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EMBRACE TRADITION, REJECT MODERNITY? RECENT FTC AND DOJ DEAL CHALLENGES SHOW PREFERENCE FOR TRADITIONAL ANTITRUST THEORIES OF HARM

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SUMMARY

Both the Federal Trade Commission (FTC) and Department of Justice (DOJ) Antitrust Division have now brought cases challenging deals under President Trump's administration. In many respects, the theories of harm alleged in these cases are traditional and not necessarily reflective of the "new theories" under the 2023 Merger Guidelines. Additionally, in both cases, the DOJ and FTC show a continued focus on both price and non-price aspects of competition, especially those related to innovation.

FTC'S CHALLENGE TO GTCR/SURMODICS DEAL

On March 6, 2025, the FTC filed an administrative complaint and a complaint in the United States District Court for the Northern District of Illinois seeking to block the proposed acquisition of Surmodics, Inc. (Surmodics), a medical device coating manufacturer, by GTCR BC Holdings, LLC (GTCR), a private equity firm. This is the first time under Chairman Andrew Ferguson's leadership that the FTC has sought to block a proposed merger or acquisition.

This action demonstrates what was already confirmed by the FTC—the 2023 Merger Guidelines continue to be the governing standard for agency merger reviews. The FTC alleges that the combination of the two companies would result in a high level of concentration in the market for hydrophilic coatings for medical devices, which would violate the 2023 Guidelines. The FTC alleges that this alleged over-concentration would stem from GTCR's majority stake in Biocoat, the second largest medical device coating manufacturer behind Surmodics. The FTC alleges that, if the acquisition were allowed to go through, the merged entity would control over 50 percent of the market. However, this level of market concentration would have been illegal under the old merger guidelines as well. That being so, it is likely that the deal would have been challenged by the FTC regardless of the applicability of the 2023 Guidelines. Thus, this case is not a good measure of whether the Trump administration will enforce the more novel or stringent aspects of the 2023

Guidelines. Instead, this might be a signal from the Republican Commissioners that they will focus on pursuing traditional antitrust cases.

Notably, this was a unanimous, bipartisan decision by the FTC. All four of the FTC Commissioners in place at the time voted to challenge this transaction, though since then the two Democratic Commissioners have been fired. The vote demonstrates that, despite some (very) heated rhetoric from the Democratic and Republican Commissioners, there is still a significant area of bipartisan agreement that mergers resulting in very high market shares are likely to harm competition.

This unanimity is particularly interesting because, as mentioned above, GTCR is a private equity firm. This was of particular importance to Commissioners Slaughter and Bedoya, who asserted that this action "challenges a transaction that is part of a widespread and problematic playbook in our economy: a private equity giant establishes a position in a market then acquires competing businesses as part of a consolidation strategy." However, Chairman Ferguson has previously noted that the private equity distinction is irrelevant. In that statement, Mr. Ferguson firmly noted that he agreed with the action because it was based on traditional antitrust theories, not because the company was a private equity firm:

> I concur in today's Commission action because it is a routine law-enforcement matter embodying a traditional approach to competition law. A reader might reach a different conclusion given the agency's rhetoric in connection with the public announcement of this settlement. The press release and the Chair's statement both suggest that this case is extraordinary because it involves "private equity" and "serial acquisitions," and hint at antipathy toward private equity. I write to pierce through this breathless rhetoric to make clear that this case is an ordinary application of the most elementary antitrust principles. That Welsh Carson is a private equity firm is irrelevant; the antitrust analysis would be the same if Welsh Carson were, for example, an individual or institutional investor.

Based on this, Chairman Ferguson is unlikely to be as aggressive toward private equity firms as Commissioners Slaughter and Bedoya or the previous Chair, Lina Khan, and would likely not support challenging a deal simply because a private equity firm is involved. In fact, the complaint here does not give any weight to the fact that a private equity firm was involved. However, regardless of these differing views, Mr. Ferguson is still willing to challenge private equity deals that he believes violate traditional antitrust/competition laws.

Digging into the particulars of the complaint, it contains noteworthy allegations of harm to innovation implicitly premised on labor competition. While innovation harms are theoretically a well-understood anticompetitive effect of certain deals, proving that innovations "would have occurred" is highly challenging in practice. Here, however, the FTC solves this dilemma by focusing on the hiring by Biocoat of a former Surmodics Senior Director of Hydrophilic Technologies to develop similar UV-cured device coating technologies to better compete with Surmodics. The complaint is silent on whether the hiring of this former senior employee by a competitor was impacted by a

noncompete agreement (which might be expected in such a situation). It will be interesting to see whether the hiring of this senior employee in order to gain access to his technological knowledge feeds into the FTC's continuing development of labor theories of antitrust under both Presidents Biden and Trump, highlighted by Chairman Ferguson's recent launch of a labor antitrust task force.

DOJ'S CHALLENGE TO HPE/JUNIPER DEAL

Similarly, the DOJ's first antitrust lawsuit during President Trump's administration also alleged that the proposed merger would result in harm to innovation. DOJ is challenging the proposed acquisition of Juniper Networks, Inc. (Juniper) by Hewlett Packard Enterprise Co. (HPE). In the complaint, DOJ alleges that competitive pressure from Juniper forced HPE to "develop[] advanced software products and features as part of a multifaceted campaign to 'Beat Mist.'" "Mist" refers to Juniper Mist, the brand that Juniper uses to provide its wireless networking services. One of the innovations that came out of this campaign was HPE's "Project Gravity," which focused on improving user interface and adding artificial intelligence capabilities to HPE Aruba's software. By using the parties' own "hot documents," DOJ pleads key facts about this campaign, which is targeted specifically at competing with Juniper. As in the Surmodics-GTCR complaint, harm to innovation is a key element of the allegations, reflecting head-to-head competition between the parties that would be eliminated by the merger.

In challenging the deal, DOJ relies on traditional antitrust theories of harm rather than any new positions taken by the Biden DOJ. DOJ alleges that the deal would result in unduly high levels of concentration of the market for "commercial or 'enterprise' wireless networking solutions" in the United States. The complaint alleges that, if the acquisition were allowed to go through, two companies, Cisco Systems, Inc. (Cisco) and HPE, would control "well over 70 percent of the U.S. market." Although the 2023 Merger Guidelines are cited in the complaint, the 70+% level of market concentration would have also been presumptively illegal under the prior guidelines, which is consistent with the enforcement position taken by the FTC in its challenge to the Surmodics deal discussed above.

There is one key difference in this case: the existence of a third party, Cisco, with a majority share of the alleged market, which will present different hurdles for DOJ in proving its case. However, regardless of this difference, this challenge is similar to the FTC's challenge in that it seems to be based more on traditional antitrust theories than the applicability of new antitrust theories under the 2023 Guidelines.

CONCLUSION

The first two merger challenges under the Trump administration are based on traditional theories of antitrust harm and not necessarily reflective of the "new" theories of harm that were incorporated into the 2023 Merger Guidelines. Thus, neither is a good measure of how aggressively the agencies will enforce the 2023 Merger Guidelines under new leadership during President Trump's

administration. For the FTC specifically, although Mr. Ferguson would not challenge a deal simply because it involved a private equity firm, there is a continued willingness by the FTC to challenge deals involving private equity firms if those challenges are based on traditional antitrust theories. Lastly, in both cases, the FTC and DOJ, respectively, focused not only on market concentration but also harm to innovation that might result from the proposed deals.

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