2018 US MERGER ENFORCEMENT YEAR IN REVIEW

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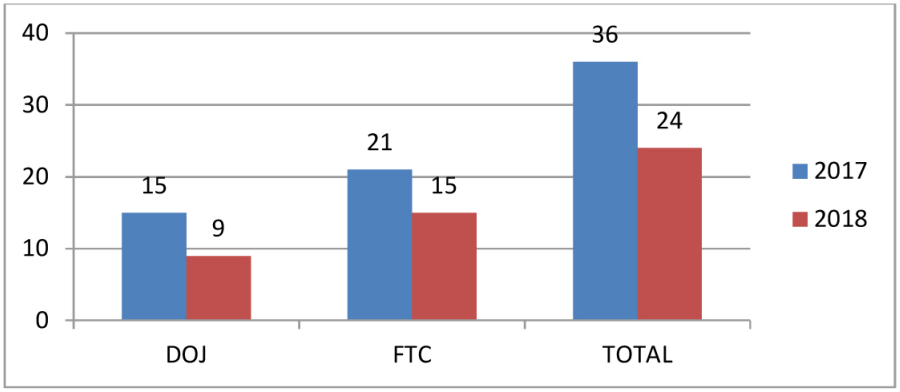
Overview

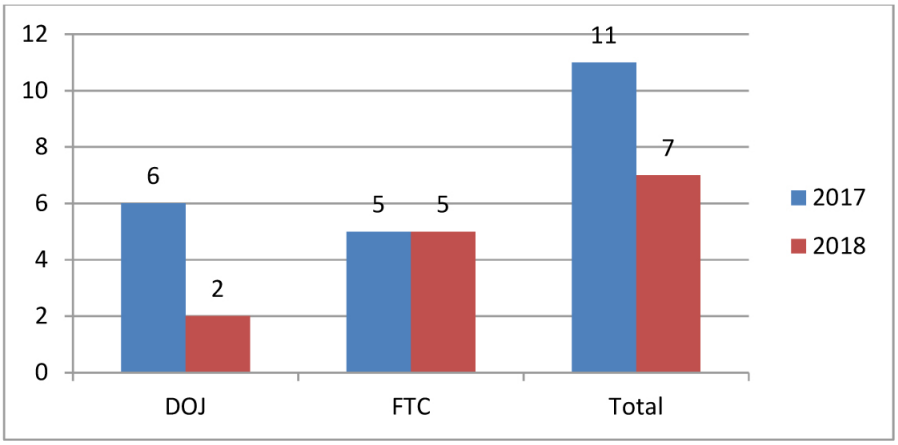
After more than a year of transition, both the DOJ and FTC have fully appointed leadership in place. Importantly, in 2018 the FTC went from only two sitting Commissioners to its full slate of five Commissioners. Although it took nearly 17 months for the full leadership teams to be in place, the US authorities continued to pursue transactions they believed raised competitive issues. Moreover, the authorities followed through on publicly stated skepticism toward vertical mergers that was voiced in 2017, while also focusing on future competition and monopsony issues. 2018 also featured substantial focus on implementing structural remedies, including the sufficiency of divestiture buyers and the scope of hold separate orders. While there was a non-trivial drop-off in the total formal actions this past year, the agencies pursued a number of significant cases and enforcement continued to be aggressive.

Figure 1. Formal Actions Taken by US Federal Antitrust Authorities 2018*



*Includes all merger-related court filings by the FTC and the DOJ (both litigated complaints and consent decrees) as well as mergers abandoned following agency scrutiny (including 3 cases that originated in 2017). These figures exclude prosecution of HSR violations and challenges pursued by other parties.

Figure 2. Federal Court Challenges by US Antitrust Authorities 2018*



*Includes transactions abandoned following agency scrutiny (including 3 cases that originated in 2017). These figures exclude HSR violations, challenges by other agencies, and complaints filed along with a consent order or proposed final judgment.

Litigations and Challenges to Deals

Authorities Had Mixed Results Bringing Challenges in Court

Few merger challenges are actually litigated, as most transactions are settled with consent decrees or divestitures. However, 2018 marked a year in which a number of transactions were litigated. The FTC won two cases at the district court level. The DOJ lost one case at the district court level and appealed the decision.

AT&T/Time Warner

On June 12, 2018, the US District Court for the District of Columbia ruled in favor of AT&T's proposed acquisition of Time Warner.[3] The transaction, which sought to combine the distribution assets of AT&T/DIRECTV with the programming assets of Time Warner, was challenged by the DOJ on November 20, 2017.[4] The DOJ alleged, "the merger would give the merged company the market power to weaken competing distributors' ability to compete by raising their costs, would allow the merged company to impede emerging and growing rivals, and, furthermore, would result in increased likelihood of oligopolistic coordination."[5] The Court, however, ruled against the DOJ.[6] The DOJ appealed the ruling on July 12, 2018,[7] and oral arguments were held December 6, 2018. The appeal is ongoing.

Wilhelmsen Maritime Services/Drew Marine Group

Wilhelmsen Maritime Services agreed to acquire Drew Marine's technical solutions business for $400 million on April 27, 2017.[8] Both companies supply water treatment chemicals to maritime customers.[9] The FTC issued an administrative complaint in February 2018,[10] and alleged that the merger would eliminate head-to-head competition between the companies, harming "Global Fleet" customers (i.e., operators with fleets that call in ports around the world).[11] The FTC also filed suit in the US District Court for the District of Columbia seeking to preliminarily enjoin the transaction.[12] Rather than defining product markets for each individual water treatment chemical, the FTC alleged that the relevant product was "the global supply of marine water treatment chemicals and services to Global Fleets," arguing that the relevant product was a "program" or "solution" that included chemicals as well as associated services and capabilities.[13] The FTC alleged that Global Fleet customers have fewer competitive alternatives due, in part, to their demand for global sales and delivery capability.[14] The merging companies argued that the FTC had erroneously lumped together into one product market multiple water treatment products that were not substitutes for each other.[15] The District Court accepted the FTC's market definition and granted a preliminary injunction on July 21, 2018.[16] Subsequently, the parties abandoned the transaction.[17]

Tronox/Cristal

On December 5, 2017, the FTC filed an administrative complaint to block Tronox's proposed acquisition of Cristal. Originally announced on February 21, 2017, the deal sought to combine two titanium dioxide (TiO2) producers.[18] The FTC claimed that the transaction would merge two of the three largest manufacturers of TiO2, allowing the combined company to restrict the supply of TiO2 to the market and enhancing the likelihood of coordinated effects among the remaining providers.[19] In January, 2018, the merging parties sought, unsuccessfully, to move the litigation to federal court.[20] On July 5, 2018, the European Union cleared the merger with conditions,[21] after which time the FTC sought a preliminary injunction in federal court to prevent the parties from consummating the transaction prior to the resolution of the administrative suit.[22] On September 12, 2018, the District Court granted the preliminary injunction, finding that the FTC successfully showed a likelihood that the transaction would substantially lessen competition in the North American market for TiO2.[23] The District Court was not persuaded by the parties' arguments that the company would face significant competition post-merger from large Chinese entrants or that the deal presented significant synergies and efficiencies.[24] The FTC Administrative Law Judge issued a decision to enjoin the acquisition on December 14, 2018.[25] The judge concluded that the transaction was likely to have anticompetitive effects in the TiO2 market.[26]

Several Transactions Were Abandoned in the Face of a Challenge

The threat of litigation can bring significant expense, risk, and delay to a transaction. This means that, in the face of a potential challenge, parties often abandon transactions when confronted with the possibility of a prolonged litigation in court.

Ultra/Sparton

On July 7, 2017, Ultra Electronics announced its proposed acquisition of Sparton Corporation for $234 million.[27] The two firms supplied the US Navy with sonobuoys through their joint venture ERAPSCO.[28] The DOJ opposed the transaction, alleging that the combination of these two suppliers would "permanently combine the only two qualified suppliers of sonobuoys to the US Navy."[29] Even though Sparton and Ultra had jointly supplied the Navy with sonobuoys, the Navy took the position that the two companies should instead enhance their ability to "independently develop, produce and sell sonobuoys."[30] Given the Navy's view, the DOJ informed the parties that it intended to block the transaction, and the two parties abandoned the transaction on March 5, 2018.[31]

J.M. Smucker Co./Conagra

On May 30, 2017, the J.M. Smucker Company, which manufactures Crisco, announced that it would acquire the Wesson cooking oil brand from Conagra Brands, Inc. for $285 million.[32] The FTC filed an administrative complaint on March 5, 2018. It alleged that the merger would enable the companies to raise prices on canola and vegetable oils by eliminating head-to-head competition between the two brands.[33] In defining the product market, the FTC alleged two separate product markets: (1) the sale of canola and vegetable oils to retailers and (2) the sale of branded canola and vegetable oils to retailers.[34] The FTC stated that Crisco and Wesson combined would have shares of least 35 percent and 70 percent respectively in these two product markets.[35] Smucker stated that the FTC did not give sufficient weight to the competitive constraint provided by private-label brands when it issued its press release announcing termination of the transaction on March 6, 2018.[36]

CDK Global Inc./Auto/Mate Inc.

