

Turf Wars: Intensified Antitrust Agency Clearance Battles and Implications for Your Clients

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Introduction

Amidst the backdrop of increasing political contentiousness in Washington, the U.S. antitrust agencies have been embroiled in their own disagreements. The Federal Trade Commission (“FTC”) and the U.S. Department of Justice (“DOJ”) share jurisdiction under Section 7 of the Clayton Act to review mergers and acquisitions.¹ Despite concurrent jurisdiction, only one agency will assert its jurisdiction for any given merger. Historically, the FTC and the DOJ have used an informal, non-transparent process to allocate mergers, where prior experience in an industry was the key factor in determining which agency received “clearance” to review mergers and other antitrust matters.² For at least the past year, the U.S. antitrust agencies have been unable to avoid increasingly public, combative, and protracted clearance disputes, even in industries with a history of being the province of one agency. While clearance determinations historically were often resolved at the staff level, matters have recently escalated to higher-level officials. FTC Chairman Joe Simons has held several meetings related to clearance issues with Bureau of Competition staff.³ According to a former FTC official, “In toto, the DOJ-FTC relations are as bad as I have ever seen them.”⁴

Losing a few weeks or more of the initial waiting period to a clearance dispute can have significant implications. It can affect the parties’ strategy and overall timing, and counsel should be aware of this dynamic and account for it in the transaction timeline. Counsel should also try to take advantage of any opportunities for the parties to begin engaging the agencies, even during a protracted clearance dispute.

¹ 15 U.S.C. § 18. 15 U.S.C. § 18a requires parties to certain proposed transactions to submit a Hart-Scott-Rodino (“HSR”) form to the FTC and the DOJ prior to consummating the transaction. “Both the FTC and the [DOJ] enforce the federal antitrust laws. In some respects, their authorities overlap, but in practice the two agencies complement each other.” *The Enforcers*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> (last visited Feb. 10, 2020).

² Press Release, *FTC and DOJ Announce New Clearance Procedures for Antitrust Matters*, FED. TRADE COMM’N (Mar. 5, 2002), <https://www.ftc.gov/news-events/press-releases/2002/03/ftc-and-doj-announce-new-clearance-procedures-antitrust-matters> (explaining that the traditional methodology for allocating matters between the agencies emphasized historical experience in addressing specific commercial sectors) [hereinafter 2002 FTC Press Release].

³ Jenna Ebersole and Joshua Sisco, *Deals in Pharma, Elsewhere Prompt U.S. DOJ-FTC Conflict as DOJ Seeks Greater Role*, MLEX (Oct. 10, 2019), <https://mlexmarketinsight.com/insights-center/editors-picks/mergers/north-america/deals-in-pharma-elsewhere-prompt-us-doj-ftc-conflict-as-doj-seeks-greater-role>.

⁴ Kirk Victor, *Tug of War Between Antitrust Agencies Prompts Worry*, MLEX (Aug. 5, 2019), <https://www.mlexwatch.com/articles/5887/>.

2002 Memorandum of Agreement

There was one major public attempt to formalize and streamline the clearance process to provide clarity and to resolve disagreements between the antitrust agencies approximately twenty years ago. When Timothy J. Muris became FTC Chairman in 2001, he identified four issues with the clearance process that he believed harmed the agencies and the parties. He focused on the needless delay in clearing matters, the waste of agency resources, the friction between the agencies, and the diminished transparency and increased uncertainty for merging parties.⁵

Not long after, in March 2002, Chairman Muris and then-Assistant Attorney General (“AAG”) Charles A. James announced that the FTC and the DOJ had entered into a Memorandum of Agreement (“Agreement”) to streamline clearance procedures for merger reviews and other antitrust matters.⁶ The Agreement was unprecedented, “overhaul[ing] the clearance process and for the first time formally allocat[ing] primary areas of responsibility, on an industry-wide basis, between the FTC and the DOJ.”⁷ The press release announcing the Agreement noted that the traditional methodology for allocating matters between the agencies based on historical experience had become less effective in the face of rapid technological change and diversified companies (*i.e.*, companies that compete in multiple industries).⁸

The Agreement enumerated specific industries that would be assigned to either the FTC or the DOJ and established a committee that would be tasked with further refining the list of industries as necessary.⁹ The Agreement also established that each agency would have at least one clearance officer responsible for clearance matters (with duties including weekly inter-agency meetings, weekly reports of relevant statistics, and quarterly meetings to review and discuss improvements to the Agreement).¹⁰ In the event agency staff could not resolve a clearance dispute within 144 hours (six days) of receiving the initial request, the matter would first be referred to the agency heads, who would

⁵ Timothy J. Muris, *Comments on the FTC-DOJ Clearance Process Before the Antitrust Modernization Commission* 6-7 (Nov. 3, 2005), https://govinfo.library.unt.edu/amc/commission_hearings/pdf/Muris_Statement.pdf [hereinafter Muris Statement].

