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Mahvesh Qureshi

A "Third Culture Kid' at the pinnacle of M&A

Mahvesh Qureshi
Hogan Lovells

Mahvesh Qureshi's family history of migration began before she was born. In 1947, her father's family fled by train from Amritsar in India to the new Pakistan across the violent plains of the Punjab. The division of the subcontinent that steamy August was the last grand gesture of the British Raj as it abandoned the crown jewel of its empire in the face of a long and determined fight for Indian independence and its own exhaustion after the second world war. Her grandparents' journey was exceedingly dangerous as they joined the frantic rush of millions of two peoples colliding in bloodshed as they abandoned all they had ever known to reach what they thought would be safety in either of the two countries, Muslims to the new theocracy of Pakistan and Hindus to the new India.

The family, including two dogs, is now headquartered some 12,000 kilometers away from South Asia in McLean, Virginia, where Ms. Qureshi lives with her husband and two children, and her parents in their own house not far away. On May 1, Ms. Qureshi was officially re-elected to the 45-and-under seat on the Global Board of Hogan Lovells for her second three-year term. She is a partner in the firm's Washington, D.C. office where she is head of the Corporate & Finance practice group for the Americas and a member of the Global Tech M&A Leadership team. This comes soon after *The Deal* placed Ms. Qureshi on its 2023 honors list of the *Top Women in Dealmaking*. The family seems settled at last.

For Ms. Qureshi, her grandparents' flight from Amritsar was the beginning of a life of recurring if far less fraught upheavals. Her father began his career at the World Bank, where he still works, when she was a child and the family moved by turns twice to Myanmar (then Burma), where Ms. Qureshi went to British schools, then to the Philippines, where she went to an American school, later to Indonesia when Mahvesh was in college, and thence to America. Ms. Qureshi agrees that she is the epitome of a third-culture kid," or "TCK," a sociological term developed in the 1950s for children who grow up in countries different from that of their parents and are heavily influenced by cultures other than their own. "Yes," she says, "that is definitely my story. Your world view expands so drastically when you have to assimilate into new cultures and meet new people. You learn to figure out who your friends are very rapidly, and you have to be ready at any moment to pack up and start all over again. These are things that you take for granted. But my husband, who grew up mostly in Massachusetts and had never moved as a young adult, not even for dental school or undergrad, found it a big adjustment even to move from Boston to Washington DC."

It can be a fascinating life for a third-culture

Qureshi →

Qureshi

continued

kid. It is nothing like simply traveling abroad. Foreign countries become home, sometimes for many years. It's also a chance to understand one's own country from afar, like an astronaut gazing back on the earth from space. But there are times of profound loss, particularly among those who grew up before email and social media that have since made it possible to keep in touch with friends and to find them online should ties get frayed. Without those tools, friends could simply disappear forever after each serial diaspora. Friendships are always important to the young but for third culture kids, they are based on an intense and unusual experience that often proves impossible to explain to those who did not share it. There can be loneliness after it is over. It is not surprising, then, that some TCKs hope to spare their children the life they themselves led growing up. "I always wanted my children to have stability, to stay in one school system, to grow up in one home where they can build all their memories," says Ms. Qureshi, "Now, my children feel that they've missed out on all the fun I had by moving every couple of years. The grass is always greener."

Ms. Qureshi was born in the town of Gujranwala, where the family was staying at the time her mother gave birth, just outside Lahore in Pakistan's share of the divided Punjab. Although the clan has roots in Karachi, where her parents first landed as a young couple after their marriage, as well as in the city of Multan where her maternal line has deep roots, Lahore is the city that drew many of her relatives, so many, in fact, to a particular quarter of the city that the neighborhood street where her father grew up eventually took on the family's surname. It is still known as Qureshi Road.

Lahore is a two-thousand-year-old city on the banks of the Ravi River in central Pakistan. It has often been a tempting target for invasion, sacked by the Mongols, glorified by the Mughals, ruled by the Sikhs, and subjugated by the British, among many other foreign intruders stretching back to antiquity. In the first decades of the twentieth century, Lahore was a hot epicenter of the movement to unshackle the subcontinent from the last of its occupiers. The edifice complex of Lahore's overlords has layered the legendary metropolis with rich spoor, from the massive mosques and tombs and gardens of the Mughals to the Victorian behemoths of Raj officialdom. It has long been renowned for its universities and scholars and as a bastion of music, literature, and architecture. In its modern incarnation, Lahore serves both as Pakistan's provincial government center for the Punjab, as it did under the Raj, and has become the epicenter of the country's film industry, known as 'Lollywood," a portmanteau of the words "Lahore" and "Hollywood."

