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# Current Themes in U.S. Merger Control

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## I. Introduction

The past year has seen a wholesale turnover in leadership at the two federal antitrust enforcement agencies, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Makan Delrahim was confirmed as the new assistant attorney general for the DOJ in September 2017; Joe Simons was sworn in as the new FTC chairman in May of this year; two new FTC commissioners have been appointed and a third is on the way; and the new leaders of both agencies have made new senior staff appointments. With these changes in leadership have come a shift in emphasis and a renewed focus on the role of the antitrust agencies in merger enforcement, which is being reflected in the agencies' approach to transactions under review as well as existing consent decrees.

Two related themes that have emerged over the past year are an increased hostility toward remedies that result in ongoing supervision or monitoring by the agencies (known as "behavioral" remedies) and a sharper focus on vertical merger enforcement. The two are closely related in that the typical "fix" for competition concerns in vertical transactions is often a behavioral remedy—the imposition of requirements that the merged firm act in a certain way after consummation of the transaction, such as an obligation to continue to give access to competitors. In the absence of such a resolution, the agencies are faced with a decision to permit the transaction to proceed, look for a structural solution or challenge the transaction in its entirety.

## II. Developments in Merger Remedies

Since his confirmation, AAG Delrahim has repeatedly emphasized that the DOJ is a law enforcement agency, not a regulatory agency.<sup>1</sup> As he has explained: "In Section 7, Congress did not call for illegal mergers to be regulated, it called for them to be prohibited."<sup>2</sup> Delrahim criticized the previous administration, under which the DOJ "entered into several behavioral consent decrees to resolve vertical mergers it determined to be illegal ...."<sup>3</sup> Instead, the AAG has agreed with commentators who wrote that "allowing [a] merger and then requiring the merged firm[s] to ignore the incentives inherent in its integrated structure is both paradoxical and likely difficult to achieve."<sup>4</sup>

The FTC appears to share these views. The new director of the FTC's Bureau of Competition, Bruce Hoffman, similarly describes the FTC's role as "antitrust enforcers ... not price police."<sup>5</sup> This enforcement-focused approach is exemplified by the DOJ's approach to existing consent decrees, as well as the agencies' stated preference for anticompetitive mergers being remedied structurally rather than behaviorally.<sup>6</sup>

### A. DOJ consent decree activities

The DOJ has taken steps to manage the extensive collection of consent decrees on its books, as well as to make future consent decrees easier for the government to enforce. The DOJ has created an

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Office of Consent Decree Enforcement to assist in ensuring parties' compliance with, and the DOJ's enforcement of, current consent decrees; initiated an extensive review of so-called legacy or perpetual consent decrees; and added new provisions to its recent consent decrees to make them easier to enforce.<sup>7</sup>

With respect to this latter initiative, the DOJ announced that it has improved the enforceability of its consent decrees by including provisions that enable the agency to establish a violation of the consent decree by a lower standard of proof.<sup>8</sup> Instead of requiring "clear and convincing evidence" of a violation, the newly negotiated consent decrees permit the DOJ to establish a violation by a "preponderance of the evidence." The recent provisions also allow the DOJ to apply for an extension if the court finds a violation, seek reimbursement for enforcement costs and terminate the decree after a certain number of years upon notice to the court and the defendant(s). The DOJ views these provisions as transferring the "risk of failure" to the defendants and away from the American taxpayer.<sup>9</sup> Merging parties before the DOJ can expect to see the agency insist on the inclusion of these provisions in all future decrees.

### **B. Hostility toward behavioral remedies**

There are two basic types of merger remedies: structural and behavioral. Structural remedies restructure the merger transaction by requiring asset divestitures or similar relief as a condition for clearance. For instance, consider a transaction between Company A and Company B in which Company A has Business Lines 1, 2 and 3, and Company B has Business Lines 3, 4 and 5. If only the acquisition of Business Line 3 renders the acquisition anticompetitive, the agencies could avoid challenging the acquisition in its entirety by

requiring the divestiture of either Company A's or Company B's Business Line 3 to a third party, which would restore the competitive balance in the market for Business Line 3. As is clear from this example, structural remedies work best in transactions with horizontal overlaps.

By contrast, behavioral remedies are conditions that impact the company's future and ongoing business functions. For example, if the competitive concern with a transaction is that competitors would be denied access to an essential input or would be foreclosed from a significant aspect of the market, a potential solution could be for the merging firms to permit competitors to access that input, or permit access to key elements of distribution, after the closing of the transaction. Such remedies require ongoing monitoring and supervision by the antitrust agencies, typically achieved through the appointment of monitors, reporting requirements and other mechanisms.

