Proving market realities is crucial in antitrust merger litigation

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After taking the reins of the Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ), the respective heads of the Biden-era antitrust agencies promised to more aggressively investigate and block transactions based on theories that more "accurately reflect modern market realities" and capture "the rich complexity of the modern economy." But, in some cases, the agencies vigorously pursued this aggressive strategy even where the market realities did not support their theories. This approach undoubtedly achieved the agencies' desired goal of thwarting many transactions where the parties did not have the appetite or resources to engage in year-long antitrust investigations followed by complex litigation and appeals. However, as shown in recent cases, parties successfully have fought off merger challenges in court when they can show that the government's theoretical antitrust case is not supported by market realities. Demonstrating market realities is critical to both the government and the parties in antitrust merger litigation.

To enjoin a merger, the FTC and the DOJ must, like any other litigant, prove their case in court with facts. This principle is deeply rooted in antitrust jurisprudence: "'antitrust theory and speculation cannot trump facts'; the government must make its case 'on the basis of the record evidence relating to the market and its probable future.'" After a one-sided government investigation, the federal courts therefore offer the parties to a transaction a level playing field when the government seeks to enjoin a transaction. Recent merger challenges show that, despite the current political rhetoric surrounding antitrust enforcement, courts will reject the antitrust agencies' theories when they are not supported by market realities. This is most apparent when the government makes theoretical economic assumptions concerning the purchaser's incentives and competition strategies in nascent markets.

For example, in *United States v. UnitedHealth Group*, the DOJ sought to enjoin UnitedHealth Group (which owns UnitedHealthcare, "the nation's largest health insurer" and Optum, which provides healthcare and insurance related services) from acquiring Change, a "healthcare technology company" that provides critical services to many health insurance companies. The DOJ challenged this merger on horizontal and vertical theories, alleging that the merger would allow United to monopolize technology used to determine whether a healthcare claim should be paid, and would provide United with incentives to access competitors' competitively sensitive information (CSI) through its ownership of Change.

After finding that United's proposed divestiture defeated the DOJ's horizontal theories of harm, the court turned to

the DOJ's vertical theory. The DOJ theorized that United had no incentive to adhere to its own firewall policies because it had spent $13 billion to acquire Change specifically to have "access to vast amounts of data and rights to use that data." United argued that, in fact, it had strong incentives to carefully observe its firewall policies because to do otherwise would "uproot its entire business strategy and corporate culture; intentionally violate or repeal long standing firewall policies; flout existing contractual commitments; and sacrifice significant financial and reputational interests." The court dismissed the DOJ's challenge because it "rest[ed] on speculation rather than real-world evidence" and ignored market realities. The DOJ plans to appeal.

Similarly, in *United States v. United States Sugar*, the DOJ sought to enjoin the United States Sugar Corp.'s (US Sugar) acquisition of Imperial Sugar Co.'s (Imperial) assets and business, a deal that included Imperial's cane sugar refinery in Georgia. The DOJ theorized that the combined US Sugar and its competitor American Sugar Refining (which sells the Domino brand) would control 75 percent of a hypothetical "Southeast" regional sugar market and would "leav[e] wholesale customers in [the Southeastern United States] at the mercy of a cozy duopoly." To support its claim, the DOJ argued that the court's evaluation of the transaction's likely effect on competition should be limited to competition among refiner/distributors (and exclude distributors) and confined to its concocted geographic market of the Southeastern United States or in the alternative "Georgia Plus" (Georgia and all adjacent states).

The court rejected both these arguments because they contradicted market realities. First, the court found that distributors accounted for 25 percent of sugar sales nationally and that "the record is replete with evidence of distributors competing with refiner producers like Domino and Imperial" selling high volumes of sugar to the exact same sorts of customers as the parties. The court also rejected the government's narrow geographic market finding that it "exclude[d] 33 percent of Imperial's sales" and "ignore[d] the economic realities of the sugar industry … that sugar flows freely and over long distances in response to market forces."

The court also expressed its astonishment as to why the government even brought this case, when the USDA so closely regulates sugar supply, thereby controlling the price of sugar. The court found that the acquisition "must be viewed against the backdrop of the USDA's intimate involvement with the US Sugar industry" through the Federal Sugar Program, which requires the USDA to control import rates and domestic marketing of sugar. In the end "the court [found] it more than curious that the government is purportedly concerned about anticompetitive harm and increased prices in an industry where the government itself keeps the prices high and, in many ways, controls the competition." The DOJ's appeal of the district court's decision currently is pending.