Writers throughout the ages and throughout the world have paid it homage. The giant of Urdu and Persian poetry, Iqbal, for example, once wrote that all the works in man's library are "not worth one sunset on the banks of the Ravi," the title he gave to one of his most famous elegiac poems. Several centuries before and a world away, John Milton in the 1674 version of <u>Paradise Lost</u> has God dispatch Archangel Michael to lead Adam on a grand magical tour of what the Almighty will create in the future after Adam is banished. Included among "Earth's kingdoms and their glory" are the cities of "Agra and Lahor[e]of great Mogul."

The houses near her relatives homes in Lahore are surrounded by high walls that protect the private lives within and the beloved gardens that flourish in the cool months. Sweet peas climb up laces of string tied to bamboo stakes. Chrysanthemums, some destined for the annual flower show, stand by the dozen in clay pots, known as *gamlas*. The *gulmohars*, or flame trees, reach their apogee in April and May with blossoms of red-orange vermilion. Hoping that a front gate or two will open to admit them to these sanctuaries, snake charmers and bear trainers, monkey wallahs and magicians, milk sellers and sweets purveyors stroll along the quiet streets, singing of their wares and offerings. "Lahore to me is multi-layered and multi-dimensional with underlying notes of bittersweetness," says Ms. Qureshi.

Twice each year, the family would return home to Pakistan for long visits. Her mother and father were determined that their children sustain their relationship with their history, their culture, and their family in the midst of a nomadic international life. "As good parents," Ms. Qureshi says, "mine insisted that their child learn multiple languages. So it was English and Spanish at school, and at home we spoke the mother tongue," she says. "I'm the eldest of three so I also learned to write Urdu and read Arabic, but my parents had given up on reading and writing Urdu by the time my sister and brother were learning to read and write. They did still insist that all of us be able to converse with grandparents and aunts and uncles in Urdu and read Arabic."

For Ms. Qureshi, the longest time she spent in the same place while growing up was the six years the family lived in the Philippines, where she graduated high school at International School Manila, founded by a group of American and British parents in 1920 and originally called the American School. Then, it was off to Smith College in far-off Northampton, Massachusetts. After Smith, Ms. Mahvesh chose Boston College Law School. "I was always law-school bound," she says "and I had always wanted to work at a law firm." This was the beginning of a career built on carefully planned choices, quick reflexes when opportunity beckoned, and lessons well learned on how the business of law functions. It reads like a book on how to craft a career in Big Law.

She knew that there was little hope of getting a summer position at a prominent law firm at the end of her first year simply because in the year 1999 a "One L" summer associate program was unheard of in the profession. This did not deter Ms. Qureshi.

She wrote and talked her way into an unpaid internship at Coudert Brothers, the firm with the highest gross income in the country at the time and renowned for its international practice. "I ended up working on a massive litigation project," she says. "I managed to parlay that into a campaign to return as a summer associate at the end of my second year of law school. They were impressed with my work ethic. They said, 'We really want you to come back next summer so just skip the on-campus recruiting and divide your time between our New York and DC offices.' " Ms. Qureshi returned to law school with her future organized, particularly thrilled at her escape from the arduous interviewing process during the academic year that is the lot of most law students. She accepted Coudert's offer and spent the following summer at both firm offices, armed with a permanent offer to join either one after her law school graduation. "Wow," she thought, "I've won the lottery. This is awesome."

However, plans change, as Ms. Qureshi was well aware they always can. During her third and final year at Boston College Law School, she got some disrupting news: the man with whom she was in a relationship asked her to marry him. *"Oh!,"* she thought to herself, *"Why couldn't he have done this sooner? I want to make partner in a law firm and now I'm about to accept the offer to join the Washington office or the New York office of Coudert.'"* Her fiancé offered to transfer to a different dental school and follow her to either city.

