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MERGER CONTROL 2023

Global interview panel led by Bradley Justus, Lisl Dunlop and James Hunsberger of Axinn Veltrop & Harkrider LLP.

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United States

Lisl Dunlop has over 30 years of experience guiding clients through antitrust reviews of their most significant transactions. A trusted adviser, she represents clients in antitrust agency investigations and complex antitrust litigation in a broad range of industries. Her clients include leading industrial, technology and healthcare companies.

Bradley Justus focuses his practice on antitrust law, including mergers, litigation, government investigations and counselling. Bradley has represented clients in several of the most high-profile and complex deal reviews and antitrust litigations in recent memory. In addition to appearing in courts throughout the country, before the Department of Justice and before the Federal Trade Commission, Bradley has represented major clients facing merger reviews by the European, Brazilian, Chinese, Korean, Canadian, Mexican and Japanese competition regulators.

James Hunsberger's practice focuses on the full range of antitrust matters, including mergers, litigation, government investigations and antitrust counselling. He has represented clients in a broad range of industries, including telecommunications, chemicals, software, semiconductors, consumer goods, building solutions and international shipping. In addition to his significant experience before US courts and agencies, James also has helped clients achieve merger clearances for complex global deals in several other major jurisdictions.

Aigerim Saudabayeva is an associate in the antitrust group in Axinn's Washington, DC office. Her practice focuses on merger clearance and litigation.

QUESTIONS

1 What are the key developments in the past year in merger control in your jurisdiction?

We are in a period of seismic change in US antitrust enforcement. Representing a sharp break from former Republican and Democrat administrations, the Biden administration is pushing an aggressive antitrust agenda that is hostile to deal making. The changes are reflected in enforcement actions being brought in the courts, new guidance on how the enforcement agencies will approach merger review, and significant proposed changes to the premerger notification regime.

The Federal Trade Commission (FTC) and the Department of Justice's Antitrust Division (DOJ) (the FTC and DOJ, collectively, the Agencies) have continued to choose high-profile cases to demonstrate their aggressive approach to merger enforcement, mounting often unsuccessful court challenges based on an expansive application of vertical theories of harm (eg, *Microsoft/Activision*), 'portfolio theory' (eg, *Amgen/Horizon*) and the doctrine of 'potential competition' (eg, *Meta/Within*). The FTC also overturned an adverse decision of its own Administrative Law Judge (ALJ) in *Illumina/GRAIL*.

On 19 July 2023, the Agencies released the 2023 Draft Merger Guidelines (DMGs). The DMGs signal an aggressive enforcement agenda, underpinned by a policy preference for organic growth over acquisitions. The DMGs represent a break from the bipartisan, economics-driven consensus of the past several decades, and are designed to give the Agencies more ways to challenge transactions through lower threshold presumptions and expansive theories for finding mergers unlawful.

The Agencies also have proposed massive changes to the premerger notification filing process under the Hart-Scott-Rodino (HSR) Act. If implemented, these changes would slow the review process and

Lisl Dunlop   Bradley Justus

James Hunsberger   Aigerim Saudabayeva

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substantially increase the burden on merging parties. The changes signal a fundamental shift in the US review regime and could chill merger activity.

2 Have there been any developments that impact how you advise clients about merger clearance?

Each change impacts the way clients approach significant transactions. First, US merger reviews are becoming longer, covering a broader range of concerns. This has consequences for the time a pending deal needs to stay open before closing and the cost of obtaining clearance. While parties in the largest transactions will continue to make these investments, these factors may discourage smaller deals.

Given the Agencies' hostility to deals and their lack of success in court, clients need to consider the potential need to litigate to gain clearance. Again, this has implications for deal timing: failing to allot enough time may mean that the Agencies can effectively stop the merger without risking an adverse litigation outcome by simply 'running out the clock' in the investigation phase until the deal agreement expires. Without a credible threat of litigation, the Agencies may feel less constrained by the prospect of judicial review and have little incentive to engage in remedy discussions.

Additionally, given the Agencies' increased reluctance to accept remedies, clients need to be prepared to implement remedies proactively without Agency approval and 'litigate the fix' in court if necessary. In those rare cases where the Agencies will negotiate, clients need to be prepared for possibly onerous 'prior approval' provisions that may hamper future deal making.

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

Recent cases showcase a more aggressive attitude toward enforcement. Key priorities are vertical deals, acquisitions involving private equity firms, deals in the high-tech and healthcare industries, and transactions affecting labour markets.