According to AAG Delrahim, behavioral remedies require the agencies to regulate the market "through complex decrees that ignore the profit-maximizing incentives of private actors."<sup>10</sup> Such remedies are "overly intrusive and unduly burdensome for both businesses and government."<sup>11</sup> Further, behavioral remedies generate concerns with regard to administrability and efficiency. While structural remedies such as divesting the source of anticompetitive harm substantially eliminate the risk of harm, behavioral conditions, at best, merely lower the risk.<sup>12</sup> Echoing the DOJ's concerns, the FTC's Hoffman has explained that behavioral remedies are problematic because they try to prevent the merged entity from acting anticompetitively, but they leave the anticompetitive incentive in place, "and people have a way of acting upon incentives."<sup>13</sup>

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## III. Vertical Mergers Take on a Higher Profile

### A. The agencies' approach to vertical mergers

Review of vertical mergers has long been an aspect of U.S. merger control, but has recently assumed a much higher profile. Possibly due to the increasingly difficult merger enforcement environment in industries that have seen significant consolidation over the past decade—such as healthcare and entertainment—parties are looking further afield for transaction opportunities. The U.S. agencies have investigated several major vertical merger transactions over the past year, including AT&T-Time Warner, CVS-Aetna, Cigna-ExpressScripts and Amazon-Whole Foods, and several other investigated transactions have included vertical aspects, such as the Bayer-Monsanto merger.

As explained by the DOJ's Non-Horizontal Merger Guidelines, "[b]y definition, non-horizontal mergers involve firms that do not operate in the same market."<sup>14</sup> As such, they also do not combine substitutes, and vertical mergers do not alter the concentration in any relevant market and are therefore less likely to generate competitive concerns. Instead, vertical mergers often involve complements, the combination of which generates efficiencies, including cost reduction, and "come with a more built-in likelihood of improving competition than horizontal mergers."<sup>15</sup>

Nevertheless, vertical mergers can raise competitive concerns in a variety of ways. Historically, the agencies have relied upon several theories of harm, such as that the merger would increase barriers to entry, create input or customer foreclosure, or lead to anticompetitive information exchanges.

**Barriers to entry:** A vertical merger could create post-merger market conditions that could deter or prevent entry from other firms because firms would need to enter at both levels of the market—so-called two-stage entry.<sup>16</sup> Alternatively, the merger may reduce the potential for the merging firms to enter each other's market, eliminating a source of potential competition.

**Foreclosure:** A vertical merger may result in "input foreclosure," where the upstream merger partner either refuses to supply essential inputs to downstream rivals or supplies only on disadvantageous terms that favor its own integrated downstream business unit. Alternatively, the merger may result in "customer foreclosure," whereby the downstream firm refuses to purchase products from competitors of the upstream supplier, cutting off an important route to market for the upstream company's competitors.

**Information exchanges:** Under this theory of harm, the merger gives the integrated firm access that it did not previously have to competitively sensitive business information of an upstream or downstream rival. The integrated firm might use that information to make it harder for the rival firm to compete, which could reduce competition in the market in which the merged firm competes with the rival. Alternatively, the firm could use that information to facilitate coordination between them and competition on pricing and market strategies.

It has been the long-standing policy of the DOJ and FTC that behavioral remedies "can be an effective method for dealing with competition concerns raised by vertical mergers."<sup>17</sup> As described above, however, public statements made by AAG Delrahim

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and FTC officials suggest that this is no longer the case. As a consequence, in the absence of a possible structural fix, the agencies' decision to challenge a vertical transaction will be all or nothing, raising the bar for parties considering vertical deals.

### **B. Vertical merger on trial: AT&T-Time Warner**

In October 2016, AT&T Inc. announced its proposed merger with Time Warner Inc. Just over a year later, in November 2017, the DOJ sued to block the transaction on the basis of vertical foreclosure concerns. According to the DOJ's complaint, the merger would substantially lessen competition in the video programming and distribution market nationwide by enabling AT&T to control Time Warner's "must have" programming content to "hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner's networks."<sup>18</sup> The DOJ further alleged that the merged entity "would use its increased power to slow the industry's transition to new and exciting video distribution models that provide greater choice for consumers." Thus, the DOJ alleged that "[t]he proposed merger would result in fewer innovative offerings and higher bills for American families."<sup>19</sup>

AT&T and Time Warner argued that the merger would increase innovation and competition in the marketplace.<sup>20</sup> According to the parties, the video programming and distribution market is drastically changing as a result of high-speed Internet access facilitating innovative content and advertising offerings. They pointed to the success of vertically integrated entities like Netflix, Hulu and Amazon providing affordable, on-demand video content directly to viewers, and to viewers choosing to "cut" or "shave" the cord, abandoning traditional cable and satellite packages. The parties

also reported declining advertising revenue for television, with Facebook and Google taking the lead. AT&T and Time Warner viewed their merger as a means to enable them to "catch up to the competition." As a result of the merger, AT&T would be able to experiment with and develop innovative video content and advertising offerings for its customers, and Time Warner would gain access to AT&T's customer relationships and data about Time Warner's programming.