Because his dental school did not transfer existing credits if a student left for another place, this would mean he would have to repeat a year of training. "I said no, that's generous but ridiculous. I'll look for a job in Boston. But back then, nobody did 'Three-L' recruiting. So once again, I had to improvise, to create the process myself, as I had for my One-L internship," says Ms. Qureshi. "Fortunately, the dot.com bubble was still going strong when I started to look for a position in 2000 and the law firm of Bingham, Dana & Gould was desperately seeking more associates to join the corporate department to handle the corporate work that was pouring in. The stars aligned. I got the job. I secured a position in Boston and my soon-to-be husband didn't have to move or miss a beat with his graduate schooling. Then September 11th happened, the dot.com bubble exploded, and I found myself starting my career working in very challenging economic times with people I'd never worked with before. So that's where I began my journey. It was an interesting start to a legal career."

Her first assignment at Bingham McCutchen did not end up being corporate work. "Once the dot.com bubble burst, we had to do a great deal of distressed company work, some of which was on the brink of litigation. I helped with the huge volume of discovery and little else. So, that meant that because of market forces, the first two years of practice were not pure-play corporate in the way I had envisioned." Over the next three years, she did get regular assignments with clients in tech and life sciences, including Boston Scientific, many of whom were being acquired by the Who's Who of the tech world or were themselves acquiring targets in their industry sector. As her time at Bingham McCutchen marched on, she and her husband began to think about having children. Ms. Qureshi knew that could turn into a Rubicon. "I saw a lot of women in the corporate group who were my mentors and other senior lawyers dropping like flies one by one after they had a family and found it all too difficult to try to manage everything," she says. "I was in my fifth year. My husband had finished dental school. And at that point, I had a moment of prescience. Okay, I thought. If I want to move, it's now or never. I started looking into the Washington, D.C. market."

Hogan & Hartson seemed enthusiastic, but Ms. Qureshi was a woman in a hurry. This was all taking too long. "I met this group of partners at King & Spalding, and they seemed really interesting and exciting. They did M&A work for clients in the aerospace and government services, a completely different industry sector than I had experienced. What's more, in DC at the time,

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there were very few lawyers that actually did real corporate and M&A work, and they seemed to have a need for a senior associate with my level of expertise. I studied the possible trajectory, and it didn't seem too crowded, so I joined the group." Five months later to the day, at what seemed likely to be an unremarkable meeting in a conference room at King & Spalding, the partners announced that they were moving as a group at none other than Hogan & Hartson, now known as Hogan Lovells. "This is why I firmly believe you end up wherever you're meant to end up," she says now. "It's just the twists and turns that are unpredictable."

Just as she sees her early nomadic life not as a series of unrelated and demanding moves but as the gift of peripheral vision into the world beyond her own origins, Ms. Qureshi says her brief time at King & Spalding also saved her from tunnel vision about the business of law. "It showed me what it was like to be in a smaller office of a larger firm," she says, "and when we moved to Hogan & Hartson, the then-headquarters of the firm, occupying a half a city block, I could feel the difference. There was critical mass. There was an excitement and energy that otherwise I might not have appreciated."

Ms. Qureshi is unlikely to have displayed a lack of excitement and energy in any context. As a partner at Hogan Lovells, she says her practice includes not only her clients, but also the associates she mentors and her pro bono work on behalf of the firm, a tradition that Hogan Lovells prizes. In 2010, after the earthquake that hit Haiti at a magnitude of 7.0 Mw, the government set up the Interim Haiti Recovery Commission to coordinate the international aid effort that followed.. Ms. Qureshi was part of a large team that structured and inaugurated the commission. She also went to Haiti and saw the devastation for herself. "It's a place that just cannot seem to get a break," she says. "I have so much sympathy obviously coming from and having lived in developing countries and then living in stable, developed countries like the United States. It's just a jarring contrast."

Girl Rising also had help from Ms. Qureshi. It is a non-profit dedicated to the education of young women, 129 million of whom have no access to schools. The organization uses storytelling to change how girls are valued around the world. It is a cause that Ms. Qureshi particularly admires after her early years growing up in developing countries and later, as a professional in the U.S., facing what all women and girls confront everywhere. Ms. Qureshi says she helped the group decide on how they should structure themselves, best practices for governance and board meetings, entering into necessary commercial contracts and licensing agreements, and a range of other matters that she and her fellow lawyers took on to help launch the organization.

