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From Faculty to Fast Food, No-Poach Agreements Are on Their Way Out

By John R. Ingrassia and Nicollette Moser

No-poach agreements between employers not to compete for each other's employees are facing stepped-up scrutiny from private plaintiffs and antitrust enforcers. Naked no-poach agreements are illegal *per se* under Section 1 of the Sherman Act. A no-poach agreement is considered "naked" if it is "not reasonably necessary to a larger legitimate collaboration" between employers.[1] Agreements, however, that are ancillary to a legitimate undertaking or collaboration, are more typically examined under the rule of reason, which requires the court to determine if the agreement constitutes an unreasonable restraint on trade by weighing its pro- and anti-competitive effects – with the burden of proof falling to the plaintiff/claimant.

In 2016, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") issued joint guidelines informing businesses that naked no-poach agreements are *per se* illegal and will be criminally prosecuted. While the DOJ and state Attorneys General have been active in the arena of no-poach agreements, the legal standard remains unsettled as few courts have ruled on the topic.

In April 2018, the DOJ announced its investigation of Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation ("Wabtec"), two of the world's largest rail equipment suppliers. The investigation revealed that beginning in 2009, the suppliers entered into

[1] Antitrust Guidance for Human Resource Professionals Department of Justice Antitrust Division Federal Trade Commission, October 2016 [hereinafter "DOJ Guidelines"], *available at* https://www.ftc.gov/news-events/press-releases/2016/10/ftc-doj-release-guidance-human-resource-professionals-how.

illegal no-poach agreements with each other not to solicit, recruit, hire without prior approval, or otherwise compete for employees.[2] According to the complaint, the no-poach agreements substantially reduced competition for skilled employees in the United States rail industry and restricted their mobility. Shortly after that, the parties reached a settlement with the agency in which the companies agreed to eliminate no-poach agreements – though the settlement did not prohibit the companies from entering into agreements that are ancillary to legitimate business collaborations.

In March 2019, the DOJ filed a statement of interest in a no-poach case involving medical school faculty members.[3] Plaintiffs in the private class action alleged that Duke University and the University of North Carolina ("UNC") agreed not to poach one another's medical school professors. The DOJ argued that the court should apply the *per se* standard if it finds that the two universities entered into a naked no-poach agreement constituting an illegal market allocation among competitors with respect to attracting medical school professors to their program. UNC settled early in the case, agreeing to refrain from enforcing or entering into no-poach agreements for five years. After the remaining Duke defendants agreed to a $54.5 million settlement in April 2018, the DOJ took the unusual step of intervening for the sole purpose of obtaining the right to enforce injunctive relief against Duke. In its final judgment order, the court granted the DOJ the right to enforce injunctive relief against Duke, prohibiting the university from entering, maintaining, or enforcing unlawful no-poach agreements for five years.

State AGs have also taken a zealous role in enforcement at the state level.[4] One AG in particular stands at the forefront of cracking down on no-poach agreements: Washington AG Bob Ferguson. Since opening an investigation in January 2018, more than 60 major chains ranging from fast food to fitness franchises have agreed to eliminate no-poach agreements nationwide.

AG Ferguson's investigation sparked a wave of private class actions filed by franchisee employees, alleging that franchisors entered into illegal no-poach agreements. Among the franchisors were Auntie Anne's, Carl's Jr., and Arby's. The cases caught the attention of the DOJ, who again weighed in with statements of interest in each case. The DOJ argued that while naked, horizontal no-poach agreements between rival employers within a franchise system are illegal *per se*, franchise agreements that prohibit franchisees from poaching one another's employees should be analyzed under the rule of reason as a vertical restraint. AG Ferguson also submitted amicus briefs, pushing for a *per se* standard. However, the court did not rule on the issue as the cases settled in March 2019.

The importance of what standard of review applies is underscored by two recent no-poach cases that have reached substantive court rulings: *Ogden v. Little Caesar Enterprises*[5] and *Butler v. Jimmy John's Franchise LLC et al*.[6] *Little Caesar* became the first case that led to a substantive ruling granting the franchisor's motion to dismiss. The court held that the plaintiffs failed to plead facts sufficient to support a finding that the no-

[2] *See* Compl. at 2-3, United States v. Knorr-Bremse AG, No. 18-cv-747 (D.D.C. Apr. 3, 2018).