CDK Global proposed to acquire Auto/Mate Dealership Systems on April 28, 2017.[37] The FTC challenged the merger on March 19, 2018.[38] CDK Global and Auto/Mate both provide dealer management systems (DMS), used by franchise car dealerships.[39] The FTC characterized franchise DMS as a highly concentrated market, with CDK being one of the two largest providers in the country (alongside competitor Reynolds & Reynolds)

and Auto/Mate as a successful and disruptive challenger.[40] In particular, the FTC alleged that CDK viewed Auto/Mate as a "current and emerging threat," and that CDK responded to Auto/Mate's growth by offering aggressive discounts.[41] Alleging that CDK sought to acquire Auto/Mate in order to eliminate competition, the FTC concluded that the post-merger firm would control nearly half of the franchise DMS market.[42] Notably, the FTC also claimed that CDK offered to purchase Auto/Mate at a price "far in excess" of its standalone valuation in an effort to prevent the company from being acquired by a buyer "willing to invest additional resources" to make Auto/Mate an even stronger competitor.[43] CDK and Auto/Mate abandoned their merger on March 20, 2018, the day after the complaint was filed.[44]

Additional Challenges Are Pending Currently

Two litigations involving consummated mergers remain ongoing at this time.[45]

Otto Bock/Freedom Innovations

On December 20, 2017, roughly three months after the parties closed the transaction, the FTC issued an administrative complaint challenging the consummated acquisition of Freedom Innovations by Otto Bock.[46] The FTC alleged that the acquisition reduced competition in the US market for microprocessor prosthetic knees (MPKs).[47] In response, the parties argued first that defining the relevant market narrowly to include only MPKs was an impractical misrepresentation of the market as perceived by market participants, prosthetic physicians, and amputees.[48] The parties further argued that the merger would not substantially lessen competition because there were at least six manufacturers of MPKs in the United States, and Freedom Innovation is not Otto Bock's closest competitor in the market.[49] Additionally, Otto Bock contended that there are low or no barriers to expansion for the remaining competitors who, in conjunction with the heavily regulated insurance system, would continue to constrain the merged company's ability to raise prices.[50] Lastly, the merging parties stated that, but for the merger, Freedom would have failed as it was experiencing "severe financial distress."[51] The trial began on July 10, 2018.[52] The FTC attacked the argument that Freedom was failing. It cited a March 2017 document from the company's Chief Financial Officer stating, "[p]erformance of the company has improved significantly over the last 6 to 8 months with Dec 2016 and Jan/Feb 2017 both far exceeding plan revenue and profit."[53] On October 10, 2018, the administrative law judge closed the hearing record.[54] On November 20, 2018, the parties filed post-trial briefs,[55] but a final decision has not yet been issued.

Franciscan Health/WestSound Orthopedics & The Doctors Clinic

As we discussed in our 2017 Year in Review, on August 31, 2017, the State of Washington filed suit in federal court to challenge Franciscan Health System's July 2016 acquisition of WestSound Orthopedics.[56] Washington alleged that the acquisition of WestSound's assets had reduced price competition, quality of care, and consumer choice in the orthopedic care market in Washington (specifically on the Kitsap peninsula),[57] and presented evidence that Franciscan described the merger as "eliminat[ing]…the competitive threat" of WestSound.[58] In its response, WestSound stated that Washington's complaint "oversimplified" the way competition works in the health care industry.[59] WestSound further argued that the resulting merger specific efficiencies would far outweigh any alleged anticompetitive effects, that there are low barriers to entry and expansion, and that WestSound was failing prior to the acquisition.[60] In the same suit, Washington also alleged that Franciscan's arrangement with The Doctor's Clinic, a hospital on the Kitsap peninsula, amounted to price fixing because Franciscan shut down many of its outpatient facilities in order to redirect those operations to The Doctor's Clinic's inpatient facility, where higher rates could be charged.[61] The court stated that it is a question for a jury whether the arrangement between Franciscan and The Doctor's Clinic amounts to a conspiracy susceptible to antitrust scrutiny, as alleged by the FTC, or a single economic unit with immunity from antitrust conspiracy charges, as the defendants claimed.[62] The case is scheduled for trial on March 19, 2019.[63]

Notable Mergers Closed Without Conditions

Despite headline-grabbing merger challenges and divestitures, many significant transactions are cleared without conditions.

Discovery/Scripps

Discovery Communications, Inc. entered into an agreement on July 30, 2017 to acquire Scripps Networks Interactive, Inc. for $14.6 billion.[64] The deal combined both companies' cable programming portfolios, including Discovery's Discovery Channel, TLC, Animal Planet, and OWN networks and Scripps' HGTV, Food Network, Travel Channel, DIY Network, Cooking Channel, and Great American Country offerings.[65] According to one estimate, the combined company's portfolio accounts for nearly 20 percent of ad-supported cable viewership in the United States.[66] Following a Second Request, Discovery announced on February 27, 2018 that the DOJ had closed its investigation without imposing conditions.[67]

Essilor/Luxottica

On January 15, 2017, Essilor International SA agreed to acquire Luxottica Group SpA for approximately $24 billion in stock.[68] Essilor is considered a leading eye wear manufacturer and has been expanding into eyeglass retail.[69] Luxottica makes luxury frames for brands like Armani, Chanel, and Prada, while also operating some of the largest eyeglass retailers (its chains include Lenscrafters, Pearle Vision, and Sunglass Hut).[70] On March 1, 2018, the FTC declined to take action and issued a unanimous closing statement after examining a number of potential theories of harm.[71] A "primary focus" of the FTC's investigation was whether the transaction would result in foreclosure of independent eye care professionals who both purchase eye wear products from the merging firms and compete with them at retail.[72] However, the independent eye care professionals themselves reported that they have alternative suppliers to purchase from.[73] Moreover, the firm's combined retail strength was insufficient to enable them to capture lost sales.[74] Therefore, the merged firm would not be capable of effectively foreclosing independent eye care professionals.[75] The FTC also analyzed whether the firm's combined position as large optical retailers would raise concerns. The FTC determined that Luxottica's actual market share was less than 10 percent and Essilor's network of independent eye care professionals only comprised a small portion of that market.[76] Therefore, the FTC concluded that the merged firm would not be able to raise prices or reduce output.[77] The FTC also analyzed potential competition in wholesale laboratory services.[78] Essilor operates a network of wholesale laboratories today.[79] Luxottica has operated a laboratory network focused on its own retail stores and recently "opened one of the largest optical

laboratories in the world in Atlanta, Georgia."[80] However, the FTC concluded that Luxottica was unlikely to meaningfully enter the so-called "free-to-choose" wholesale laboratory services market.[81]

CoStar Group, Inc./Landmark Media Enterprises, LLC

On September 12, 2017, CoStar Group announced its intent to acquire ForRent.com from Dominion Enterprises, which is owned by Landmark Media Enterprises LLC.[82] In an interview, CoStar's founder and chief executive stated that the acquisition furthers CoStar's plan to list "every single apartment in the US being marketed, whether it's someone's garage apartment up to the largest institutional property."[83] CoStar previously expanded from commercial real estate data services and a marketplace for the sale of commercial spaces to online apartment listings when it acquired Apartments.com.[84] CoStar since has acquired other apartment listing websites ApartmentFinder, ApartmentHomeLiving.com, Westside Rentals, and Apartamentos.com, and describes this network as "the premier online apartment resource" for renters and property managers.[85] This transaction adds the ForRent.com network of four apartment listing websites to CoStar's website group.[86] The FTC issued closing letters to both parties on February 12, 2018, but did not issue a closing statement.[87] In prior real estate website and listing service mergers (for example, the 2015 Zillow/Trulia combination), FTC commissioners expressed doubt that "real estate portals" constituted a market for antitrust purposes and emphasized the availability of alternative apartment advertising options "like Realtor.com, online brokerage services such as Redfin, and other consumer-facing online real estate products."[88]

Cigna/Express Scripts

On March 8, 2018, Cigna Corporation, a health service and health insurance company, agreed to purchase Express Scripts Holding Co. (ESI), a pharmacy benefit manager (PBM), for approximately $67 billion.[89] After six months of review, the DOJ cleared the transaction without conditions on September 17, 2018.[90] The DOJ explained that it analyzed both the horizontal aspects of pharmacy benefit management services as well as potential vertical effects—namely the incentive and capability of Cigna to raise the cost of PBM services to its health insurance competitors.[91] Regarding potential horizontal concerns, the DOJ found that Cigna's pre-merger PBM business was small enough that there were no likely anticompetitive effects despite the overlap, especially given competition from other PBM companies, including Cigna's current PBM partner Optum.[92] As for vertical concerns, the DOJ concluded that Cigna was unlikely to be able to raise rivals' costs because of the availability of other PBMs and the existence of sufficient competition from other vertically integrated providers.[93]