Its first project was what would become an award-winning documentary film in 2013 that follows nine girls and their struggles to surmount the boundaries imposed on them by power. The organization arranged a special screening at Hogan Lovells. "It was just such a moving experience to watch it in a conference room surrounded by colleagues," Ms. Qureshi says. "I think there were about a hundred of us who had in one way or another supported their efforts. It made us realize that what might seem a pile of documents for a pro bono client would go from a film to a movement with a measurable impact on the lives of young girls in parts of the world where they need the help the most."

Meanwhile, as a young associate and then a partner at Hogan Lovells, Ms. Qureshi has lived through three severe crises in M&A: the implosion of the dot.com bubble; the Great Recession; and COVID. In each case, she points out, the turmoil and panic eventually subsided, and M&A returned to its rightful place in corporate life. Ms. Qureshi was able to reassure her team that what goes up always comes down. M&A now faces severe headwinds, as its challenges are so often described. But some of today's headwinds are neither particularly new nor insurmountable, Ms. Qureshi maintains. Antitrust regulation, for example, may well be stricter under the present administration but Ms. Qureshi says that many in the industry have been watching it play out and have now helped many a client work their way through it. "I'm not suggesting that things are not unpredictable," she says. "I'm saying that now it's a bit like how different 'Month 12' of Covid felt than it did in 'Week 1.' Headwinds are the scariest when they first arise, because of the unpredictability of how they may play out."

What's more, in troubled times there are troubled companies and distressed M&A comes to the fore. "I feel like I'm joined at the hip with our insolvency colleagues these days," says Ms. Qureshi, "because we are teaming up on several live opportunities right now for distressed M&A. Some clients have been quietly looking at distressed and zone-of-insolvency M&A right from the beginning of Covid." I would say those conversations occurred once every few months a couple of years ago, and now there seems to be something once a week, if not practically every day. Buyers are pursing all types of transaction types."

Ms. Qureshi says she that she is avidly watching newly vibrant economies around the world that are likely to welcome M&A sooner than one might think. "As a partner at a global firm whose practice is half in the U.S. and half outside, I might see fewer domestic deals during certain economic cycles but I'm getting as many calls, if not more, about deals outside this country. There was already a lot of interest in Africa and now there is much excitement about central Europe. As a human on this planet who has lived in different places, I'm fascinated by what countries are projected to become the top economies who will start to see deals and deal flow in their direction. Smart businesspeople know that they've got to diversify their own portfolios. They've got to go after the wealth or the anticipated wealth of the younger populations growing up, from consumer products to hardware to tech. There is always something going on somewhere in the world."

It is only now that Covid no longer dominates human existence that Ms. Qureshi can look back and appreciate a few of the wholly unexpected changes it wrought. Dealmaking became both more efficient, for one thing, and sometimes more amusing than traditional M&A work. "There were moments of levity we'd never normally see," she says. "Inevitably a client's children would wander in or their pets would appear and we had some fun while negotiating the deal." What's more, the work can move far more quickly. On one tech deal during Covid, Ms. Qureshi recalls, there were six parties involved, five sets of lawyers, and fifty boxes on the video screen on the final all-hands negotiation. Normally, she says, the introductions alone would have taken time away from the work. "We got through the intros in two minutes because you could see on the screen who they were and who they were representing. Such efficiency!"

Covid, of course, also forced its own changes on life at home. Those spared the ravages of the disease had no choice but to slow down and take stock of what the daily frenzy had for so long imposed. "I didn't feel this way at the time, and it is going to sound strange to say it, but that pause was a real blessing for me personally and professionally," recalls Ms. Qureshi. Until the shutdown in March of 2020, she was traveling without cease. She had hit her stride as a partner, pitching work and winning work around the country and the world. "It got to the point where I would come home for a few hours to switch suitcases. My husband and children would barely turn their heads when I would sweep in and sing out 'Hi! I'm home'. It was jarring to stop everything. But it forced me to reflect. I started to exercise. I began to walk every day. I had time to be with my family at long last. We got a puppy. I will probably look back on it as some of the best years of my life."