[3] Statement of Interest of the U.S., Seaman v. Duke University, 15-cv-00462 (M.D.N.C. Mar. 7, 2019).

[4] Recently, a coalition of nineteen state AGs sent a letter to FTC Chairman Simons urging the FTC to use its rulemaking authority to end the "abusive use of non-compete clauses in employment contracts." Letter from Keith Ellison, Minn. AG et al., to Joseph Simons, FTC Chairman (Nov. 11, 2019). On January 9, 2020, the FTC held a hearing on the issue at which Commissioners Phillips and Slaughter signaled the FTC is considering a rule to address non-competes.

[5] *See* Ogden v. Little Caesar Enterprises, Inc., 393 F. Supp. 3d 622 (E.D. Mich. 2019).

[6] *See* Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 789, 796-97 (S.D. Ill. 2018).

poach agreement was illegal *per se*. Further, the court found that plaintiffs failed to make a "serious effort" to put forth a theory under the rule of reason analysis. Therefore, the court refused to allow the case to move forward, while suggesting that no-poach provisions should be analyzed under rule of reason as vertical restraints. The case is currently on appeal in the Sixth Circuit Court of Appeals.

In *Jimmy John's*, the court denied the franchisor's motion to dismiss, declining to rule on the applicable standard of review so early in the case. The judge did, however, provide *guidance* as to which standard may apply. For the case to result in a *quick look analysis*, the evidence would have to demonstrate that the franchisees truly are as independent as the plaintiffs claim. Under a quick look analysis, courts apply an abbreviated rule of reason standard in which the restraint in question has clear anticompetitive effects, but procompetitive benefits also exist. The court continued, stating that the *per se* standard may even apply if there is "Herculean" evidence that the franchisees are independent. However, if there is weak evidence of franchisee independence, or if the franchisor meets its burden under the quick look approach, the rule of reason analysis "may rear its head and burn this case to the ground."[7] The case is currently pending in the Southern District of Illinois.

While naked, horizontal no-poach agreements are illegal *per se*, the wait continues to see what legal standard courts will apply to no-poach agreements in the franchisor-franchisee context and relationship. If courts adopt the DOJ's position, plaintiffs will face a heavy burden. If, however, courts adopt AG Ferguson's *per se* position, demonstration of pro-competitive benefits will not be a defense.

With the threat of DOJ criminal prosecution looming, employers should have compliance policies in place to educate their staffs and protect themselves from potential claims. Companies need to have policies prohibiting conversations with competitors that suggest or offer not to compete for employees. These policies should prohibit agreements with other companies to refuse to solicit or hire the other company's employees. Such agreements do not necessarily need to be agreed orally or in writing to be illegal. Rather, illegal no-poach agreements can be inferred from evidence of discussions and parallel behavior. Employers should review their current agreements, institute training and compliance protocols, and proceed with caution to ensure that they are not exposing themselves to potential claims of engaging in illegal no-poach agreements.

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[7] *Jimmy John's,* 331 F. Supp. 3d at 797.

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

By Anna Kertesz, Christine N. Chang, and Naari Ha

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.

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[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

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[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. DEP'T 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, 2002updated Mar. 29, 2018), https://www.multichannel.com/news/hollings-seeking-doj-ftc-deal-records-143889; Paige Albiniak, *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

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[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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What's Trending in Canadian Competition Law?

By Sandy Walker and Simon Kupi

In 2020, Canada's Competition Bureau (the Bureau) can be expected to sharpen its focus on the digital economy—a clear priority for Commissioner of Competition (the Commissioner) Matthew Boswell. Shortly after Mr. Boswell's March 2019 appointment, the Commissioner declared his "big picture" vision to be "for the Bureau to be among the world's leading competition agencies in terms how we do all aspects of our work in the digital economy." As we discuss below, this is one of several trends that could see the scaling up of competition enforcement this year in Canada.