Divestitures & Consent Decrees

Many transactions that present antitrust issues are resolved by the parties agreeing to a remedy with the reviewing authority that attempts to restore any lost competition that likely would result from the transaction. The authorities have long had preference for structural remedies (generally a divestiture of a physical asset) over conduct/behavioral remedies (generally a requirement that governs a party's conduct post-closing). Over the past few years, the authorities have reiterated their strong preference for structural remedies, including in cases involving vertical issues,[94] and also have suggested that structural remedies are most effective when there is a sale of on-going businesses to a single buyer, as opposed to piecemeal divestitures or behavioral remedies.[95]

Vertical Transactions

Several transactions in 2018 served as focal points in the ongoing debate about competition and efficiencies in vertical transactions. Historically, vertical transactions have been viewed as less problematic than horizontal transactions, as they arguably can present fewer anti-competitive harms and substantial pro-competitive efficiencies. The federal antitrust authorities, made clear in 2018 that they will examine vertical transactions and take action where they deem necessary. However, district courts do not always agree with the authorities' perspective—as the result in *AT&T/Time Warner* demonstrates.

CVS/Aetna

The DOJ conditionally approved the combination of CVS and Aetna on October 10, 2018 after ten months of review.[96] CVS, which offers retail pharmacy services and pharmacy benefit management (PBM) services (through its Caremark brand), sought to acquire Aetna, a health insurance provider.[97] The transaction presented several potential vertical issues, as competitor health insurance companies used CVS's retail pharmacy or PBM services before the transaction.[98] However, the DOJ ultimately determined that these vertical issues were unlikely to harm competition, because competition remained from other retail pharmacies and PBMs.[99] The DOJ also determined that CVS would not be able to raise prices for its pharmacy or PBM services (even if Aetna attempted to offset CVS's losses by capturing additional insurance customers).[100] The DOJ instead focused on an area of alleged horizontal overlap between the two parties. DOJ alleged that both companies are leading sellers of individual prescription drug plans,[101] and that the combined company's share would range from 35-53.5 percent in 12 regions across the country.[102] Accordingly, the companies agreed to divest

Aetna's individual prescription drug plan business to health insurance company WellCare Health Plans, Inc.[103] After the DOJ's complaint and proposed settlement were provided to a federal district court for review, as part of the standard Tunney Act process, the court raised concerns regarding the parties' intention to integrate the two businesses before the court finished its review of the proposed settlement.[104] Accordingly, CVS and Aetna committed to several steps to hold the businesses separate while the court's review is pending.[105]

Bayer/Monsanto

On September 14, 2016, Bayer AG agreed to acquire Monsanto Company for $66 billion in cash and acquired debt.[106] Bayer is a global life sciences company based in Germany with agrochemical, consumer health, and pharmaceutical businesses.[107] Monsanto was a global biotechnology and seed company based in the United States selling seeds and traits, herbicides, and digital agriculture products.[108] The DOJ conditionally approved the merger on May 29, 2018.[109] The DOJ alleged that, without conditions, the merger would harm competition in 17 product markets across four broad product categories: genetically modified seeds and traits, foundational herbicides, seed treatments, and certain vegetable seeds.[110] The DOJ also alleged innovation harms and loss of competition for so-called "integrated solutions" that combine seed, trait, and crop protection products with digital agricultural services.[111] In most product markets, the DOJ alleged horizontal overlaps and required structural divestitures.[112] DOJ also raised concerns about the vertical integration of Bayer's seed treatment business with Monsanto's seed business—specifically, that the merged firm would be able to foreclose seed rivals or raise their costs by manipulating the seed treatment market.[113] Accordingly, the DOJ required a divestiture of a significant portion of Bayer's seed treatments business.[114] Notably, as part of the settlement, the parties agreed to operate the Bayer and Monsanto businesses entirely separately until all the divestitures are "fully accomplished."[115]

Conduct/Behavioral Remedies

As noted, antitrust authorities have long voiced a preference for resolving merger concerns with structural remedies (such as divestitures). This year, representatives from both the FTC and the DOJ made comments suggesting skepticism that conduct or behavioral remedies can resolve competitive concerns. For example, on September 25, 2018, DOJ Assistant Attorney General Delrahim withdrew the Division's 2011 Policy Guide to Merger Remedies and reverted to the 2004 Remedy Policy Guide, which includes a more cautious approach to behavioral remedies. Likewise, the Deputy Director of the FTC Bureau of Competition published a statement in connection with the Northrop Grumman/Orbital ATK consent decree emphasizing that the FTC prefers structural remedies in most cases. Nonetheless, the FTC still utilized behavioral remedies to ameliorate competitive concerns in at least two cases this year.

Northrop Grumman/Orbital ATK, Inc.

On June 5, 2018, the FTC conditionally approved Northrop Grumman's acquisition of Orbital ATK.[116] This vertical transaction, announced September 2017, sought to combine Northrop Grumman, a missile system provider, with Orbital ATK, a missile component supplier.[117] The FTC expressed concerns with the transaction. It noted that the vertically integrated company might disadvantage Northrop's missile system competitors by denying them access to Orbital ATK's missile components.[118] Notably, the FTC imposed several conduct remedies to resolve its concerns with this transaction, including the requirement that the combined company make Orbital ATK missile component products available to other missile system competitors on a non-discriminatory basis.[119] The FTC also deviated from the typical ten-year term of consent decrees and opted instead for the consent decree to be in effect for twenty years.[120] Importantly, a statement on the merger and settlement by the FTC Bureau of Competition Deputy Director stressed that despite accepting a behavioral remedy in this transaction, the FTC still strongly favors structural remedies, such as divestitures.[121]

Corpus Christi Polymers Joint Venture

In March 2018, three polyethylene terephthalate resin (PET) producers formed a joint venture (Corpus Christi) to purchase a partially completed PET manufacturing plant out of bankruptcy. The FTC alleged that before the acquisition, the three joint venture owners controlled 90 percent of the North American PET market.[122] The FTC alleged that this joint venture would increase the likelihood of collusion between these companies, increase their market power, and increase the risk of improper exchanges of competitively sensitive information.[123] To resolve these concerns, the parties reached a settlement with the FTC on December 21, 2018.[124] The joint venture owners (and Corpus Christi itself) agreed to a number of conditions, including a requirement that no joint venture owner control more than one-third of the ownership interest in Corpus Christi or more than one-third of the tolling capacity at the plant.[125] To ensure the joint venture did not reduce output, the consent decree requires that if a member does not use its tolling capacity, the other members have the right to use that capacity; and if capacity is still leftover, Corpus Christi must market that extra capacity to third parties.[126] Further, to prevent the joint venture from enabling an exchange of competitively sensitive information, the settlement (1) limits the information the joint venture owners may receive from Corpus Christi, (2) requires the joint venture owners to report communications with each other to the FTC, (3) generally prohibits the joint venture owners from influencing Corpus Christi independent board members, and (4) limits the joint venture owners' ability to solicit, recruit, or hire Corpus Christi's independent board members and employees.[127] As in the Northrop Grumman/Orbital ATK merger, the FTC extended the term of this primarily behavioral consent order from the standard ten years in merger consents to twenty years as is typical in non-merger consents.

Up-Front Buyers or Complete Hold Separate

The majority of transactions resolved with conditions include some form of divestiture. In a number of matters, the authorities either required an upfront buyer or required the parties not to integrate any part of their business until the divestiture was complete.