What will come next for this third culture kid from the city of the Mughals on the Ravi River? It is certain that change will be welcomed and that standing still is not an option. "I like a challenge. And when I feel like I have achieved what I was heading out to do, I look for something new. I've come to accept it. That is the person I am."

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U.S. Merger Authorities Seek Revolutionary Changes Unseen in Forty-Five Years

The FTC and the DOJ in late June announced proposed new rules governing merger reviews that if adopted in final form would mean the most expansive overhaul of the Hart-Scott-Rodino process in four-and-a-half decades. Alarm is sweeping through the global world of dealmaking.

"It's kind of a head-scratcher," says Andrew Eklund, Senior Counsel at the Washington, D.C. office of Norton Rose Fulbright. "It seems like they're taking a shotgun approach where they should be using a scalpel. That's my biggest concern. Some of the proposed changes are probably a good thing, but most of them are going to be incredibly burdensome, even by the Commission's own estimates."

The proposed amendments would not affect the criteria governing whether or not a transaction must be reported to the federal antitrust agencies. Those jurisdictional thresholds would remain unchanged. They address instead the information required to be filed on the Notification and Report Form, known for short as the HSR Form, including documents and detailed descriptions of the transaction before the regulators. Their ten "key" proposals would now become part of the initial screening of all proposed deals, regardless of size and regardless of whether the parties are competitors. Here is their list of what buyers and sellers might soon be required to address at the outset:

- The rationale for the transaction;
- Details about the specific investment vehicle and corporate relationships;
- Products or services in which the merging parties compete, including the identity of customers;
- Non-horizontal business relationships such as supply agreements;
- Projected revenue streams for the to-be-acquired business;
- Transactional documents, including all non-privileged drafts;
- Internal documents describing market conditions (going beyond the historical limitation to those materials provided to "officers and directors" under Item 4 of the HSR form);
- The structure of entities involved, including specifically private equity structures;
- Details regarding prior acquisitions for the past 10 years (going beyond the current 5-year requirement); and
- Information about labor markets, including employee classifications and commuting zones.

The FTC and the DOJ acknowledge that compiling all this new information would take much more time than is now typical for an HSR filing. "By their own estimates," says Mr. Eklund, "the proposed changes would result in a net increase of 107 hours per filing. That is based on a range of anywhere from an increase of 12 to 222 hours per filing, including both external lawyers as well as work that has to be done internally at the company. Based on this blended rate, they assume a burden of an additional 759,000 hours required to comply with Act if the number of expected filings for Fiscal 2023 all fall under the new regime. They further estimate that the cost would be about $350 million, all to be borne by the merging parties. This constitutes a tax on mergers. I think they are trying to deter merger activity simply by making compliance with the HSR Act more onerous."

The merger review process begins after the parties have come to an agreement. When they submit their HSR filings, that kicks off a 30-day waiting period. During that waiting period, the agencies review the filings and if there are no further inquiries, the parties are free to close at the end of that 30-day period. Based on the most recent data provided in the Fiscal Year 2021 Hart-Scott-Rodino Annual Report, approximately 90 percent of those filings never get any kind of substantive review. That is presumably because the agencies have determined that the transactions do not pose a risk of harm to competition and therefore that the deal in question should be allowed to close. For deals that present questions about their effect on competition, the agencies decide between them which should assume the task of reviewing the transaction. In antitrust parlance, this means the deal has been "cleared" to one or the other for review.

After clearance, if the regulators so decide, a staff attorney from either the FTC or DOJ will typically contact the parties to say that the responsible agency has questions about the deal and that the regulators would like the parties' help in understanding the transaction. The next potential step is what is called a voluntary access letter, which essentially asks for information beyond what is required to be submitted with the HSR Form. The regulators might request a list of top ten customers, top ten vendors, an organizational chart, or strategic plans for the merged entity over the next few years. The reviewing agency can also issue a "Second Request" for more documents and data, which prevents the parties from consummating the transaction until they have substantially complied with the demands of the Second Request and observed an additional waiting period.