After a six-week trial, a federal court judge ruled in June of this year in favor of the merging parties, pointing out the DOJ's concession that the merger would also result in hundreds of millions of dollars in annual cost savings to AT&T customers and that "no competitor will be eliminated by the merger's proposed vertical integration."<sup>21</sup> The court analyzed the merger by balancing whether the DOJ's "asserted harms outweigh the merger's conceded consumer benefits." AT&T closed its acquisition of Time Warner on June 14. The DOJ has appealed, so it remains to be seen what the ultimate fate of the transaction will be.

But the fact that the DOJ challenged the transaction at all is a striking example of the shift away from behavioral remedies. AT&T-Time Warner bore striking similarities to the 2010 merger of Comcast and NBC Universal, which was cleared by the DOJ and Federal Communications Commission subject to extensive behavioral remedies.<sup>22</sup> Given the relative success of those remedies, and the failure of potential anticompetitive harms to manifest after the deal closed, AT&T and Time Warner might reasonably have expected to face demands for ongoing access to HBO and other key content and other remedies similar to those imposed in Comcast-NBCU. Instead, the DOJ sought to stop the transaction completely.

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### C. Recent remedies in other vertical deals

Several other recent vertical merger reviews have resulted in consent decrees, with the DOJ seeking structural rather than behavioral remedies. By contrast, a single recent FTC consent order this year utilized behavioral remedies to address concerns. While it is difficult to draw firm conclusions from such a narrow sample, given that the parties in the FTC case have a single U.S. customer, the Department of Defense, which clearly supported the transaction, that case may be an outlier.

The DOJ entered into consent decrees in vertical transactions in Bayer-Monsanto<sup>23</sup> and CRH-Pounding Mill Quarry.<sup>24</sup> Both of these deals raised concerns about potential input foreclosure. Bayer-Monsanto raised concerns about the vertical integration of certain significant Bayer seed treatment businesses with Monsanto's seed businesses leading to increased prices for, or lack of access to, certain seeds and seed treatments. CRH-Pounding Mill Quarry raised input foreclosure concerns over access to aggregates after the deal placed all aggregate quarries in the market in the hands of the merged firm. The remedy sought in both cases was divestiture: divestiture of Bayer's seed treatment business and of one of Pounding Mills' quarries.

## IV. Conclusion

The current DOJ and FTC approaches to merger remedies and the increasing prevalence of non-horizontal transactions have created a somewhat uncertain regulatory environment for significant vertical deals. Having said that, the fundamental procompetitive benefits of most vertical transactions have been acknowledged by

The FTC recently entered into a consent order permitting Northrop Grumman to acquire Orbital ATK.<sup>25</sup> Northrop Grumman is one of four competitors capable of supplying the U.S. government with missile systems; Orbital ATK is one of only two viable suppliers of solid rocket motors (SRMs), which are a component of missile systems. The FTC alleged that the merger would have given Northrop Grumman the incentive to raise the price of or deny access to Orbital's SRMs to other missile system competitors, and provide it access to competitors' competitively sensitive information. The consent order sought to resolve these concerns by (1) requiring Northrop Grumman to continue to act as a nondiscriminatory merchant supplier of Orbital ATK's SRMs rather than favor its now-vertically integrated missile system business, and (2) protect SRM and missile system competitors' competitively sensitive information from improper use or disclosure through a firewall. Notably, the consent agreement also provides that the Under Secretary of Defense for Acquisition and Sustainment of the Department of Defense shall appoint a compliance officer to oversee Northrop's compliance with the order.

current agency leadership, and only in exceptional cases will such transactions be investigated and potentially challenged. The changing regulatory landscape highlights the importance of early antitrust counsel for companies seeking to engage in significant transactions.

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Lisl Dunlop is a partner in the New York office and co-chair of the firm's antitrust and competition practice group. She advises leading U.S. and multinational companies in an array of industries—in particular the media, technology and healthcare sectors—on a broad range of antitrust counseling, antitrust litigation and transactional matters. Lisl advises on the antitrust-related aspects of mergers and acquisitions, joint ventures and other combinations, and sales and distribution matters; represents clients in antitrust agency investigations; and has represented major corporations in complex antitrust litigations, including multidistrict, treble damages class actions. Lisl has regularly been recognized as a leading antitrust lawyer in Chambers USA, Legal 500, Who's Who Legal and Global Competition Review.