UTC/Rockwell Collins

On September 4, 2017, United Technologies (UTC) announced its intention to acquire Rockwell Collins for $30 billion dollars.[128] Rockwell Collins is an aviation technology company, "globally recognized for its leading-edge avionics, flight controls, aircraft interior and data connectivity solutions."[129] United Technologies produces products primarily targeting the aerospace industry.[130] The DOJ focused on two product markets: "pneumatic ice protection systems for fixed-wing aircraft," which remove ice from aircraft wings using an inflatable rubber device, and trimmable horizontal stabilizer actuators (THSAs), which adjust the angle of the aircraft tail during flight.[131] DOJ claimed that UTC and Rockwell Collins were two of three suppliers for pneumatic ice protection systems and are two of the "leading" suppliers of THSAs for large aircraft.[132] Therefore, the DOJ alleged the combination would reduce competition in both product markets.[133] To resolve these concerns, the parties agreed to divest Rockwell Collins's ice protection system and THSAs businesses.[134] The settlement includes an upfront buyer for the THSA business, Safran S.A.[135] For the ice protection system, the settlement requires only a buyer "acceptable" to the DOJ.[136]

Air Medical Group/AMR Holdco

AMR Holdco agreed to divestitures on March 7, 2018 as a condition to merge with Air Medical Group Holdings, Inc.[137] The $2.4 billion merger between two inter-facility air ambulance transport providers in Hawaii was announced on August 7, 2017.[138] The FTC alleged that the merger would "tend to create a monopoly" by combining the "only providers" of air inter-facility air ambulance transport services in the State of Hawaii, and thus raise prices and lower quality.[139] Before the merger, Air Medical Group Holding provided only air

ambulance transport services, and AMR Holdco provided both ground and air ambulance services.[140] The FTC focused its analysis on Hawaii air services, after noting that air ambulance transport services in the state typically involve transporting patients from one island to another.[141] To alleviate concerns regarding the transaction, the FTC required AMR Holdco to divest its air ambulance business and support assets to an upfront buyer, AirMD.[142] The FTC noted that AirMD had the experience to manage the divested assets and operations in Hawaii because it previously operated aircraft used by AMR Holdco to provide air ambulance transport in the state.[143]

Praxair/Linde AG

On June 1, 2017, Praxair Inc. agreed to merge with fellow industrial gas supplier Linde AG.[144] On October 22, 2018, the parties agreed to divestitures with the FTC to resolve concerns regarding the transaction.[145] The FTC raised concerns with horizontal competitive effects in markets for nine industrial gases.[146] The FTC argued that each of the product markets for the nine gasses is "highly concentrated"[147] and raised significant concerns with barriers to entry. The FTC noted the large sunk investment required for equipment and difficulty in acquiring raw material supplies due to existing long-term contracts.[148] To resolve these concerns, the parties agreed to divest facilities, equipment, and source contracts used to make these products to various named buyers.[149] While an upfront buyer was not required as part of the consent agreement, Praxair and Linde AG agreed to make the divestitures within four months and were prohibited from integrating any of their businesses, anywhere in the world, until the divestitures were completed.[150] Commissioner Rohit Chopra dissented from the consent agreement; he believed that further conditions were necessary because one of the divestiture buyers was a joint venture partially owned by a private equity firm.[151]

Potential Competition

The antitrust authorities also scrutinize transactions for impact on potential competition. The DOJ and the FTC examine issues related to both short-term future competition (often identified with overlapping product "pipelines") and long-term innovation (often focused on whether the firms both hold the technological building blocks to make "next-generation" developments).

Amneal Pharmaceuticals LLC/Impax Laboratories Inc.

On October 17, 2017, Amneal Pharmaceuticals LLC agreed to purchase fellow pharmaceutical manufacturer Impax Laboratories, Inc. for approximately $1.45 billion.[152] On April 26, 2018, the FTC required divestitures to resolve concerns with horizontal competition, including potential future competition concerns in seven product areas.[153] The FTC alleged that "either Amneal or Impax is a current competitor and the other is likely to enter" in a number of markets.[154] Moreover, the FTC alleged that the party that was considered likely to enter was one of a limited set of possible entrants with either approval to enter or the capacity to enter, and in some cases was the only foreseeable entrant.[155] To resolve these concerns, the FTC required that Impax divest all of its rights and assets related to the products at issue to three up-front buyers.[156] Under the consent decree, ANI Pharmaceuticals, Inc. acquired seven products (four future and three current),[157] Perrigo Company plc acquired two future products for which it had already partnered with Impax,[158] and G&W Laboratories acquired one future product that G&W already manufactures for Impax.[159] While the FTC normally prefers an entire divestiture package to go to one purchaser, in this case, the FTC decided to require divestiture of most of the overlap products to one buyer while allowing divestitures of the jointly-developed products to the merging firms' respective partners.

Building Materials

CRH/Ash Grove Cement Company

On June 14, 2018, construction company CRH agreed to divest assets in three local markets in order to proceed with its planned acquisition of Ash Grove Cement Company.[160] The FTC contended that the merged company would become the largest supplier of (1) portland cement, a key ingredient in concrete, in Montana; (2) sand and gravel in Omaha, Nebraska and Council Bluffs, Iowa; and (3) limestone in Johnson County, Kansas.[161] The FTC alleged that CRH and Ash Grove were two of three significant suppliers of portland cement in Montana, which operated the only two cement plants in the state. Thus, the transaction would leave only two competitors in the Montana cement market and allegedly increase the likelihood of collusive behavior.[162] In sand and gravel in Omaha, Nebraska and Council Bluffs, Iowa, and limestone in Johnson County, Kansas, the FTC alleged that the companies were the two leading suppliers.[163] The FTC also claimed that, due to high concentration in these areas, the merged company would be able to increase prices.[164] In order for the acquisition to take place, the FTC required CRH to divest cement assets in Montana to Grupo Cementos de Chihuahua, SAB de CV,[165] as well as to divest sand and gravel assets in Nebraska to Martin Marietta Materials and crushed limestone assets in Kansas to Summit Materials, Inc. subsidiary Hamm, Inc.[166]

Martin Marietta Materials/Bluegrass Materials

Martin Marietta Materials announced plans to acquire Bluegrass Materials Company for $1.625 billion on June 26, 2017.[167] The DOJ raised concerns that the acquisition would combine two of the three producers of aggregate, a key component in asphalt and ready mix concrete, in Forsyth and north Fulton County, Georgia as well as Washington County, Maryland.[168] The DOJ alleged that elimination of competition between the companies would allow the merged entity to increase prices or decrease the quality of services provided to customers.[169] On April 25, 2018, Martin Marietta was required to divest the lease and assets of its Forsyth quarry to Midsouth Paving, Inc., and Bluegrass Materials Company was required to divest its quarry in Hagerstown, Maryland to a buyer approved by the DOJ in consultation with the State of Maryland.[170]

CRH/Pounding Mill

On March 26, 2018, CRH, a global supplier of building materials, reached an agreement to acquire Pounding Mill, a quarry operator in Virginia and West Virginia.[171] The DOJ focused its investigation on two products purchased by the West Virginia Department of Transportation (WVDOT) for projects in southern West Virginia: aggregate (crushed stone, sand, and gravel used for road construction and repair) and asphalt concrete (a composite used to build roadways).[172] The DOJ alleged that CRH and Pounding Mill controlled an estimated 80 percent of the aggregate used in WVDOT projects and competed "head-to-head" with each other in the local aggregate market.[173] As to asphalt concrete, the DOJ alleged that CRH enjoyed a "virtual monopoly" over the product supply in West Virginia. The DOJ claimed that the transaction would allow CRH to prevent any other competitor from entering the asphalt concrete market in West Virginia, by controlling CRH's supply of aggregate product.[174] In June 2018, the parties reached a negotiated settlement, agreeing to divest Pounding Mill's Rocky Gap quarry to Salem Stone Corporation, a regional aggregate producer active in Virginia and North Carolina.[175]

Media

Disney/21st Century Fox

On December 13, 2017, the Walt Disney Company announced the planned acquisition of certain assets from Twenty-First Century Fox.[176] Disney, which owns broadcast networks (such as ABC) and cable networks (such as ESPN), sought to acquire Fox's portfolio of regional sports networks (RSNs), the National Geographic

network, the FX networks, Fox's interest in Hulu, Fox's television and film studios, and Fox's international television business.[177] The DOJ focused on the potential impact of the transaction on sports television programming, specifically the combination of ESPN and Fox's RSNs. DOJ alleged that the transaction would eliminate competition and lead to higher prices for television distributors.[178] The DOJ focused on 22 RSNs in particular—in geographic areas where Disney/Fox would allegedly control a combined share of sports programming revenue ranging from 45–60 percent.[179] To remedy these concerns, the DOJ required the parties to divest all 22 RSNs.[180]

Gray Television/Raycom Media

On June 23, 2018, Gray Television announced plans to acquire Raycom Media for $3.6 billion.[181] Both companies operate local television stations.[182] The DOJ focused on the potential impact of the transaction in nine local markets.[183] Specifically, the DOJ alleged that the transaction would lessen competition for "Big 4" network retransmission (NBC, CBS, ABC, FOX) and result in local market shares ranging from 48–74 percent for broadcast retransmission.[184] The DOJ also alleged that the transaction would reduce competition for local broadcast spot advertisements in the nine local markets, with post-merger shares ranging from 38–82 percent.[185] On December 14, 2018, the DOJ conditionally approved the acquisition by requiring the merging parties to divest "Big 4" television stations in the nine local markets at issue.[186] The transaction also secured FCC approval on December 20, 2018, without additional divestiture requirements beyond the nine local markets at issue in the DOJ's review.[187]