Norton Rose Fulbright's Mr. Eklund suggests that, rather than having a targeted view of which transactions to examine, the agencies propose to widen their scope to study every single transaction that clears the necessary thresholds under the law. "The changes to the HSR Form," says Mr. Eklund, "would essentially take all of the voluntary access requests as well as a number of the specifications that typically come in a Second Request and put all those topics at the front end of the process. The latest government data from fiscal year 2021 show that eight percent of all filed transactions that year received requests for information beyond the HSR Form. That means that fewer than ten percent of all filed transactions get any kind of substantive review. So, by their own statistics, the regulators are proposing that fully 90 percent of applicants that do not present antitrust problems should bear the increased burdens that would be imposed under the proposed rules."

What's more, Mr. Eklund notes, the proposal would not only widen the depth of field for the agencies but expand the topics that it would be entitled to ask of the dealmakers who come before them. "The new proposed review topics, for example, would include labor," he points out. "But historically Second Requests did not touch on labor because it was not generally considered to have competitive effects. Now, we have seen over the last two years more and more Second Requests that include questions about the potential effects labor might have on competition. I don't know how many companies readily have that kind of information and it's also unclear to me whether that's the kind of information that we should be asking from the very beginning of a proposed merger review."

In her June 27 statement, Chair Lena M. Khan writes: "Many of the updates in the proposal are consistent with data already collected by antitrust authorities around the world. For example, competition enforcers in other jurisdictions already require firms to provide narrative responses with information about business lines, the transaction's structure and rationale, business overlaps, and vertical and other relationships. Accordingly, much of what would be required in the update HSR Formshould be familiar to market participants and their counsel."

Mr. Eklund questions the implications from the regulators that not only will the proposal help the antitrust regulators cope with the massive expansion of the number of deals and their ever-increasing complexity, but also help U.S. merger enforcers align with the requirements of the European Commission. "Again," he says, "I think the numbers speak for themselves. The EU's published data suggest that they had something like 370 reportable transactions in 2021. In that same period, the U.S. had over 3,500 transactions. That's almost ten times the number of transactions. This would seem to have the potential effect of creating an even greater burden on agency staff."

In her statement, Chair Khan points out that 45 years with no change in the HSR form is a very long time. Deal volume, she writes, has soared. When the HSR Act was passed, the House Report estimated that the statute would generate about 150 mergers a year that would require official approval. "Today, the agencies often receive more than 150 filings each month," she says. Transactions grow ever more complicated, both in form and global effect. Thirty days

A 45-Year Pause ➔

A 45-Year Pause

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is not enough for the agency teams to develop even a basic understanding of key facts," Chair Khan argued. What's more, much of the information needed to those judgments "is known only to the firms proposing the merger, such as the exact timeline of the proposed transaction, the deal rationale, and the structure of each relevant entity. Seeking this information on a voluntary basis can leave key gaps."

The proposal rule is subject to public notice and comment and those interested can reply within 60 days of the rule's publication in the Federal Register. In the meantime, here is the full text of the statement from the FTC chair and commissioners.

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Joined by Commissioner Rebecca Kelly Slaughter and
Commissioner Alvaro M. Bedoya
Regarding Proposed Amendments to the
Premerger Notification Form and the Hart-Scott-Rodino Rules
Commission File No. P239300

June 27, 2023

Today, the Federal Trade Commission, with the collaboration and concurrence of the Department of Justice's Antitrust Division, is issuing a Notice of Proposed Rulemaking ("NPRM") to amend the Hart-Scott-Rodino ("HSR") Form and Instructions.[1] This marks the first time in 45 years that the agencies have undertaken a top-to-bottom review of the form (the "HSR Form") that businesses must fill out when pursuing an acquisition that must be notified in accordance with the HSR Act.[2]

These proposed changes are designed to effectuate the goals that Congress laid out when crafting the HSR Act. Lawmakers passed that statute to solve a specific problem. While the Clayton Act had prohibited mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly," antitrust enforcers had struggled to block unlawful mergers prior to their consummation and before they could cause widespread harm. A primary reason was that businesses faced limited obligations to report their proposed mergers to antitrust enforcers and—critically—faced no restrictions on their ability to consummate the deal right away. "Midnight deals" were the norm, allowing companies to close deals quickly to avoid government detection. As a result, even once the FTC implemented a limited merger notification program in 1969,[3] the agencies were left seeking post-acquisition relief.