Vertical Mergers

Despite losing a vertical deal challenge last year – *UnitedHealth/Change Healthcare* – the Agencies have continued to bring enforcement actions against vertical mergers. The FTC challenged Microsoft's US$69 billion acquisition of Activision Blizzard, alleging that the deal would enable Microsoft to exclude its competitors by making Activision's content, particularly the *Call of Duty* video game franchise, exclusive to Microsoft's Xbox gaming console, and subscription and cloud gaming offerings. The FTC first initiated proceedings in its in-house administrative court. But after the

European Commission cleared the deal subject to behavioural remedies and the parties appealed the initial prohibition order from the UK Competition and Markets Authority (CMA), the FTC expressed concern that the parties may imminently close the deal despite the CMA's order and sought an injunction in federal district court (the FTC itself has no power to enjoin transactions on a preliminary basis, so FTC challenges typically follow this dual-track process). On 10 July 2023, the district court denied the FTC's request for a preliminary injunction, and that decision is now on appeal in the Ninth Circuit. The FTC's internal proceedings are suspended until the appeals court rules.

While past administrations viewed vertical mergers as generally procompetitive, the Agencies' current approach is highly skeptical of claimed efficiencies. In addition to the DOJ's challenge to *UnitedHealth/Change* in 2022 and the FTC's challenges to *Microsoft/Activision* and *Illumina/GRAIL*, the current administration's stricter approach toward vertical deals is also reflected in the FTC's withdrawal of the 2020 *Vertical Merger Guidelines* and the DMGs.

Private equity

Private equity acquisitions are a renewed enforcement priority. In particular, the Agencies are focused on stemming so-called private equity 'roll up' strategies, where the Agencies claim that private equity firms attain a dominant share in a particular industry by engaging in a series of small, often non-HSR-reportable transactions in a once-fragmented market. Last year, the FTC investigated two acquisitions by private equity firm JAB Consumer Partners, accusing it of using a 'roll-up' strategy to consolidate local markets for veterinary clinics. In addition to requiring clinic divestitures, the FTC's settlements with JAB imposed extensive notification and approval obligations for similar future transactions.

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In September 2023, the FTC filed a complaint against private equity firm Welsh Carson Anderson & Stowe and its subsidiary US Anesthesia Partners (USAP), alleging that Welsh Carson spearheaded a 'roll-up' strategy to consolidate hospital anaesthesia services, making USAP the 'dominant' provider in several major cities in Texas. The FTC alleges that the 'roll-up' strategy, combined with other agreements between USAP and other anaesthesia practices, enabled USAP to increase its negotiating leverage against insurers and impose higher prices on hospitals. The case is currently in its initial stages.

Big tech

The Agencies are still pursuing their quest against 'Big Tech,' with investigations and court actions underway against Meta, Google, Amazon and others. The FTC sued to enjoin Meta from acquiring virtual reality app developer Within alleging that the transaction was anticompetitive because it eliminated potential competition from Meta in the 'virtual reality dedicated fitness app market,' where Within competed with its app, *Supernatural*. The FTC argued that, with its

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'virtual reality empire', Meta was an 'actual potential competitor' with the required resources and motivation to build competing apps, and its independent entry would spur innovation and competition. The FTC also claimed the mere threat of Meta's entry acted as a competitive constraint on market participants who 'perceived' Meta as a potential entrant. The district court rejected the FTC's challenge on the facts. However, the DMGs include the potential competition theories utilised in *Meta/Within*, and we expect the Agencies to increasingly push these theories, particularly against acquisitions of smaller competitors in nascent technology markets.

Healthcare

The FTC has continued its intense scrutiny of mergers involving healthcare, including its ongoing litigation against Illumina's acquisition of GRAIL. In September 2022, the Chief ALJ for the FTC sided with Illumina, finding the FTC failed to demonstrate that innovation in the market for multi-cancer early detection tests would be substantially lessened. On 3 April 2023, the full Commission reversed the decision, finding that Illumina's proposed remedies were inadequate to outweigh the acquisition's competitive harms. The case is currently on appeal in the Fifth Circuit Court of Appeals.

The FTC also challenged drug company Amgen's US$27.8 billion acquisition of Horizon alleging that Amgen could leverage the combined drug portfolio to disadvantage competitors, even though the companies' products had no significant horizontal overlap or non-horizontal links. The FTC sued the parties in district court to enjoin the transaction, but settled the case with a rare behavioral remedy, prohibiting Amgen from bundling Amgen and Horizon products, or from using contract terms to exclude competitor products.

Labour markets

Another key trend is the Agencies' increased emphasis on a merger's potential effects on labour markets, especially when the merged entity might be a large employer. The Agencies' proposed HSR amendments announced on 27 June 2023 would require merging companies to disclose detailed information regarding employees, including a five-year history of citations from the Occupational Safety and Health Administration, the National Labor Relations Board and the Department of Labor's Wage and Hour Division, and to report overlapping employee geographies.