Gaming

Penn National Gaming/Pinnacle Entertainment

On December 18, 2017, Penn National Gaming announced its planned acquisition of fellow casino operator Pinnacle Entertainment for $2.8 billion.[188] Attempting to "fix it first," Penn National also announced that it would sell four Ameristar properties to Boyd Gaming.[189] These properties were the Ameristar St. Charles (St. Louis, Missouri); Ameristar Kansas City (Kansas City, Missouri); Belterra Casino Resort (Florence, Indiana); and Belterra Park (Cincinnati, Ohio).[190] On October 1, 2018, the FTC announced that it was requiring the divestitures announced by Penn National to preserve competition in three local markets for "casino services."[191] These divestitures preserved four competitors in St. Louis and five competitors in both Kansas City and Cincinnati.[192] In requiring these divestitures, the FTC noted that regulatory limits on gambling in these markets reduced the likelihood of new entry or expansion by competitors to replace competition.[193]

Retail Gasoline

Marathon Petroleum Corporation/Express Mart

On April 13, 2018, Marathon Petroleum Corporation, owner of the Speedway brand, agreed to acquire various gasoline retail entities from Express Mart.[194] Both companies operated retail fuel stations.[195] The FTC and the New York Attorney General (NYAG) identified competitive concerns in five New York cities: Farmington, Fayetteville, Johnson City, Rochester, and Whitney Point.[196] The FTC and NYAG argued that in four local markets for retail gasoline, the number of competitors would be reduced to two and, in another market, the number would be reduced to one.[197] For diesel retail, they alleged that the merger would result in a monopoly in three markets, the reduction of competitors from three to two in another market, and reduction to three competitors in the last.[198] To resolve these allegations, the parties agreed on October 25, 2018 to divest four Speedway and one Express Mart stations to Sunoco LP.[199] Because Sunoco also serves as a wholesale supplier to independent retail gas stations in the Rochester, New York area, the FTC and NYAG required Sunoco to create information firewalls between its wholesale and retail fuel pricing businesses in the region.[200]

7-Eleven/Sunoco

On April 6, 2017, 7-Eleven announced plans to acquire 1,100 locations from Sunoco for $3.3 billion.[201] Both companies operate gasoline and diesel outlets as well as convenience stores. The FTC alleged that the companies competed in 76 local markets.[202] The FTC further alleged that the proposed acquisition would reduce the number of independent market participants from two to one in 18 local areas, from three to two in 39 local areas, and from four to three in 19 local areas.[203] Under the terms of the consent agreement issued on January 19, 2018, 7-Eleven was required to sell 26 of its retail fuel and convenience store locations to Sunoco,[204] and was prohibited from purchasing 33 of the locations it otherwise planned to acquire from Sunoco.[205] The FTC noted that Sunoco plans to convert the retained retail fueling stations from company-operated sites to commission agent sites, which the FTC observed would "preserve competition as it is today."[206] Because Sunoco also serves as a wholesale supplier to retail gasoline stations (including some 7-Eleven stations), the FTC also required Sunoco to create information firewalls between its employees in charge of setting retail fuel prices and its wholesale supply business.[207]

Buyer Power & Monopsony

An area that has received increased attention in recent years is monopsony or buyer power.

Grifols/Biotest

On December 22, 2018, Grifols SA agreed to acquire Biotest US.[208] Grifols is a Spanish company with plasma collection centers in the U.S. and Europe.[209] Biotest also owned a network of plasma collection centers in the US.[210] The FTC alleged that the transaction would be a merger to monopoly in three local areas for blood plasma collection services around Lincoln, Nebraska; Augusta, Georgia; and Youngstown, Ohio.[211] The FTC cited as the competitive harm the potential for a consolidated plasma purchaser to reduce donor fees in these geographic areas.[212] To resolve these concerns, Grifols agreed to divest its centers in the three areas cities to KedPlasma.[213] In a tweet, FTC Commissioner Rohit Chopra praised the decision for avoiding monopsony power and subsequent lower payments to donors.[214]

Private Merger Enforcement

It is important for merging parties to remember that the DOJ and the FTC are not the only parties that can challenge a transaction. Although rare, private parties may challenge transactions even if the FTC or DOJ do not. In 2018, a federal district court imposed divestitures on a consummated transaction in a case brought by a private plaintiffs where the FTC and DOJ did not challenge the transaction.

JELD-WEN/Craftmaster International

In June 2012, JELD-WEN sought to acquire Craftmaster International (CMI). JELD-WEN and CMI both offered finished doors, as well as interior molded doorskins (a finished door component).[215] The DOJ reviewed the transaction, but ultimately did not take action, and the acquisition closed in October 2012.[216] In 2016, Steves & Sons (Steves) raised concerns regarding the transaction. Steves—a competitor to JELD-WEN in interior molded doorskins, and a customer of JELD-WEN doorskin components—alleged that after the transaction, JELD-WEN raised doorskin prices to Steves in an effort to destroy Steves' ability to compete in the finished door market.[217] Steves filed suit in the Eastern District of Virginia challenging the transaction and seeking to "restore competition in the markets for doorskins and doors."[218] Steves challenged the transaction as a violation of Clayton Act, Section 7.[219] On February 2, 2018, a jury agreed with Steves that the JELD-WEN/CMI merger violated the antitrust laws,[220] and Steves subsequently requested equitable relief in the form of JELD-WEN divesting a particular doorskin facility to restore competition allegedly lost through the merger.[221] DOJ filed a Statement of Interest, which noted its long-standing preference for structural remedies (such as divestiture) in lieu of conduct or behavioral remedies.[222] DOJ also provided suggestions to the court, designed to ensure that a divestiture would properly restore competition.[223] On October 5, 2018, the District Court for the Eastern District of Virginia ordered JELD-WEN to divest a doorskin facility.[224] JELD-WEN has announced its intention to appeal the decision.[225] This appears to be the first successful private lawsuit to win a divestiture after challenging a merger.[226]

The Authorities Have Increased Enforcement of Consent Decrees

This year, both the DOJ and the FTC have increasingly focused on the enforcement of existing consent decrees. For example, the DOJ opened a new Office of Decree Enforcement, similar to the FTC's Compliance Division.[227] And the FTC recently brought an enforcement action to support a consent decree originally entered in 2014.

CoreLogic/DataQuick

In March 2014, the FTC cleared CoreLogic's acquisition of DataQuick, on the condition that CoreLogic license data and provide transitional services to RealtyTrac (a new entrant intended to preserve competition in the national assessor and recorder bulk data market).[228] In March 2018, the FTC announced that it would modify the 2014 final order, alleging that CoreLogic failed to comply with the original order.[229] For example, the FTC alleged that CoreLogic failed to share with RealtyTrac all the data and information required by the 2014 order.[230] CoreLogic disputed the FTC's allegations, but to resolve the matter, agreed to more detailed implementation plans and a three year extension on the commitment to transfer bulk data.[231]

The Authorities Actively Pursued Hart-Scott-Rodino Violations

The Hart-Scott-Rodino (HSR) Act enables the federal government to review mergers and acquisitions reaching certain thresholds by requiring merging parties to provide notice of the transaction and not close until either the statutory waiting period expires or is terminated. When parties fail to make the required notice, the agencies will bring an enforcement action seeking civil penalties.

Valero Plains/Plains All American Pipeline

Valero, a diversified energy company that refines crude oil,[232] attempted to acquire Plains All American Pipeline, which the California Attorney General alleged was the "only independent terminal owner in the [San Francisco] Bay Area."[233] The FTC took no action as to the transaction,[234] but the State of California filed suit on July 10, 2017, which ended in a stipulated order and the abandonment of the transaction.[235] However, the FTC investigated whether Plans All American Pipeline improperly shared competitively sensitive information with prospective bidders, including Valero.[236] The HSR Act restricts pre-merger integration in order to preserve competition until a transaction closes; accordingly, behavior like improper sharing information or premature transfer of control can be a violation of the HSR Act as well as other antitrust laws. The FTC began its investigation based on documents submitted during the original review of the transaction. Although the FTC emphasized its concerns with the potential information sharing, it declined to take action in this case. Instead, the FTC issued closing letters to both parties, in reliance on the representation of counsel that all nonpublic information obtained during the transaction's pendency had been destroyed.[237]

James Dolan/Madison Square Garden Company

On December 6, 2018, James Dolan, the Executive Chairman of Madison Square Garden Company—which owns the New York Knicks and New York Rangers—agreed to pay $609,810 in civil penalties to settle allegations that he violated the HSR Act.[238] The DOJ, filing on behalf of the FTC, alleged that Mr. Dolan acquired additional voting securities in Madison Square Garden Company on September 11, 2017, in the form of restricted stock units included in his compensation package, bringing his total holdings beyond a reporting threshold, and did not notify the PNO or wait for the statutory period to expire to close the transaction.[239] Mr. Dolan filed a corrective filing in November 27, 2017. Accordingly, the antitrust authorities maintained that he continuously violated the HSR Act from the time of his acquisition of shares until expiration of the waiting period for the corrective filing on December 26, 2017.[240] The DOJ cited the inadvertence of the violation and Mr. Dolan's prompt self-reporting as reasons to reduce the penalty from the statutory maximum to $609,810.[241]

Takeaways from 2018 and Expectations

The antitrust authorities remained busy in 2018, and there is every reason to believe that the DOJ and FTC will continue to be active in 2019. These notable cases and settlements from 2018 offer some insight into the DOJ and FTC priorities for the upcoming year.