A heightened focus on digital issues

The most visible of the Bureau's initiatives on the digital front was a September 2019 "call-out" to market participants for information on potential anti-competitive conduct in key digital markets, such as online search, social media, display advertising and online marketplaces. This "tip line"-like approach was an unusual move for the Bureau and signals the Bureau's keen interest in pursuing firms that erect or reinforce barriers to entry (including those relating to data) as well as misleading advertising and pricing practices in the online world. With written submissions in the call-out process now in, all eyes are on the Commissioner as to whether 2020 will see an uptick in digital-related enforcement cases or advocacy.

An early sign of a potential digital enforcement trend came this past summer, when private equity firm Thoma Bravo saw the Bureau challenge—post-closing—its acquisition of oil and gas reserves software maker Aucerna. The firm quickly came to a consent agreement resolution with the Commissioner, committing to divest an Aucerna rival that it owned. On the Bureau's theory of the case, the Aucerna deal represented a "merger to monopoly" in a market for reserves data it described as "critical" to the business and compliance requirements of Canadian oil and gas producers. This case signals the Bureau's interest in mergers in the technology sector.

A further development was the release of the Competition Tribunal's decision in the *Vancouver Airport Authority* (VAA) case. Among other things, *VAA* clarifies the competition law criteria that apply to economic actors that exercise control over, or set the rules of, a market without competing in it, including what constitutes a "plausible competitive interest" in a market sufficient to support abuse of dominance allegations. These criteria may be important in any future Bureau action concerning a digital platform. That said, the *VAA* decision set a low bar for the "plausible competitive interest" required for the Commissioner to pursue a case but did underscore the importance of having legitimate business justifications for conduct that is challenged as anti-competitive. In addition, while the Tribunal affirmed the Bureau's position in its revised Abuse of Dominance Guidelines that "compliance with a statutory or regulatory requirement,"

such as a privacy law obligation, can constitute a business justification, parties will need to support these justifications with sufficient evidence.

The Bureau's digital focus in 2020 may also draw upon the resources of the "Chief Digital Enforcement Officer" position the organization created in 2019, with its hiring of an ex-IBM data and AI specialist. This officer's role is to ensure the Bureau has the technology, tools and techniques to capture evidence of deceptive marketing practices online or cartels/bid-rigging, monitor threats and underlying emerging technologies and work with domestic and international partners in digital enforcement.

Finally, 2020 may see the creation of the role of the Data Commissioner, as outlined in the Prime Minister's mandate letter to the Minister of Innovation, Science and Industry. The mandate letter states that the Data Commissioner will oversee new regulations for large digital companies to better protect people's personal data and encourage greater competition in the digital marketplace. The question of how this commissioner's responsibilities will align with those of the Commissioner of Competition and the broader question of how privacy and competition laws intersect do not have clear answers at this time but will be watched closely.

Non-notifiable mergers increasingly on the Bureau's radar

Another recent organizational change for the Bureau was the rebranding of its Merger Notification Unit as the "Merger Intelligence and Notification Unit." In announcing the change, the Bureau noted its intent to more actively scrutinize mergers falling below the *Competition Act*'s thresholds for notification.

Consistent with the announcement, many observers noted an increase in Bureau interest in non-notifiable mergers in mid-to-late 2019, such as its document production order relating to the acquisition of Encore Event Technologies by PSAV in the audiovisual services market. The Bureau's legal authority to investigate or challenge non-notifiable mergers is not new; in fact, one such case was litigated to the Supreme Court of Canada several years ago. However, the Bureau's new enforcement tack should cause companies looking to acquire Canadian businesses to more proactively assess and address competition risks in 2020.

An expanded scope for competition class actions

The Supreme Court of Canada's highly anticipated decision in *Pioneer Corp. v Godfrey* can also be expected to have consequences for competition enforcement going forward. The Court found that so-called "umbrella" purchasers that buy goods or services from non-cartelists in a sector affected by price-fixing could bring private actions under the *Competition Act* to seek damages. It also found that the discoverability principle was available to extend the two-year limitation period under the statute, and that a private right of action was not intended to displace other common law or equitable remedies available to plaintiffs. Finally, the Court established a lower bar for showing a loss at the class certification stage than in the United States. Each of these developments can be expected to spur on private class actions in Canadian courts in 2020 and beyond.

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