what is really happening.

But to parties trying to make and implement M&A decisions, the result—and, I fear, the goal—is to sow uncertainty about the future. Uncertainty, in turn, discourages post-merger integration and investment. This effect is particularly harmful for small companies, which are more likely than larger firms to need M&A to become more efficient and competitive, and which will have a harder time remaining viable should their merger be unwound. How is that a good thing? Once again, there is a critical benefit to agency heads: because investigations never end, we can never be seen as approving the deals we are investigating.

How is the M&A Tax Working?

If these various M&A taxes have borne fruit as strategies to stop more anticompetitive mergers, those fruit are not apparent. But the disproportionate burdens already are.

Are the big guys running scared? The New York Times' DealBook recently reported that while global M&A is down overall from last year—a natural and predictable corollary of plummeting equity values and rising interest rates—there has been a sharp increase in the value and volume of very large deals—i.e., $10 billion or more—"despite increased scrutiny from antitrust regulators and other factors that dampened enthusiasm for smaller deals".[34] If that was the goal in the first place, it is very different from the rhetoric.

Conclusion

Policy involves tradeoffs. In their zeal to tax M&A however they can, especially in ways that courts cannot police, those running the antitrust agencies and their supporters are already inviting perverse consequences. They are driving up costs and sowing uncertainty that disparately impact smaller players, putting them at a competitive

[34] Michael J. de la Merced, Deal-making took a hit in the first quarter of 2022, N.Y. TIMES (Apr. 15, 2022, 2:15 PM), https://www.nytimes.com/live/2022/04/01/business/economy-news-inflation-russia#deal-making-took-a-hit-in-the-first-quarter-of-2022.

disadvantage to the biggest companies. And, apart from press releases and avoiding political accountability, what's the payoff?

Everything I have described today involves the process for merger control. But substantive changes are surely coming, as the Antitrust Division of the Department of Justice ("DOJ") and FTC undertake revisions of the merger guidelines. I am not opposed to this project in principle, and I am open to exploring well-supported, administrable changes to the 2010 Guidelines.

But the hostile mentality about M&A responsible for recent process reforms is a bad place to start, and I am concerned that bias is already skewing the Guidelines revisions. The January 18 Request for Information issued jointly by the DOJ and FTC solicits "specific examples of mergers that have harmed competition" but not of mergers that benefited competition. Or consider the "listening forums" undertaken by FTC Chair Lina