Continued Skepticism of Behavioral Remedies. Representatives from both the DOJ and FTC have continually made public statements expressing the authorities' preference for structural—rather than behavioral—remedies.[242] Indeed, on September 25, 2018, DOJ Assistant Attorney General Delrahim withdrew the Division's 2011 Policy Guide to Merger Remedies, reverting instead to the 2004 Remedy Policy Guide, which suggests a more skeptical approach to behavioral or conduct remedies.[243] Interestingly, Bureau of Competition head Bruce Hoffman has indicated that the FTC remains willing to consider conduct remedies where appropriate, while reiterating a preference for structural remedies.[244] As noted above, the FTC has done so in recent cases, including Northrop Grumman/Orbital.

Hold Separate Orders. In merger settlements, the antitrust authorities commonly require parties to hold divestiture businesses separate while they are being spun off. However, in 2018, both the DOJ (in Bayer/Monsanto) and the FTC (in Praxair/Linde) went further by requiring the merging parties hold their *entire* businesses separate (and avoid any integration) until divestiture purchases were completed. And, this year, a federal court went one step further in CVS/Aetna, requiring that the companies hold their businesses separate even after the divestiture was finalized, until the court could finish its review of the settlement under the Tunney Act.

Continued enforcement of HSR violations. The US antitrust authorities continue to monitor transactions—including acquisitions of stock by individuals—to ensure compliance with the HSR Act. As a result, both companies and individuals should have procedures in place to ensure that HSR-reportable transactions are notified and statutory waiting periods are obeyed.

Continued Vigilance in Enforcing Consent Decrees. The US antitrust authorities take compliance with consent decrees seriously. As the CoreLogic case demonstrates, the FTC and DOJ will enforce non-compliance. Therefore, parties subject to a consent decree should ensure that their employees are aware of the obligations under the consent decree and that their activities comply with the obligations.

Challenges to Consummated Transactions. As the Otto Bock matter demonstrates, the authorities can investigate and challenge transactions that are under the HSR reporting threshold. Parties therefore should carefully consider antitrust risks of non-reportable transactions.

Private Litigation. While merger enforcement is generally within the purview of the FTC and the DOJ with some involvement of other federal agencies and state attorneys general, the Clayton Act can still be enforced by private litigants. As JELD-WEN/Craftmaster International demonstrates, private challenges can succeed even if the federal authorities reviewed the transaction and decided to take no action. Indeed, private challenges can result in divestitures well after the transaction has closed and the companies have integrated.

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Endnotes

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95 Bernard A. Nigro, Jr. Dep. Ass. Att'y Gen, Antitrust Div. U.S. Dep't of Justice, A Partnership to Promote and Protect Competition for the Benefit of Consumers (Feb. 2, 2018), *available at* https://www.justice.gov/opa/speech/file/1030711/download; Press Release, Fed. Trade Comm'n, FTC Releases Staff Study Examining Commission Merger Remedies between 2006 and 2012 (Feb. 3, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/02/ftc-releases-staff-study-examining-commission-merger-remedies.
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100 *Id.*
101 *Id.*
102 *CVS* Complaint, *supra* note 96, ¶ ¶34; Analysis to Aid Public Comment at 3, *CVS Health Corp.*, No. 1:18-cv-02340, *available at* https://www.justice.gov/opa/press-release/file/1099846/download.
103 [Proposed] Final Judgment, *CVS Health Corp.*, *available at* https://www.justice.gov/opa/press-release/file/1099841/download.
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105 CVS Health Corporation's Memorandum in Response to the Court's December 3, 2018 Order to Show Cause, *CVS Health Corporation,* No. 18-2340 (D.D.C. Dec. 14 2018). These steps include (1) operating Aetna's health insurance business as a separate and distinct unit from CVS; (2) allowing Aetna to maintain control over pricing and products offered; (3) retaining current compensation and benefits for Aetna personnel; and (4) implementing a firewall between CVS and Aetna. *Id.*
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108 *Id.*
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111 *Id.*
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114 DOJ *Bayer* Press Release, *supra* note 112.
115 Stipulation and Order at 6-7, *Bayer AG,* No. 1:18-cv-01241, *available at* https://www.justice.gov/opa/press-release/file/1066636/download; [Proposed] Final Judgment at 32, *Bayer AG,* No. 1:18-cv-0124, *available at* https://www.justice.gov/opa/press-release/file/1066631/download.
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117 Complaint ¶ ¶ 1-3 and 5, *In re* Northrop Grumman Corp. and Orbital ATK, Inc., F.T.C No. C-4652 (June 5, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/1810005_c-4652_northrop_grumman_orbital_complaint_6-5-18.pdf.

118 *Id.* ¶ 11.
119 Decision and Order at 7, *In re Northrop Grumman Corp.*, F.T.C No. C-4652, *available at* https://www.ftc.gov/system/files/documents/cases/1810005_c-4652_northrop_grumman_orbital_decision_and_order_public_version_6-5-18.pdf.
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123 *Id.*
124 Analysis of Agreement Containing Consent Order to Aid Public Comment at 4, *In re Corpus Christi Polymers*, No. 181-0030, *available at* https://www.ftc.gov/system/files/documents/cases/181_0030_pet_analysis_12-21-18.pdf.
125 *Id.*
126 *Id.*; At no time can CCP reveal which member failed to use their entire capacity. *Id.*
127 *Id.*; *see also* Francesca M. Pisano, Dylan S. Young, *FTC Approves Corpus Christi Polymers Joint Venture with Conduct Remedies*, Arnold Porter (Jan. 22, 2019), https://www.arnoldporter.com/en/perspectives/publications/2019/01/ftc-approves-corpus-christi-polymers-jv.
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131 *Id.* ¶¶ 2-3.
132 *Id.*
133 *Id.* at 6-7 and 10; Competitive Impact Statement, *United Technologies Corp.*, No. 1:18-cv-02279, *available at* https://www.justice.gov/atr/case-document/file/1100066/download.
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136 *Id.* at 6-7.
137 Press Release, Fed. Trade Comm'n, Ambulance Companies Air Medical Group Holding, Inc. and AMR Holdco, Inc. Agree to Divest Air Ambulance Services in Hawaii as a Condition of Merger (Mar. 7, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/03/ambulance-companies-air-medical-group-holdings-inc-amr-holdco-inc.
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140 *Id.* at 2, 9.
141 *Id.* at 3.
142 Decision and Order at 8, *In re Air Medical Group Holdings*, No. 171-0217, *available at* https://www.ftc.gov/system/files/documents/cases/1710217_air_medical_kkr_amr_decision_and_order_public_version_0.pdf.
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146 Complaint at 2-3, *In re* Linde AG and Praxair Inc., No. C-4660 (F.T.C. Oct. 19, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/1710068_praxair_linde_complaint.pdf. The product markets are (1) bulk liquid oxygen; (2) bulk liquid nitrogen; (3) bulk liquid argon; (4) bulk liquid carbon dioxide, (5) bulk liquid hydrogen, (6) bulk liquid helium, (7) on-site hydrogen, (8) on-site carbon monoxide, and (9) excimer laser gases. *Id.*
147 *Id.* at 4.
148 *Id.* at 5-6.
149 Fed. Trade Comm'n, Linde AG and Praxair, Inc.; Analysis To Aid Public Comment, 83 Fed. Reg. 55533, 55538 (Nov. 6, 2018), *available at* https://www.govinfo.gov/content/pkg/FR-2018-11-06/pdf/2018-24206.pdf; FTC *Praxair* Press Release, *supra* note 145.
150 *Id.*
151 Statement of Commissioner Rohit Chopra, *In re* Linde AG, Praxair, Inc., and Linde PLC,No. 1710068 (F.T.C. Oct. 22, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf. Commissioner Chopra highlighted that financing can be a significant predictor of divestiture success and argued that the FTC should closely consider whether buyers have sufficient financing to vigorously compete as well as whether their financial and governing structure favors preserving the business. In this matter, Commissioner Chopra would have preferred to require that the PE-funded divestiture buyer give notice (or seek approval) before making any asset sales, to avoid the risk that the buyer simply sells off the divested assets in the future.
152 Complaint, *In re* Amneal Holdings, et al., No. C-4650 (FTC Apr. 27, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/1810017_amneal_impax_complaint_final_0.pdf.

