WilmerHale Client Alert, Wait, I Thought We Were Done? DOJ Challenges $4B Merger Months After HSR Filing and Expiration (https://www.wilmerhale.com/en/insights/client-alerts/~~/link.aspx?_id=88F5169736B342C8A949CFA9E9BC5266&_z=z).

[7]*See* Performance Food Group Company, Form 8-K (disclosing that parties received FTC warning letter on same day HSR waiting period expired but expect to close transaction shortly).

[8]*See* n.4 supra.

[9]European Commission, Press Release, Mergers: Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina (July 22, 2021) (https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3844); *see also In re Illumina, Inc. and Grail Inc.*, FTC Docket No. 9401 (March 30, 2021).

[10]*See* Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021); Holly Vedova, Adjusting merger review to deal with surge in merger filings (Aug. 3, 2021).

[11]Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021).

THE MYSTIFYING ANTITRUST AGENCY CLEARANCE PROCESS; OR HOW I LEARNED TO ACCEPT DISORDER AND MOVE FORWARD

By Jeremy Morrison, Kate Brockmeyer, and Charlie Stewart

Jeremy Morrison is a partner in the Washington, D.C. office of Jones Day. Kate Brockmeyer and Charlie Stewart are associates in the Washington, D.C. office of Jones Day. Contact: jmorrison@jonesday.com, kbrockmeyer@jonesday.com or charliestewart@jonesday.com.

One of the more arcane and least understood parts of the merger review process is the inter-agency maneuvering by the Federal Trade Commission ("FTC") and Antitrust Division of the U.S. Department of Justice ("DOJ") to determine which agency will review a given transaction or investigate potential anticompetitive conduct. The two U.S. antitrust agencies share concurrent jurisdiction over the merger review process, but remarkably (and often frustratingly), there is no formal allocation of subject matter between the agencies. Rather, for a number of industries, mergers historically have been reviewed by either the FTC or the DOJ, according to an informal allocation of industries between the agencies, the so-called "clearance process."[1] Although this informal allocation may reduce bureaucratic inefficiencies relating to duplicative review, its design is opaque and flawed. Because the allocation is not codified and requires two independent agencies to reach an agreement, it can (and has) led to disputes between the agencies over which one would review a particular transaction. Indeed, in some past cases, the agencies have even flipped a coin to resolve these clearance disputes to determine which one would investigate.

This decision about which agency reviews a transaction and when that clearance decision is made can have a significant impact on merging parties. This article briefly explains the history of the clearance process before detailing the ways in which the clearance decision can impact transactions. It then suggests ways to minimize problems created by clearance battles and unpredictable clearance decisions.

History of the Merger Clearance Process

Federal merger review in the United States began in 1914 with the passage of the FTC Act,

which established the eponymous agency. The process continued in 1933, when President Roosevelt nominated the first assistant attorney general ("AAG") responsible for antitrust enforcement within the DOJ. In 1948, the FTC and the DOJ agreed to divide responsibility for merger enforcement but failed to delineate each agency's jurisdiction.

Merger review clearance questions began in earnest when Congress passed the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). The HSR Act established the modern premerger notification process that requires parties to notify the federal government about a transaction before its consummation. It did not, however, outline how the FTC and the DOJ should determine which agency would investigate a particular transaction that is reportable—let alone not reportable—under the HSR Act.

There have been several unsuccessful attempts since the passage of the HSR Act to formalize the merger clearance process:

