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Antitrust Merger Enforcement In the Obama Administration:

Has the Pendulum Swung Too Far?

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With Senate Judiciary Committee oversight hearings scheduled for March 9, it seems an appropriate time to examine whether the Obama Administration's more aggressive merger enforcement has gained so much momentum that it is causing the pendulum to swing too far. Have the U.S. Department of Justice and the Federal Trade Commission lost sight of mergers' value to the economy by abandoning the middle ground and too often treating "problem" mergers as all-or-nothing propositions?

No doubt some mergers may be fundamentally flawed and we needn't discuss a "fix" for them. In those instances, perhaps as DOJ Assistant Attorney General William Baer observed following one recent challenge, the deal should "never have been considered, much less publicly proposed." But, in a series of other merger challenges, both Mr. Baer's Antitrust Division and the FTC have acknowledged that they were open to making a deal to allow the merger, but ultimately failed to find a solution. One question properly asked is whether they are trying hard enough.

The starting proposition for this discussion must be that mergers benefit the economy, and should not be impeded absent countervailing anticompetitive effects. The free movement of capital and the efficiencies that mergers promise should be encouraged. Where a merger does present competitive concerns, the remedy should, where possible, seek to retain the portions of the transaction that are not problematic while also preserving competition.

The agencies speak as if they agree with this proposition. Indeed, the joint DOJ and FTC press release accompanying release of the 2010 Horizontal Merger Guidelines stated that a "primary goal of the 2010 guidelines is . . . avoiding unnecessary interference with mergers that either are competitively beneficial or likely will have no competitive impact on the marketplace." In support of this ideal, the agencies have also stated their intent to propose remedies that will allow mergers to close and preserve the efficiency benefits for the economy that they carry. DOJ's Policy Guide to Merger Remedies explicitly states that "[e]ffective remedies preserve the efficiencies created by a merger." Similarly, the FTC's statement on Negotiating Merger Remedies reflects Commission staff's commitment to "discuss with the parties what it has learned and what it believes an acceptable remedy must include . . . ."

The idea of crafting remedies to preserve the efficiency gains of mergers has also gained currency globally. In the recently released draft Merger Remedies Workbook of the International Competition Network (ICN) Merger Working Group, the ICN noted that, "[m]ergers that raise competition issues in one or more relevant markets may nonetheless generate efficiencies for the merging parties or have a pro-competitive impact . . . in other markets. In such circumstances, imposing remedies rather than prohibiting the merger outright reduces the risk that these benefits would otherwise be lost" (International Competition Network, ICN Merger Working Group, Merger Remedies Workbook (2016), § 2.4, at 4).

Despite the agencies' recognition that they shouldn't throw the proverbial baby out with the bathwater, in a number of high-profile merger matters DOJ and the FTC seemingly concluded that they do not need to propose or even discuss potential remedies with the parties. Rather than take responsibility for protecting the benefits of the unobjectionable aspects of a merger, the agencies appear not to be making any affirmative efforts to avoid the collateral harm of rejection.

For example, during the FTC's challenge to the now-abandoned Sysco/US Foods transaction, one of the agency's own ALJs criticized it for not making a remedy proposal to the parties. The Commission's failure to engage in meaningful settlement discussions did not escape public notice, and was cited by at least one state attorney general who wrote to Congress in support of the transaction. In its recent challenge to the proposed acquisition by Staples of Office Depot, the FTC similarly is reported to have rejected out-of-hand—"without so much as a counteroffer"—a substantial settlement offer by Staples to assuage antitrust concerns. Judge Sullivan, who is presiding over the FTC's challenge to the merger, has even chastised the agency for failing to consider a remedy. He noted last week that there "must be something that would appease the government." Despite having competitive concerns with only a narrow portion of the merging parties' customers, the FTC appears to discount the efficiencies to be gained from the larger transaction, without engaging in meaningful remedy discussions over the narrow market in which it found a problem.

DOJ has not shown any greater concern for the harm that may result from forcing abandonment of a merger that has both objectionable and unobjectionable components. In its challenge to the proposed acquisition of GE's appliance unit by Electrolux, the Antitrust Division reportedly would accept nothing short of a complete divestiture of Electrolux's entire US appliance business in settlement, despite having real competitive concerns only in the narrow homebuilding segment of the appliances industry.

And DOJ appears unable to find an acceptable remedy to allow the proposed combination of Haliburton and Baker Hughes to move to completion, despite the reported willingness of the parties to divest a package of assets valued at over $5 billion, and of GE—hardly an unknown entity—to purchase an additional divestiture package that would preserve competition.

These examples are indicative of a larger problem with the agencies' current approach to merger enforcement. The problem seems to be the agencies' laser-like focus on obtaining a remedy that is 100 percent effective in curing perceived competitive concerns, regardless of the impact on the transaction as a whole. Where one part of a transaction raises competitive concerns while substantial other portions do not, by failing to offer or discuss a remedy that will allow the transaction to proceed, the agencies are preventing the expected efficiencies from coming to fruition. Certainly, where a merger has both anticompetitive effects and efficiencies that are inextricably intertwined, it may not be possible to separate them out in a way that would allow the efficiencies to be achieved. But where competitive concerns arise with respect to only a discrete portion of a transaction, by refusing to work creatively to solve the narrow problem and instead effectively challenging the entire deal, the agencies are sacrificing efficiencies that are *not* inextricably intertwined with the competitive concerns, to the detriment of consumers.

We have previously noted in a WLF *Legal Backgrounder* a concern that an improper focus on remedy can lead to overreaching by the enforcement agencies. But focus on a "perfect" remedy can also kill a deal. The agencies are ill-served by focusing solely on a remedy for a portion of a transaction and ignoring the negative impact it might have on the deal as a whole. DOJ and the FTC would be well served to follow their own published guidance and make an effort to propose and follow through on remedies that do not bring an entire transaction to a halt, sacrificing the benefits it promises to consumers and the economy. The public record suggests they are not making such an effort. It would be useful for the agencies either to follow through on their commitment to protect the benefits of mergers, or explain how their current record is consistent with that commitment.