153 *Id.* (1) Aspirin and dipyridamole extended-release capsules, an antiplatelet therapy used to reduce the risk of stroke;(2) azelastine nasal spray, a treatment for seasonal allergies; (3) diclofenac sodium and misoprostol delayed release tablets, a pain relief treatment that minimizes gastrointestinal side effects; (4) erythromycin tablets, an antibiotic; (5) fluocinonide-E cream, a topical corticosteroid used to reduce swelling, redness, itching, and allergic reactions; (6) methylphenidate hydrochloride extended release tablets, a central nervous system stimulant used to treat attention-deficit disorder and attention-deficit/hyperactivity disorder; and (7) olopatadine hydrochloride nasal spray, a treatment for seasonal allergies.
154 *Amneal Holdings, LLC, and Impax Laboratories, Inc.*; Analysis to Aid Public Comment, 83 Fed. Reg. 19764, 19766 (May 4, 2018) *available at* https://www.ftc.gov/system/files/documents/federal_register_notices/2018/05/amneal_published_frn_5-4-18.pdf.
155 *Id.*
156 *Id.*
157 ANI acquired generic aspirin and dipyridamole ER capsules, generic diclofenac sodium and misoprostol delayed release tablets, generic erythromycin tablets, generic methylphenidate hydrochloride extended release tablets, generic desipramine hydrochloride tablets, generic ezetimibe and simvastatin immediate release tablets and generic felbamate tablets. Press Release, Fed. Trade Comm'n, FTC Requires Generic Drug Marketers Amneal Pharmaceuticals LLC and Impax Laboratories Inc. to Divest Rights to 10 Generic Medications as Condition of Merger (Apr. 27, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/04/ftc-requires-generic-drug-marketers-amneal-pharmaceuticals-llc.
158 Perrigo acquired generic azelastine nasal spray and generic olopatadine hydrochloride nasal spray. *Id.*
159 G&W acquired Impax's rights to generic fluocinonide-E cream. *Id.*
160 *See* Decision and Order at 8-9, *In re* CRH plc, No. 171-0230 (F.T.C. June 14, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/1710230_crh_plc_decision_and_order.pdf [hereinafter *CRH Ashgrove* Decision].
161 Complaint at 12, *In re CRH plc*, No. 171-0230, *available at* https://www.ftc.gov/system/files/documents/cases/1710230_crh_plc_complaint.pdf.
162 *Id.* at 16.
163 *Id.* at 12.
164 *Id.* at 16.
165 *CRH Ashgrove* Decision, *supra* note 160 at 8.
166 *Id.* at 8-9.
167 Competitive Impact Statement at 1-2, U.S. v. Martin Marietta Materials, Inc., et al., No. 1:18-cv-00973 (D.D.C. Apr. 25, 2018), *available at* https://www.justice.gov/opa/press-release/file/1057556/download.
168 Complaint at 2, *Martin Marietta Materials,* No. 1:18-cv-00973, *available at* https://www.justice.gov/opa/press-release/file/1057561/download.
169 *Id.* at 1-2.
170 [Proposed] Final Judgment at 7-8, *Martin Marietta Materials, Inc.,* No. 1:18-cv-00973, *available at* https://www.justice.gov/opa/press-release/file/1057591/download; Press Release, Dep't. of Justice, Justice Department Requires Martin Marietta to Divest Quarries to Preserve Competition in Connection with its Acquisition of Bluegrass Materials (Apr. 25, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-martin-marietta-divest-quarries-preserve-competition-connection.
171 Competitive Impact Statement at 1, *US v. CRH PLC, et al.*, No.1:18-cv-01473 (D.D.C. June 22, 2018), *available at* https://www.justice.gov/opa/press-release/file/1074246/download.
172 *Id.* at 4-7.
173 Complaint, at 2, *U.S. v. CRH PLC, et al.*, No. 1:18-cv-01473 (D.D.C. June 22, 2018), *available at* https://www.justice.gov/opa/press-release/file/1074241/download.
174 *Id.* at 3.
175 Hold Separate Stipulation and Order, *CRH PLC.*, No. 1:18-cv-01473, *available at* https://www.justice.gov/opa/press-release/file/1074236/download.
176 Complaint ¶2, *U.S. v. The Walt Disney Company and Twenty-first Century Fox, Inc.*, No. 18-cv-05800 (S.D.N.Y. June 27, 2018), *available at* https://www.justice.gov/opa/press-release/file/1075081/download.
177 *Id.* ¶1–2; Competitive Impact Statement at 1-2, *The Walt Disney Company*, No. 18-cv-05800 (June 27, 2018), *available at* https://www.justice.gov/atr/case-document/file/1085951/download. Disney did not attempt to acquire Fox Broadcasting Company, Fox Sports, or several other Fox cable networks.
178 *Id.* at 2-3.
179 *Id.* at 6-7.
180 *Id.* at 9.
181 Complaint, *US v. Gray Television, Inc. et al*, No. 1:18-cv-02951 (D.D.C. Dec. 14, 2018), *available at* https://www.justice.gov/atr/case-document/file/1120496/download.
182 *Id.* at 1-2.
183 *Id.* at 2. The local markets at issue include (i) Waco-Temple-Bryan, Texas; (ii) Tallahassee, Florida-Thomasville, Georgia; (iii) Toledo, Ohio; (iv) Odessa-Midland, Texas; (v) Knoxville, Tennessee; (vi) Augusta, Georgia; (vii) Panama City, Florida; (viii) Dothan, Alabama; and (ix) Albany, Georgia. *Id.*
184 *Id.* at 7-8.
185 *Id.* at 12-13.
186 Proposed Final Judgment, *Gray Television,* No. 1:18-cv-02951, *available at* https://www.justice.gov/atr/case-document/file/1120511/download.
187 *FCC Approves Merger of Gray TV & Raycom Media*, FCC, *available at* https://www.fcc.gov/document/fcc-approves-merger-gray-tv-raycom-media
188 Arunima Banerjee, *Casino operator Penn National to buy Pinnacle in $2.8 billion deal* Reuters (Dec. 18, 2017), https://www.reuters.com/article/us-pinnacl-ent-m-a-penn-natl-gaming/casino-operator-penn-national-to-buy-pinnacle-in-2-8-billion-deal-idUSKBN1EC1FQ.
189 *Id.*
190 Press Release, Boyd Gaming Corp., Boyd Gaming To Acquire Four Pinnacle Entertainment Assets (Dec. 18, 2017), *available at* https://www.prnewswire.com/news-releases/boyd-gaming-to-acquire-four-pinnacle-entertainment-assets-300572412.html.
191 Press Release, Fed. Trade Comm'n, FTC Requires Casino Operators Penn National Gaming, Inc. and Pinnacle Entertainment, Inc. to Divest Assets in Three Midwestern Cities as a Condition of Merger (Oct. 1, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-casino-operators-penn-national-gaming-inc-pinnacle?utm_source=govdelivery.
192 *Id.*