- In 1993, the FTC and the DOJ issued "Clearance Procedures for Investigations," which noted "the principal consideration in clearance decisions is agency expertise in the product in question."
- In 1995, the agencies adopted the Hart-Scott-Rodino Premerger Program Improvements agreement, which memorialized the agencies' commitment to resolve clearance disputes within nine days of a merger filing.
- In 2002, FTC Commissioner Tim Muris and AAG Charles James announced the Merger Clearance Accord (the "Accord"), which divided authority between the FTC and the DOJ according to the industry of the merging parties.[2] If still unclear which agency should handle an investigation based on the divisions in the Accord, the agency heads could submit the dispute to a third party arbitrator. Senator Ernest F. Hollings (D) from South Carolina publicly opposed the Accord, and after a few months of back-and-forth, Muris and James abandoned the agreement.
- In 2007, the Antitrust Modernization Commission (created by statute in 2002) recommended that Congress should "implement a new merger clearance agreement based on the principles of the 2002 agreement."[3] Unsurprisingly, this was never implemented.
- Most recently, it was reported that the agencies have divided up responsibility for the major technology companies between themselves.[4] Yet, even these divisions can still result in the agencies "butt[ing] heads" over jurisdiction.[5]

The Current Agency Clearance Process

The current clearance process remains opaque. It is often heavily dependent on current leadership at each agency, and at bottom, what goes on at the agencies during the clearance process stays behind closed doors. While parties can often look to historical practice for guidance about which agency will likely review a merger (as one of the agencies may have subject matter expertise from decades of experience), sometimes there is no precedent and the ultimate decision can still be surprising. This is especially true in higher-profile mergers where an agency may look for a creative hook to claim jurisdiction, such as a particular input or customer. And parties rarely, if ever,

receive feedback about the ultimate clearance decision or its rationale.

Ongoing merger reviews demonstrate the unpredictable nature of the clearance process. For example, it is widely reported that the FTC is reviewing the proposed Amazon-MGM deal despite media and content deals (*e.g.*, AT&T-TW, Disney-Fox) typically being under the purview of the DOJ. At the same time, media reports detail the DOJ is reviewing the Discovery-Warner Media. If true, this means the Amazon-MGM and Discovery-Warner Media mergers, despite being in the same industry, may have very different paths to antitrust clearance given the procedural differences between the FTC and the DOJ.

Implications for Merging Parties

For parties considering a transaction in the agencies' jurisdictional grey zone, the clearance process can introduce additional deal risk. While that risk can be mitigated in certain circumstances, it is important to understand how the clearance decision may impact the merger review process.

If the agencies are unable to quickly decide which agency will review a transaction, a clearance fight may ensue. In some cases, during the initial 30-day waiting period after filing, the agencies might investigate in tandem until a clearance decision can be reached. Such interagency battles can waste precious time during the initial waiting period such that, once the FTC or the DOJ finally gets clearance, the parties face the Cornelian dilemma of a pull-and-refile or the threat of a Second Request. This is particularly problematic if the merging parties believe there are strong arguments why a transaction does not deserve an extended look or drawn out investigation. And if parties are seeking to close before a target date for tax or other business reasons, a clearance battle has the potential to cost the parties more than just time.[6]

There is also the potential for significant divergence between the FTC and the DOJ in both enforcement and procedure.

First, the FTC is now issuing pre-consummation warning letters. Those letters inform certain merging parties that the FTC has not concluded its investigation even if the FTC declines to issue a Second Request or file suit to block the transaction, so should the parties close the deal, they do so at their own risk.[7] While both the FTC and the DOJ always have had authority to investigate transactions post-HSR clearance, such warning letters are not currently part of the DOJ process.

Second, whether the FTC or the DOJ reviews a transaction could impact the ultimate agency decision about the merger. In particular, for those matters where the decision to file suit or close an investigation is questionable, it is entirely possible that two independent agencies could reach a different conclusion on the same facts. This possibility is perhaps best highlighted in the well-known public dispute between the FTC and the DOJ relating to whether Qualcomm violated the antitrust laws.[8] To proceed in litigation, a majority of the five-member Commission must agree to file suit; however, when the Commission is equally divided between Republican and Democratic Commissioners (as happens with some frequency), it can result in tie votes that go to the merging parties. In contrast, while the leadership of the DOJ works collaboratively, decision-making authority is vested in a single leader. Additionally, in rare instances, political differences

between the FTC and the DOJ can lead to different enforcement agendas if the FTC is led by the opposite party of the President, while the AAG, has sole authority over merger enforcement decisions, is a member of the President's party.