⁶ *Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations*, U.S. DEPT OF JUSTICE and FED. TRADE COMM’N (Mar. 5, 2002), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/17/10170.pdf> [hereinafter Memorandum of Agreement].

⁷ 2002 FTC Press Release, *supra* note 2.

⁸ *Id.*

⁹ Memorandum of Agreement, *supra* note 6, at 8-11. According to Appendix A, the FTC would receive oversight of: airframes, autos and trucks, building materials, chemicals, computer hardware, energy, healthcare, industrial gases, munitions, grocery store operation/manufacturing, operation of retail stores, pharmaceuticals and biotechnology (other than for agriculture), professional services, satellite manufacturing/launch/launch vehicles, and textiles. Meanwhile, the DOJ would handle mergers involving: agriculture (including biotechnology), avionics/aeronautics/defense electronics, beer, computer software, cosmetics and hair care, financial services/insurance/stock and option/bond/commodity markets, flat glass, health insurance (and products/services over which the FTC determined it lacked jurisdiction), industrial equipment, media and entertainment, metals/mining/minerals, missiles/tanks/armored vehicles, naval defense, photography and film, pulp/paper/lumber/timber, telecommunication services and equipment, travel/transportation, and waste.

¹⁰ *Id.* at 2.

decide within 48 hours whether to submit the matter to a neutral arbitrator who would give a recommendation within 48 hours of the arbitrator's selection.¹¹

Unfortunately, the Agreement ultimately lasted only a few months after Senator Ernest F. Hollings (D-SC) forcefully opposed the Agreement, arguing that assigning the review of media mergers to the DOJ, an executive branch agency, would result in a less-open and politically motivated review.¹² Sen. Hollings also argued it was improper that the FTC and the DOJ had relied on advice from private parties to finalize the Agreement, while failing to obtain the consent of Congress.¹³ At the time, Sen. Hollings was Chairman of the Senate Appropriations Subcommittee on Commerce, Justice, State and Judiciary – which influenced FTC funding and staffing – and he threatened to cut salaries and jobs if the agencies proceeded with the Agreement.¹⁴ Then-Attorney General John Ashcroft instructed AAG James not to sign the Agreement, and the DOJ unilaterally rescinded the Agreement on May 19, 2002, without consulting either the FTC or the White House, citing Sen. Hollings' opposition and "the prospect of budgetary consequences for the entire Justice Department" as its reasons for withdrawing.¹⁵ As Chairman Muris later commented, the Agreement did not fail because of broad opposition from Congress but rather because of opposition from a single (albeit important) Senator.¹⁶ While the 2002 Agreement is not binding, the agencies continued publicly to divide industries based on tradition and expertise, often closely tracking the allocation of industries in the 2002 Agreement.

Current Landscape

Recently, the number and scope of clearance disputes appear to be increasing. There is a great deal of uncertainty, especially as new industries emerge (*e.g.*, cannabis)¹⁷ and old industries shift (*e.g.*, smartphone technology).¹⁸ Even transactions in industries that were traditionally cleared to one agency are now contested. In particular, the DOJ appears to be advocating review of transactions in industries that traditionally were reviewed by the FTC, such as pharmaceuticals, casinos and medical devices, while the FTC has also sought

¹¹ *Id.* at 3, 5-6. The arbitrator would be randomly selected from a panel of pre-established, mutually agreeable experts. *Id.* at 6.

¹² Martin Sikora, *Regulators Bow to Senator Hollings*, Mergers & Acquisitions J. 13 (2002); Ted Hearn, *Hollings Seeking DOJ-FTC Deal Records*, MULTICHANNEL NEWS (Mar. 12, 2002 updated Mar. 29, 2018), <https://www.multichannel.com/news/hollings-seeking-doj-ftc-deal-records-143889>; Paige Albinak, *Hollings Threatens FTC's Muris*, BROADCASTING+CABLE (Mar. 14, 2002, updated Mar. 16, 2018), <https://www.broadcastingcable.com/news/hollings-threatens-ftcs-muris-91870>.

¹³ Ted Hearn, *Hollings Threatens FTC with Cuts*, MULTICHANNEL NEWS (Mar. 19, 2002 updated Mar. 29, 2018), <https://www.multichannel.com/news/hollings-threatens-ftc-cuts-162063>.

¹⁴ *Id.*

¹⁵ Press Release, Charles A. James, *Statement by Charles A. James Regarding DOJ/FTC Clearance Agreement*, U.S. DEP'T OF JUSTICE (May 20, 2002), https://www.justice.gov/archive/atr/public/press_releases/2002/11178.htm; Neal R. Stoll & Shepard Goldfein, *Antitrust Trade and Practice, Case Digest Summary*, N.Y.L.J., Apr. 15, 2002; Muris Statement, *supra* note 5, at 9, 18.