The FTC's current investigation of Kroger's US$24.6 billion acquisition of Albertsons reportedly focuses on how the merged entity's size may allow it to exert downward pressure on store workers' wages and farmers' crop prices. To address these concerns, the parties announced a plan on 8 September 2023 to divest 413 stores and five brand labels to C&S Wholesale Grocers. It is unclear whether the Agencies will accept the parties' proposed remedies.

4 Are there any trends in merger challenges, settlements, or remedies that have emerged from the past year? Any notable deals that have been blocked or cleared subject to conditions?

Merger settlements remain limited and available only in rare situations. DOJ Assistant Attorney General (AAG) Jonathan Kanter has historically been skeptical of merger settlements, saying in a January 2022 speech that 'merger remedies short of blocking a transaction often miss the mark.' FTC Chair Lina Khan has similarly remarked that the FTC was going to focus resources on 'litigating, rather than settling'. Nonetheless, the Agencies have negotiated multiple remedies mid-litigation after bringing enforcement actions where they seemed to face the risk of a loss in court. The Agencies have settled three litigated cases under these circumstances so far in 2023: *Amgen/Horizon*, *Intercontinental Exchange/Black Knight* and *Spectrum/Assa Abloy*.

Where the Agencies have been unwilling to entertain remedies during the investigation phase, sometimes parties have acted independently to remedy their deals without agency sign-off and then 'litigated the fix' in the subsequent enforcement action. In *Microsoft/Activision*, for example, Microsoft entered into a series of agreements – including with Nintendo and rival cloud-based provider Ubisoft – to address potential foreclosure concerns. Despite the FTC's rejection of such a behavioral remedy in the investigation phase, the district court found the agreements relevant to its analysis of the merger's competitive effects, and Microsoft prevailed (the case is currently on appeal).

In September 2023, Principal Deputy AAG Doha Mekki refuted criticism that the DOJ is 'excessively obstructionist or uncompromising' in its approach to merger remedies, stating that 'consent decrees and fixes are still on the table'. But given AAG Kanter's recent comment that the strict 'remedies policy is working', merging parties should anticipate that settlement discussions will happen later in the review process, and possibly after the Agencies bring enforcement actions.

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5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

In July 2023, the Agencies released their draft guidelines for assessing the competitive effects of mergers. The DMGs adopt an approach that is generally skeptical – even hostile – to mergers, expressly stating a preference for internal growth over acquisition. The DMGs adopt 13 high-level principles, citing the text of the antitrust laws and largely pre-1970s Supreme Court cases, while relying more on structural presumptions rather than the modern effects-based economics of earlier merger guidelines. Among the changes, the DMGs lower the threshold presumption of illegality for horizontal

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mergers; introduce a structural presumption against vertical mergers where a party holds 50 per cent or more of a vertically related market; prohibit transactions that entrench or extend a dominant position; and continue their close scrutiny of potential effects on labour market competition.

The DMGs lower the thresholds for a horizontal merger to be presumed anticompetitive: mergers that increase concentration, as measured by the Herfindahl-Hirschman Index (HHI), by 100 points or more and result in a 'highly concentrated' market with an HHI of 1,800 or more are presumed unlawful. These thresholds are significantly lower than those in the 2010 Horizontal Merger Guidelines (requiring an increase by 200 or more resulting in a market HHI of 2,500 or more). The DMGs also include another strict structural presumption of illegality for a transaction that results in a combined market share over 30 per cent when the increase in HHI is 100 or more. This means, for example, that a firm with a share as low as 28 per cent could not acquire a firm with a share of only 2.1 per cent or more without triggering a presumption of illegality.

Additionally, the DMGs introduce a structural presumption against vertical mergers where the 'foreclosure share' in the vertically related market is above 50 per cent. The Agencies also include 'plus factors' they may use to find a merger unlawful, including a trend toward 'further vertical integration', the merger's nature and purpose, and possible increases in barriers to entry.

The DMGs also include concerns about transactions that are not horizontal or vertical, but that somehow entrench or extend a 'dominant position', which can be established with a share of as low as 30 per cent. The Agencies' aim with such enforcement is to 'preserve the possibility of eventual deconcentration' of markets. Similar concerns appear in a guideline prohibiting mergers that 'further a trend towards concentration'.

The DMGs do not carry the force of law and these significant changes – which depart from modern case law, economics and long-standing bipartisan consensus – create risk for the Agencies as to whether the courts will adopt them as the correct framework. The Agencies are now considering changes to the final version after receiving over 3,000 public comments.

Another major development is the proposed sweeping redesign of the premerger notification process. On 27 June 2023, the Agencies issued proposed amendments to the HSR rules. These amendments would require filing parties to provide significantly more information than is currently required, including supplying all draft versions of responsive documents related to the competitive effects of a transaction ('Item 4' documents), submitting narrative responses about the transaction's strategic rationales, providing detailed employee information and detailing the corporate governance structure. Notably, parties would also be required to identify and provide a narrative description for horizontal overlaps or vertical links between the parties' products and services, regardless of market share, revenue or competitive significance. The FTC estimates that the average time needed to

prepare a filing would increase almost fourfold from 37 hours to 144 hours, although practitioners estimate that considerably more time would be required. The extra costs associated with preparing an HSR filing will act as a burdensome tax on, and potentially disincentivise, small mergers even if they raise no competitive issues.