Third, if the FTC or the DOJ challenge a transaction, the merging parties may face different injunction standards and tribunals depending on the agency. In the case of the DOJ, merging parties will have their case heard in federal district court under a permanent injunction standard. In contrast, if the FTC is the reviewing agency, parties to a non-consummated transaction may find themselves in federal court under a preliminary injunction standard with a pending administrative trial set to proceed after the federal case. In the case of consummated transactions, or transactions that may not close for other reasons such as outstanding foreign merger investigations, parties may find themselves only before a Part III administrative court.[9]

In other words, parties litigating against the DOJ will find themselves in front of a neutral federal judge in the first instance. Parties litigating against the FTC may be in front of an administrative law judge in the first instance or, at best, find themselves in federal court facing an arguably more deferential preliminary injunction standard than if faced with a DOJ challenge to the same merger.

Finally, with respect to transactions that can be remedied through a settlement, the FTC now intends to insert "prior approval" language in consent agreements that would require the acquiring party to receive FTC clearance for certain transactions for a period of time even if those transactions are otherwise non-reportable under the HSR Act. The DOJ has not yet adopted such language, instead continuing to insert "prior notification" language in consent agreements. "Prior notification" requires the acquiring party to notify the DOJ of certain transactions even if they are otherwise non-reportable, but does not prevent the parties from closing such a transaction until the DOJ clears the deal. And, under the Tunney Act, all settlements with the DOJ must be reviewed and approved by a federal court, including a notice and comment period, before a settlement can be finalized. While FTC settlements are also subject to public comment, there is no parallel judicial review. In rare instances, federal judges have held judicial proceedings under the Tunney Act that delayed a transaction from closing.[10]

Practical Considerations for Merging Parties

While certain risks are inherent to the clearance process—for example, the judicial review and standard depending on which agency takes clearance—there are actions that merging parties can take to limit the potential downsides of a challenging process.

In the pre-signing stages, parties in an industry where clearance is uncertain should consider whether to include sufficient time in the transaction agreement to account for the risk of a pull-and-refile procedure. Further, M&A counsel should work with antitrust counsel to evaluate whether merger agreement provisions that address any differences in enforcement approaches between the agencies, even if there is only a small chance that a particular agency will review the transaction.

After filing, if the parties become aware that their transaction is the subject of an interagency

clearance battle, parties should be prepared to quickly address agency concerns after clearance is resolved. Importantly, a clearance fight is a strong indication that the agencies believe that at least some initial review is required. Parties should work to preemptively gather documents and information that may be responsive to a potential voluntary access letter or agency questions in order to respond as quickly as possible post-clearance. Parties should also consider preparing advocacy material to present to the cleared agency on short notice. Being adequately prepared will help mitigate the problems from any delayed clearance and can decrease the likelihood of having to pull-and-refile or receive a Second Request.

Parties also may consider presenting an overview of their deal to both agencies and explain why further review of the transaction is unnecessary. That approach could result in both agencies agreeing not to take clearance but rather letting the initial waiting period expire. It also may provide the agencies with additional information to more quickly resolve their clearance dispute by providing information on key inputs or customers.

In certain circumstances, it may be advisable to reach out to whichever agency *should* have jurisdiction to begin the clearance process and agency engagement, often even pre-filing. In other words, parties may consider pressing a particular agency to put in for clearance before the HSR filing if it believes that agency has the requisite expertise, experience, or history to review a particular transaction. Although it is likely not possible to steer a matter to one agency over the other, helping to guide the agencies to the "correct" clearance decision can mitigate the risk of a clearance battle in the first place, and also can ensure that the agency that has the experience that may be most relevant to the review is able to bring its expertise to bear. As a result, the parties may have to provide less in general industry background and the parties may be able to more readily cite to past agency decisions during the merger review process—in other words, an overall more efficient merger review process.