193 *Id.* The FTC did note that, "Entry (by a tribal casino) and expansion are possible in Ohio, but neither is likely or would be timely enough to deter or counteract the proposed acquisition's anticompetitive effects due to the time and expenses involved."
194 Complaint at 2, *In re* Marathon Petroleum Corporation et al., No. C-4661 (Oct. 23, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/1810152_marathon_complaint.pdf.
195 *Id.*
196 *Id.* at 3.
197 *Id.*
198 *Id.* at 4.
199 Decision and Order at 14, *In re* Marathon Petroleum Corporation et al., No. C-4661 (Oct. 23, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/1810152_marathon_do_redacted_public_version.pdf; Matthew Perlman, *NY AG Gets Marathon To Sell 5 Gas Stations for Upstate Deal*, Law360 (Oct. 24, 2018) https://www.law360.com/articles/1095527?utm_source=rss&utm_medium=rss&utm_campaign=articles_search.
200 Analysis to Aid Public Comment, 4, *Marathon Petroleum Corporation*, No. C-4661, *available at* https://www.ftc.gov/system/files/documents/cases/1810152_marathon_analysis.pdf; Press Release, N.Y. Att'y Gen., Following A.G. Investigation, Marathon Petroleum Corp. Agrees To Divest 5 Upstate Gas Stations To Preserve Local Competition (Oct. 24, 2018), *available at* https://ag.ny.gov/press-release/following-ag-investigation-marathon-petroleum-corp-agrees-divest-5-upstate-gas.
201 Complaint at 5, *In re* Seven & i Holdings Co., Ltd, No. 171-0126 (F.T.C. Jan. 19, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/1710126_seven_sunoco_complaint.pdf.
202 *Id.* at 8. The local markets were located in within Boston, Massachusetts; Brownsville, Texas; Buffalo, New York; Fort Myers, Florida; Corpus Christi, Texas; Daytona Beach, Florida; Killeen, Texas; Laredo, Texas; Mission, Texas; Miami, Florida; Gettysburg, Pennsylvania; Titusville, Florida; Venice, Florida; Tampa Florida; Roma, Texas; Victoria, Texas; and Washington, D.C. *Id.*
203 *Id.* at 10.
204 Decision and Order at II B, *Seven & i Holdings Co.*, No. 171-0126, *available at* https://www.ftc.gov/system/files/documents/cases/1710126_seven_sunoco_decision_and_order.pdf; *see* Schedule A, 7-Eleven Retail Fuel and Convenience Store Properties to be Divested, *In re Seven & I Holding Co.*, *Ltd*, No. 171-0126, *available at* https://www.ftc.gov/system/files/documents/cases/1710126_seven_sunoco_do_schedule_a.pdf.
205 *Id.* at IIA 1-2; see Schedule B, Sunoco Retail Fuel and Convenience Store Properties to be Retained, *In re Seven & I Holding Co.*, No. 171-0126), *available at* https://www.ftc.gov/system/files/documents/cases/1710126_seven_sunoco_do_schedule_b.pdf.
206 Analysis to Aid Public Comment at 3, *In re Seven & i Holdings Co.*, No. 171-0126, *available at* https://www.ftc.gov/system/files/documents/cases/1710126_seven_sunoco_analysis.pdf.
207 *Id.* at 4.
208 Complaint at 2-3, *In re* Grisols, S.A., No. C-4654 (F.T.C. July 21, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/181_0081_c4654_grifols-biotest_complaint.pdf.
209 *Id.* at 2; Press Release, Grifols, Grifols expands its plasma collection network by acquiring 24 Biotest centers in the United States (Jan. 8, 2018), *available at* http://www.grifolsusa.com/en/web/eeuu/view-news/-/new/grifols-expands-its-plasma-collection-network-by-acquiring-24-biotest-centers-in-the-united-states. Grifols recently acquired Haema (the largest German network of donation centers) and also recently agreed to jointly build a network of plasma donation centers in Cina with Boya Bio-Pharmaceutical.
210 *Id.* at 2-3. Until recently, Biotest partly owned ADMA Biologics, which sells human plasma products.
211 Press Release, Fed. Trade Comm'n, FTC Requires Grifols S.A. to Divest Assets as Condition of Acquiring Biotest US Corporation (Aug. 1, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/08/ftc-requires-grifols-sa-divest-assets-condition-acquiring-biotest [hereinafter Grifols Press Release].
212 *Id.*; Debbie Feinstein and Albert Teng, *Two Recent Federal Trade Commission Enforcement Actions Shed Light on the Treatment of Buyer Power*, Arnold & Porter (Aug. 7, 2018), https://www.arnoldporter.com/en/perspectives/publications/2018/08/two-recent-federal-trade-commission-enforcement.
213 Grifols Press Release, *supra* note 211.
214 Rohit Chopra (@chopraftc), Twitter (Aug. 1, 2018, 2:41 PM), https://twitter.com/chopraftc/status/1024726814248329216; Debbie Feinstein and Albert Teng, *Two Recent Federal Trade Commission Enforcement Actions Shed Light on the Treatment of Buyer Power*, Arnold & Porter (Aug. 7, 2018), https://www.arnoldporter.com/en/perspectives/publications/2018/08/two-recent-federal-trade-commission-enforcement.
215 Complaint for Injunctive and Declaratory Relief, Damages, and Specific Performance at 1, *Steves and Sons, Inc., v. Jeld-Wen, Inc.* No. 3:16-cv-0545 (E.D. Va. June 29, 2016).
216 *Id.* at 15.
217 *Id.* at 2-3.
218 *Id.* at 8.
219 *Id.* at 40.
220 Verdict Form, *Steves and Sons, Inc.,* No. 3:16-cv-0545 (E.D. Va. Feb 15, 2016).
221 *Steves & Sons, Inc.*, No. 3:16CV545, 2018 WL 4855459 at *1 (E.D. Va. Oct. 5, 2018).
222 Statement of Interest of the United States of America Regarding Equitable Relief, *Steves and Sons, Inc.,* No. 3:16-cv-0545 (E.D. Va. June 6, 2018), *available at* https://www.justice.gov/atr/case-document/file/1069011/download.
223 *Id.*
224 *Steves & Sons, Inc.*, No. 3:16CV545, 2018 WL 4855459, at *1.
225 Jeld-Wen Announces Final Ruling in Steves & Sons Litigation; Appeal of Erroneous Ruling to Commence Imminently, JELD-WEN (Dec. 15, 2018), *available at* http://investors.jeld-wen.com/investor-relations/news-releases/2018/12-15-2018-003328591.
226 *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 2018 WL 4855459, at *22 (E.D. Va. Oct. 5, 2018) (noting a "lack of authority from private suits based on Section 7 of the Clayton Act that have reached the divestiture issue"); Matt Bernardini, Doormaker Slams Damages Bid After Order To Sell Factor, Law360 (Oct. 31, 2018), https://www.law360.com/articles/1097537/doormaker-slams-damages-bid-after-order-to-sell-factory.
227 Delrahim, *supra* note 94.
228 Press Release, Fed. Trade Comm'n, FTC Puts Conditions on CoreLogic, Inc.'s Proposed Acquisition of DataQuick Information Systems (Mar. 24, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/03/ftc-puts-conditions-corelogic-incs-proposed-acquisition-dataquick.

229 Press Release, Fed. Trade Comm'n, FTC Adds Requirements to 2014 Order to Remedy CoreLogic Inc.'s Compliance Deficiencies (Mar. 15, 2018),*available at* https://www.ftc.gov/news-events/press-releases/2018/03/ftc-adds-requirements-2014-order-remedy-corelogic-incs-compliance.
230 *Id.*
231 *Id.*
232 Amended Complaint at 6, *State of California v. Valero Energy Corp., et al.*, No. 3:17-cv-03786 (N.D. Cal. Sept. 6, 2017) [hereinafter *Valero California* Complaint].
233 *Id.* at 2–3.
234 The HSR waiting period expired June 30, 2017. *See* Press Release, Plains All American Pipeline, Valero Energy Corporation and Plains All American Pipeline, L.P. Plan to Challenge Attempt to Block Proposed Acquisition by Valero of Certain Plains Assets (July 12, 2017) ("Valero Chairman and CEO Joe Gorder and Plains Chairman and CEO Greg Armstrong stated that they are disappointed by the California Attorney General's action, given the FTC's decision to let the transaction proceed…"), *available at* http://ir.paalp.com/profiles/investor/ResLibraryView.asp?ResLibraryID=83729&GoTopage=1&Category=117&BzID=789&G=549.
235 *Valero California* Complaint at 1, *supra* note 232; Order re Motion for Preliminary Injunction, *Valero Energy Corp.*, No. 3:17-cv-03786-WHA (N.D. Cal. Aug. 28, 2017); Stipulated Order of Dismissal and Final Judgment at 1, *Valero Energy Corp.*, No. 3:17-cv-03786 (N.D. Cal. Oct. 12, 2017).
236 Letter from Donald S. Clark, Secretary of the Fed. Trade Comm'n to Sean F. Boland, Baker Botts LLP and counsel for Valero Energy (Apr. 5, 2018), *available at* https://www.ftc.gov/system/files/documents/closing_letters/nid/161_0220_valero_plains_closing_letter_to_counsel_for_valero.pdf; Letter from Donald S. Clark, Secretary of the Fed. Trade Comm'n, to William R. Vigdor, Vison & Elkins LLP and counsel to Plains All American (Apr. 5, 2018), *available at* https://www.ftc.gov/system/files/documents/closing_letters/nid/161_0220_valero_plains_closing_letter_to_counsel_for_plains.pdf.
237 *Id.*
238 Press Release, Fed. Trade Comm'n, FTC Charges Executive Whose Company Owns New York Knicks, New York Rangers with Violations of U.S. Premerger Notification Requirements (Dec. 6, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/12/ftc-charges-executive-whose-company-owns-new-york-knicks-new-york; Press Release, Dep't of Justice, James Dolan to Pay $609,810 Civil Penalty for Violating Antitrust Premerger Notification Requirements (Dec. 6, 2018), *available at* https://www.justice.gov/opa/pr/james-dolan-pay-609810-civil-penalty-violating-antitrust-premerger-notification-requirements.
239 Complaint, *U.S. v. Dolan*, No. 1:18-cv-02858 (D.D.C. Dec. 6, 2018), *available at* https://www.justice.gov/opa/press-release/file/1117356/download.
240 Competitive Impact Statement at 4, *Dolan*, No. 1:18-cv-02858, *available at* https://www.justice.gov/opa/press-release/file/1117371/download.
241 *Id.*
242 Hoffman, *supra* note 94; Delrahim, *supra* note 94.
243 Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies, (June 2011), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.
244 Kaela Cote-Stemmermann, *Behavioral Remedies Okay for Vertical Mergers, Says Hoffman*, GCR (Nov. 16, 2018), *available at* https://globalcompetitionreview.com/article/usa/1176980/behavioural-remedies-okay-for-vertical-mergers-says-hoffman.