Finally, the proposed changes to the HSR review process create uncertainty that will impact the coordination of review processes for global deals. Outside the United States, several jurisdictions – notably the EC, United Kingdom and China – already have extended timelines for their own in-depth review. Under the regime in place since the 1970s, the HSR process has largely placed control of timing in the parties' hands. The initial HSR filing currently seeks objective, readily assembled information for the parties to 'start the clock' on the merger review. In complex deals garnering a 'Second Request' for additional information, the suspensory HSR waiting period expires 30 days after the parties certify that they have substantially complied with the Second Request. The proposed changes would inject a degree of subjectivity into the initial HSR filing that could give the Agencies unilateral discretion to 'bounce' filings they deem inadequate and may require an open-ended pre-notification process similar to regimes in Europe and Asia, extending the merger review process.

The comment period on the proposed HSR rules concluded on 27 September 2023, and the FTC will now review the submitted comments to consider whether to make revisions. Depending on the content of the final rules, parties and industry groups may challenge the changes in federal court by arguing that the FTC exceeded its rulemaking authority under the HSR Act.

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6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

Overall, US merger review has become more burdensome and more unpredictable for merging parties as a result of the Agencies' significant proposed changes to the HSR process and merger guidelines, enforcement priorities, and commitment to litigating more cases. First, the proposed HSR changes would burden transactions, requiring significantly more time and cost, with a possible effect of chilling merger activity. Second, transactions may face a broader and more stringent set of standards by which the Agencies will assess the legality of transactions, likely resulting in longer investigations and more cases being brought in court. Finally, Agency rhetoric has been hostile to remedies during the investigation stage, so that parties need to be prepared to litigate

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to either put pressure on the Agencies to accept a settlement or 'litigate the fix'.

Counsel will need to have a deep understanding of these new challenges and be ready to proactively meet them head-on. First, to handle the changes to the HSR filing process, counsel will have to get involved earlier in the process so that a filing will meet the new requirements. Second, under the new DMGs, counsel will need to be proactive in demonstrating that there are no competitive concerns. It will also be important to show that the merging parties are ready to litigate, if necessary, to preserve leverage in obtaining clearance or remedy negotiations.

Overall, a key virtue of the US merger review system is that it has been predictable in its application, and the burden of prolonged reviews has been focused on transactions raising significant concerns. The Agencies are currently considering comments on the DMGs and proposed HSR changes, so their final form may not represent as significant a change as anticipated. We hope that the Agencies will not push outcome-seeking guidelines that do not reflect the sound economic analysis that has underpinned merger review and jurisprudence until now, or change the HSR process to slow down and burden a large volume of transactions that do not raise competitive concerns.

Thanks to Axinn law clerks Maryanne Magnier and Chandler Gordon for their contributions to this article.

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

Key considerations for our clients are timing and remedies. Companies considering complex deals that will be reviewed in multiple jurisdictions may be surprised by the duration and intensity of the review across the globe, as well as how long it can take to negotiate remedies. We have seen a trend in global deals for other jurisdictions, particularly in APAC, to open in-depth reviews and seek their own remedies rather than relying on decisions from other regulators. These developments mean that clients must give early consideration to the strategy for managing different jurisdictions and prepare early for possible remedies.

In your experience, what makes a difference in obtaining clearance quickly?

A key to obtaining clearance quickly is having a clear, strong procompetitive rationale from the beginning. Preferably, this rationale will be documented by management from the outset. The first impression the parties make with Agency staff is crucial in establishing trust. If there is a potential area of concern, it is best to be transparent instead of trying to bury it and risk losing credibility. Additionally, counsel must have an extensive understanding of the market and competitive dynamics to address concerns that an in-depth investigation is required for Agencies to figure out what is going on within an industry.

What merger control issue did you observe in the past year that surprised you?

It has been surprising that antitrust enforcers have brought cases in court but in some cases have been unwilling to fully litigate them or appeal adverse decisions. The FTC attempted to stop Meta's acquisition of Within, but did not appeal. Similarly, the Agencies initiated litigation in *Amgen/Horizon*, *Intercontinental Exchange/Black Knight* and *Spectrum/Assa* Abloy before withdrawing and engaging in settlement negotiations. While it is surprising that appeals and injunctions are not being more forcefully sought given the Agencies' preference against remedies, this may reflect Agency recognition that the judiciary operates as an independent check on their authority.