¹⁶ Muris Statement, *supra* note 5, at 17.

¹⁷ Either agency may conceivably have a claim to review the cannabis industry as the DOJ traditionally reviews agriculture transactions and the FTC traditionally reviews retail transactions. See Ebersole and Sisco, *supra* note 3.

¹⁸ The agencies reportedly fought over clearance recently in Apple's acquisition of Intel's smartphone modem business; the DOJ has traditionally reviewed transactions relating to telecommunications and computer software, while the FTC has traditionally reviewed transactions relating to computer hardware. *Id.* at 3.

to review transactions traditionally within the DOJ's purview, including the defense and agriculture industries.¹⁹

Clearance disagreements are not limited to just merger investigations but involve civil antitrust jurisdiction more broadly.²⁰ For example, the disagreements between the agencies about regulating big tech have been widely reported. In June 2019, according to press accounts, the agencies struck a deal: the FTC would investigate Facebook and Amazon and the DOJ would investigate Apple and Google.²¹ But later, in July 2019, the DOJ publicly broke from this agreement, announcing that it would review practices of "market-leading online platforms" including "search, social media, and some retail services online," which appear to include Facebook and Amazon.²² According to press accounts, the FTC sent a letter to the DOJ in September 2019 raising concerns over tensions about the allocation of responsibility that might derail the investigations into big tech.²³

The heads of the FTC and the DOJ acknowledged during a September 2019 hearing before the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy, and Consumer Rights that the June 2019 agreement to allocate antitrust investigations of the

¹⁹ The DOJ reportedly wanted to review GlaxoSmithKline's joint venture with Pfizer. *Id.*

²⁰ The FTC and the DOJ have engaged in other public disagreements beyond merger clearance disputes in the past year. The agencies have publicly clashed over the FTC's lawsuit against cellular chipmaker Qualcomm, which the FTC alleged had used anticompetitive tactics to maintain its monopoly in the supply of a key semiconductor device used in cell phones and other consumer products. The DOJ filed amicus briefs in the Northern District of California and in the Ninth Circuit, siding with Qualcomm and taking a position contrary to the Commissioners, who had voted 2-1 to file a complaint against Qualcomm in federal district court. Statement of Interest of the United States of America, Fed. Trade Comm'n v. Qualcomm Inc. (N.D. Cal. May 2, 2019) (No. 5:17-cv-00220-LHK); United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal, Fed. Trade Comm'n v. Qualcomm Inc. (9th Cir. July 16, 2019) (No. 19-16122); Press Release, *FTC Charges Qualcomm With Monopolizing Key Semiconductor Device Used in Cell Phones*, FED. TRADE COMM'N (Jan. 17, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-qualcomm-monopolizing-key-semiconductor-device-used>; Qualcomm, Inc., No. 141-0199, at 1 (F.T.C. Jan. 17, 2017) (Comm'r Maureen K. Ohlhausen, dissenting), https://www.ftc.gov/system/files/documents/public_statements/1055143/170117qualcomm_mko_dissenting_statement.pdf. The DOJ presented its position opposing the FTC during the February 13, 2020 Ninth Circuit arguments. Bryan Koenig, *5G Dominates DOJ's Time in FTC, Qualcomm 9th Circ. Args*, LAW360 (Feb. 13, 2020), <https://www.law360.com/articles/1224412>.

²¹ Brent Kendall and John D. McKinnon, *Congress, Enforcement Agencies Target Tech*, WALL ST. J. (updated June 3, 2019), <https://www.wsj.com/articles/ftc-to-examine-how-facebook-s-practices-affect-digital-competition-11559576731>.

²² Press Release, *Justice Department Reviewing the Practices of Market-Leading Online Platforms*, U.S. DEP'T OF JUSTICE (July 23, 2019), <https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms>.

²³ John D. McKinnon and Brent Kendall, *U.S. Antitrust Enforcers Signal Discord Over Probes of Big Tech*, WALL ST. J. (updated Sept. 16, 2019), <https://www.wsj.com/articles/u-s-antitrust-enforcers-signal-discord-over-probes-of-big-tech-11568663356>. It is interesting to note that on February 11, 2020, the FTC issued Special Orders to Google, Amazon, Apple, Facebook, and Microsoft, requiring them to provide information about transactions in the past decade that were not reportable under the HSR Act. The Special Orders were issued pursuant to Section 6(b) of the FTC Act, which authorizes the FTC to conduct studies that do not have a specific law enforcement purpose (though they can lead to enforcement action). According to the FTC press release, the Special Orders issued to the technology companies "will help the FTC deepen its understanding of large technology firms' acquisition activity," including whether large tech companies' non-reportable acquisitions of nascent or potential competitors are anticompetitive. See Press Release, *FTC to Examine Past Acquisitions by Large Technology Companies*, FED. TRADE COMM'N (Feb. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>. The FTC press release described this study as follow-up from the FTC's 2018 *Hearings on Competition and Consumer Protection in the 21st Century*. See *id.* Information about whether the FTC and the DOJ coordinated on the issuance of the Special Orders was not publicly available at the time of the FTC's announcement of the study.