Conclusion

While there are a number of deals for which the clearance process is smooth, unfortunately, given the clearance process as it exists today, parties should be prepared in certain clearance disputed industries to potentially face a longer than expected review timeframe, even for those deals that present minimal substantive antitrust issues. This can be a particularly important aspect to keep in mind if the buyer faces a tax or other business deadline that could result in financial harm if a clearance dispute requires the parties to pull-and-refile. Given the challenges with the clearance process, both parties and counsel must be prepared both pre- and post-filing for any difficulties resulting from the clearance process.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]For instance, it has long been the province of the FTC to review and analyze mergers between hospitals while DOJ reviews transactions between health insurers.

[2] https://www.ftc.gov/news-events/press-releases/2002/03/ftc-and-doj-announce-new-clearance-procedures-antitrust-matters.

[3]Report and Recommendations, Antitrust Modernization Commission (2007), at p. 13, https://govinfo.library.unt.edu/amc/report_recommendation/introduction.pdf.

[4] https://www.politico.com/news/2020/06/12/doj-and-ftc-joust-for-chance-to-review-facebook-giphy-deal-315903.

[5]*Id.*

[6]This could be particularly problematic given the FTC and the DOJ's recent decision to suspend early termination. Thus, a pull and refile is likely to put off clearance for a full 30-days even if agency staff determine early into the review that further investigation is not required.

[7]While such letters do not alter the FTC's ability to challenge a transaction after clearance, the FTC's recent actions introduce additional uncertainty and have implications for transaction agreements.

[8]In the Qualcomm case, the FTC and the DOJ ended up arguing on opposing sides in court. The FTC argued Qualcomm violated antitrust laws by overcharging for the patents used by smartphone makers. The DOJ, by contrast, argued that Qualcomm is allowed to charge "unreasonably high" prices under United States antitrust laws—primarily on national security grounds.

[9]While technically independent, the administrative law judge is still employed by the FTC and all appeals are sent to the Commission. And while cases in the Part III administrative proceeds can ultimately reach federal court, it is a slow and arduous process.

[10]*See* Michael A. Gleason, Lauren Miller Forbes, William Coglianese, and Tommy Rucker, It Ain't Over Till It's Over: Review of DOJ M&A Settlements Under the Tunney Act, The M&A Lawyer, Vol. 23, Issue 9 (Oct. 2019), *available at* https://www.jonesday.com/-/media/files/publications/2019/10/it-aint-over-till-its-over/it-aint-over-till-its-over-review-of-doj-ma-settle.pdf.

U.K. ANTITRUST SHAKEUP WOULD INCREASE MERGER SCRUTINY, BROADEN INVESTIGATIVE POWERS AND CREATE NEW OVERSIGHT OF BIG TECH

By Bill Batchelor, Frederic Depoortere, Giorgio Motta, Ingrid Vandenborre, Aurora Luoma, and Nick Wolfe

Bill Batchelor is a partner in the London and Brussels offices of Skadden, Arps, Slate, Meagher & Flom LLP. Frederic Depoortere, Giorgio Motta, and Ingrid Vandenborre are partners, and Nick Wolfe is an associate, in Skadden's Brussels office. Aurora Luoma is counsel in Skadden's London office. Contact: bill.batchelor@skadden.com or frederic.depoortere@skadden.com or giorgio.motta@skadden.com or ingrid.vandenborre@skadden.com or aurora.luoma@skadden.com or nick.wolfe@skadden.com.

The U.K. government is consulting on far-reaching reforms to U.K. competition and consumer laws, which would substantially expand the powers of the Competition and Markets Authority ("CMA") and reduce procedural protections. Key proposals include:

Merger control jurisdiction enlarged: The CMA will have jurisdiction to "call in" mergers for investigation even if the acquirer and target do not compete where (i) the acquirer has over £100 million in U.K. revenue and (ii) one party has over 25% share of supply.