In addition to over 20 years of experience practicing U.S. antitrust law, Lisl has significant international experience in both Australia and Europe. Lisl has appeared before U.S. federal and state antitrust enforcement agencies, the European Commission, the UK Office of Fair Trading, and the Australian Competition and Consumer Commission, and has coordinated the multijurisdictional defense of transactions throughout the world. Lisl's experience in competition matters in a broad range of jurisdictions brings added value to clients that conduct business internationally and interact with different legal systems and regulators.

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<sup>1</sup> DOJ, Division Update Spring 2018, Message from Makan (updated Apr. 11, 2018), available at <https://www.justice.gov/atr/division-operations/division-update-spring-2018/message-assistant-attorney-general> (“[t]o protect consumer welfare, the [DOJ] exercises its power through the lens of law enforcement, not regulation...”) [hereinafter *Message From Makan*].

<sup>2</sup> Assistant Attorney General Makan Delrahim Delivers Remarks at the Antitrust Division’s Second Roundtable on Competition and Deregulation, Washington, D.C. (Apr. 26, 2018), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-divisions-second>.

<sup>3</sup> Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association’s Antitrust Fall Forum, Washington, D.C. (Nov. 16, 2017), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar>.

<sup>4</sup> *Id.* (citing law professor and economist John Kwoka and Diana Moss of AAI).

<sup>5</sup> Remarks of Then-Acting Director, Bureau of Competition, D. Bruce Hoffman, Vertical Merger Enforcement at the FTC, Credit Suisse 2018 Washington Perspectives Conference, Washington, D.C. (Jan. 10, 2018), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1304213/hoffman\\_vertical\\_merger\\_speech\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf).

<sup>6</sup> For example, since Sept. 27, 2017, when AAG Delrahim was confirmed, the DOJ has announced about 10 divestiture remedies, but has not announced any behavioral remedies. See DOJ, Press Releases, <https://www.justice.gov/atr/press-releases> (last visited Aug. 28, 2018).

<sup>7</sup> *Message from Makan, supra* note 1.

<sup>8</sup> DOJ, Division Update Spring 2018, Punching Things Up: The Antitrust Division Takes Steps to Make Consent Decrees More Enforceable, Less Regulatory (updated Apr. 10, 2018), available at <https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-takes-steps-make-consent-decrees-more-enforceable-less-regulatory>.

<sup>9</sup> *Id.*

<sup>10</sup> Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association’s Antitrust Fall Forum, Washington, D.C. (Nov. 16, 2017), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar>.

<sup>11</sup> *Id.*

<sup>12</sup> Assistant Attorney General Makan Delrahim Delivers Remarks at the Antitrust Division’s Second Roundtable on Competition and Deregulation, Washington, D.C. (Apr. 26, 2018), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-divisions-second>.

<sup>13</sup> *Hoffman Interview, supra* note 13.

<sup>14</sup> DOJ, Non-Horizontal Merger Guidelines, available at <https://www.justice.gov/atr/non-horizontal-merger-guidelines> (last visited Aug. 27, 2018).

<sup>15</sup> Remarks of Then-Acting Director, Bureau of Competition, D. Bruce Hoffman, Vertical Merger Enforcement at the FTC, Credit Suisse 2018 Washington Perspectives Conference, Washington, D.C. (Jan. 10, 2018), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1304213/hoffman\\_vertical\\_merger\\_speech\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf).

<sup>16</sup> Non-Horizontal Merger Guidelines, *supra* note 14.

<sup>17</sup> DOJ, Antitrust Division Policy Guide to Merger Remedies, 12 (2011), available at <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>.

<sup>18</sup> Complaint, *United States of America v. AT&T Inc.*, Case No. 1:17-cv-02511 (D.D.C. filed Nov. 20, 2017).

<sup>19</sup> *Id.*

<sup>20</sup> *United States v. AT&T Inc.*, Case No. 1:17-cv-02511 (D.D.C. June 12, 2018), available at <https://dlbjbjzgnk95t.cloudfront.net/1041000/1041928/att-time%20warner.pdf> [hereinafter *AT&T District Court Op.*].

<sup>21</sup> *AT&T District Court Op.*, *supra* note 11.

<sup>22</sup> See Press Release, DOJ, Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions (Jan. 18, 2011), available at <https://www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions>.

<sup>23</sup> DOJ, *U.S. v. Bayer AG and Monsanto Co.*, <https://www.justice.gov/atr/case/us-v-bayer-ag-and-monsanto-company>.

<sup>24</sup> DOJ, *U.S. v. CRH PLC et al.*, <https://www.justice.gov/atr/case/us-v-crh-plc-et-al>.

<sup>25</sup> FTC, Northrop Grumman and Orbital ATK, <https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk>.

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