large tech firms was not working.²⁴ Specifically, press reports pointed to a “turf battle” over Facebook as a key point of contention.²⁵ Assistant Attorney General Makan Delrahim testified that he “cannot deny that there are instances where Chairman Simons’ and [Delrahim’s] time is wasted on those types of squabbles.”²⁶

Impact on Your Clients

The intensified clearance disagreements between the FTC and the DOJ have already negatively affected companies under antitrust scrutiny. After the agencies receive an HSR filing, the initial waiting period begins, and the transaction must clear to either the FTC or the DOJ for substantive review.²⁷ The initial waiting period clock does not stop for the transaction to clear to either agency. A protracted disagreement over clearance could result in a transaction not clearing to either agency until shortly before the end of the initial waiting period. Under these circumstances, the reviewing agency may have only a few days to conduct a substantive investigation before the initial waiting period expires. At the end of the initial waiting period, the reviewing agency must either clear the transaction or issue an extensive document and information request, known as a Second Request. In this situation, agency staffers will often inform the parties that they are running out of time in the initial waiting period, and that the agency may be left with no option but to issue a Second Request to preserve the right to review the transaction. This often forces the merging parties to restart the initial waiting period by withdrawing and refiling the HSR notification, otherwise known as “pulling-and-refiling.”²⁸ By providing the reviewing agency additional time to conduct a substantive investigation, pulling-and-refiling can maximize the chances of either avoiding a Second Request altogether or receiving a Second Request with a narrower scope. However, pulling and refiling comes at a high cost for merging parties aiming to close quickly because it doubles the amount of time the agency has to review the transaction in the initial waiting period.

If most of the initial waiting period is lost to a protracted clearance battle, the parties may determine that it would benefit them to provide the reviewing agency additional time, even beyond the first pull-and-refile. In these circumstances, the parties may consider a second pull-and-refile, necessitating a second payment of the full filing fee.²⁹

Practice Tips

Counsel should consider the following when navigating the current clearance process:

- **Timing:** Plan ahead in case you need to pull-and-refile the HSR, particularly if your transaction is in an industry where the FTC and the DOJ have recently disagreed,

²⁴ Mike Lee, *Consumers Deserve Better Antitrust Enforcement*, MIKE LEE, U.S. SENATOR FOR UTAH (Sept. 20, 2019), <https://www.lee.senate.gov/public/index.cfm/2019/9/consumers-deserve-better-antitrust-enforcement>.

²⁵ McKinnon and Kendall, *supra* note 23.

²⁶ Lee, *supra* note 24.

²⁷ *Merger Review*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review>. Most transactions have a 30 calendar-day initial waiting period obligation, though cash tender offers and certain bankruptcy transactions have a 15 calendar-day waiting period obligation. *Id.*

²⁸ 16 C.F.R. § 803.12(c) (when refiled once, there is no additional filing fee).

²⁹ *Tips on Withdrawing and Refiling an HSR Premerger Notification Filing*, FED. TRADE COMM’N (updated Sept. 15, 2017), https://www.ftc.gov/system/files/attachments/hsr-resources/withdraw_and_refile_procedures_tip_sheet_updated_091517.pdf (“Refiling without incurring a new filing fee is only available one time, and only if the proposed acquisition does not change in any material way.”).

including—based on publicly available information—technology, pharmaceuticals, medical devices, and casinos. When negotiating a merger agreement, consider whether there is ample time for closing or a mechanism for extending the closing date.

- **Managing Client Expectations:** The clearance system is often bewildering to clients, particularly clients located abroad who are used to engaging with a single regulator. It is possible that the parties cannot engage with the reviewing agency until the end of the initial waiting period because neither agency can begin the substantive investigation until formal clearance. Knowing about the current clearance disagreements can enable you to prepare your client for the possibility that timing of the initial substantive review may be impacted.
- **Use Opportunities to Advocate on Behalf of the Transaction:** The FTC and the DOJ may request a joint call or meeting with the parties to help the agencies resolve the clearance disagreement. Take advantage of this opportunity to explain the benefits of the transaction and to provide information relevant to the substantive investigation. You may be able to make up for some of the time lost in the clearance process by convincing both agencies that an in-depth investigation is not warranted!



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