Another court also found that the DOJ ignored market realities in seeking to enjoin Booz Allen Hamilton (a prominent government contractor and long time supplier of signal intelligence services to the NSA) from acquiring EverWatch, its only remaining competitor bidding for the next iteration of an NSA contract for signals intelligence, and a firm that the DOJ called "an agile and innovative competitor."

The DOJ argued that because the transaction would eliminate the only other competitive bidder for a particular government contract, the court should ignore the broader marketplace of government contracting bids in which BoozAllen would be competing with other bidders. The court rejected the DOJ's "attempt to 'gerrymander its way to victory without due regard for market realties.'" Another key evidentiary aspect of the court's analysis was its complete rejection of the DOJ's attempt to use speculative, out-of-context communications between lower-level employees as conclusive proof of the potential effects of the transaction. Putting these communications in context, the court found that senior-level employees who were more informed and had better insight to the transaction should be weighed more heavily. The DOJ is not appealing this decision.

The FTC's evidentiary shortcomings were also revealed in an administrative proceeding before an ALJ in *In reIllumina Inc.* and *GRAIL, Inc.*, where it challenged Illumina's reacquisition of GRAIL (Grail), the maker of an innovative multi-cancer early detection (MCED) test. The basis for the FTCs challenge was that Illumina is the only provider of the next generation sequencing (NGS) technology required to develop and commercialize such tests. In substance, the FTC argued that after acquiring Grail, Illumina would be flush with economic

incentives to prevent other firms from entering a market in which it owned the sole competitor, despite having made an offer to supply rivals with long term contracts.

To prevail on its theories, the government had to show that competition was existent or imminent and that by acquiring Grail, Illumina would have both the means and motivation to extinguish it. But the market realities showed that Illumina, as the sole provider of NGS services, already was in the position to unilaterally control prices, regardless of the transaction. Moreover, the government's arguments about Illumina's incentives to raise prices and disadvantage Grail's rivals did not reflect the reality of the market. Indeed, the ALJ found the opposite to be true: to make the Grail transaction profitable, Illumina needed competitors to stay afloat to buy its products. The ALJ also found that raising prices to disadvantage other MCED developers would cause Illumina to suffer a reputational harm and lose other segments of NGS customers, who operate in sectors for which Illumina was not the sole NGS provider, undermining its goal of continuing to supply NGS services.

The ALJ also rejected the FTC's theory on Illumina's near-term incentives since Grail's test is the only one currently on the market and it was unlikely that any test would soon develop to compete. The ALJ found the FTC's expert's opinion that the transaction would prevent diversion to another product "mere conjecture based on an assumption lacking in evidentiary support."

Last, and crucially, the ALJ found that even though Illumina had no strong incentives to disadvantage rival firms, its 12-year term supply offer "to all its United States oncology testing customers who purchase NGS products for developing and/or commercializing oncology tests" effectively "constrains Illumina from using virtually any of the tools that Complaint Counsel asserts will raise rivals' costs or otherwise foreclose Grail's alleged rivals." The FTC is appealing the ALJ's decision to the full commission.

Most recently, in *FTC v. Meta Platforms*, the FTC failed to enjoin Meta's purchase of virtual reality fitness app maker Within Unlimited when its theory that Meta was planning to enter the fitness app market was "neither supported bythe contemporaneous remarks regarding [a proposed entry] nor the timing of the subsequent investigation into this proposal." The FTC's primary theory was that Meta's plans to develop its own app were abandoned only because it wanted to acquire Within to prevent Apple from doing so. The FTC underpinned its theory on the basis that Meta's financing and engineering capabilities made it "reasonably probable" that Meta would have entered the VR dedicated fitness app market but for the transaction. In reviewing the record, however, the court found "a dearth of contemporaneous internal discussions" that were consistent with the FTC's theory. The FTC has stated that it will not appeal the district court's decision.

In sum, the importance of proving "market realities" goes both ways. If parties to a transaction believe that the government is ignoring market realities in an effort to block their transaction, they may find the court to be a more receptive venue to successfully argue their case.

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