[1] The Hart-Scott-Rodino Act of 1978 provides that the FTC, with the concurrence of the Assistant Attorney General, shall require parties to file notifications of transactions that "contain such documentary material and information . . . as is necessary and appropriate" to allow a determination "whether such acquisition may, if consummated, violate the antitrust laws" and to "prescribe such other rules as necessary and appropriate." 15 U.S.C. § 18a(d)(1), (2)(C).

[2] Congress determined that only deals over a certain size should be notified. The original valuation threshold was set at $15 million, but was raised to $50 million in 2000 and is adjusted every year to reflect changes in gross national product. Currently, transactions valued at $111.4 million or more must be reported. *See* Revised Jurisdictional Thresholds, 88 Fed. Reg. 5,004 (Feb. 27, 2023).

[3] In order to assist antitrust enforcers in obtaining preliminary injunctions, the FTC initiated a merger notification program on May 6, 1969. The program was expanded by resolutions in 1972, 1973, and 1974, but proved ineffective because the Commission could not require a waiting period. *See* Bill Baer, *Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, Speech at the 35th Annual Corporate Counsel Institute, at nn.24-26 (Oct. 31, 1996), https://www.ftc.gov/news-events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act.

For lawmakers, the agencies' inability to halt mergers pre-acquisition contravened the prophylactic orientation of the Clayton Act, which was designed to stop monopolies in their incipiency, before they ripened into full-scale violations of the Sherman Act.[4] In practice, it would take on average five years for antitrust enforcers to obtain a court order requiring the unwinding of an illegal merger.[5] During this time, the acquiring firm would reap ill-gotten gains; the assets and management of the companies would become commingled; and key employees would have often left.[6] As a result, post-consummation merger enforcement was often a "costly exercise in futility."[7]

The HSR Act addressed this problem by creating for certain transactions a premerger notification regime that included two key requirements: (1) that firms proposing a merger submit information needed to assess preliminarily whether a deal may violate the antitrust laws, and (2) that these firms wait for a short period, typically 30 days, after filing before consummating the deal. As a result of these requirements, enforcers now have a short period after a merger filing comes in to determine whether it is likely to violate the antitrust laws and whether to open an in-depth investigation. Absent any further inquiry from the agencies during that period, the merging parties are free to consummate their deal after the initial waiting period expires, usually 30 days or less.

Much has changed in the 45 years since the HSR Act was passed. Deal volume, for example, has soared. The House Report for the HSR Act estimated that the statute would "requir[e] advance notice" for approximately "the largest 150 mergers annually."[8] Today, the agencies often receive more than 150 filings each month.[9] Transactions are increasingly complex, in both deal structure and potential competitive impact. Investment vehicles have also changed, alongside major transformations in how firms do business.

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[4] S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950) ("The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."). *See generally* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[5] H.R. REP. No. 1373, 94th Cong., 2d Sess., at 9 (1976) [hereinafter "House Report"]. The House Report on what would become the HSR Act recounted the saga of the El Paso Natural Gas merger challenge, which spawned seventeen years of litigation before the illegally-acquired firm was successfully divested. As the Report noted, "But the costs—to the firms, the courts and the marketplace—were immense." House Report at 10.

[6] House Report at 8 ("Yet by the time it wins the victory . . . it is often too late to enforce effectively the Clayton Act, by gaining meaningful relief. During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged."). *See also* John Warren Titus, *Stop, Look and Listen: Premerger Notification Under Hart-Scott-Rodino Antitrust Improvements Act*, 1979 DUKE L. J. 355, 357 (1979).

[7] 122 Cong. Rec. 25051 (remarks of Rep. Rodino).

[8] House Report at 11.

[9] FTC, Premerger Notification Program, https://www.ftc.gov/enforcement/premerger-notification-program (last visited June 27, 2023). *See also* Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding the FY2020 Hart-Scott-Rodino Annual Report for Transmittal to Congress (Nov. 8, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598131/statement_of_chair_lina_m_khan_joined_by_rks_regarding_fy_2020_hsr_rep_p110014_-_20211101_final_0.pdf; Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina M. Khan and Commissioner Alvaro Bedoya Regarding the HSR Premerger Notification (Feb. 10, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy21hsrannualreportrksstatement.pdf.

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A 45-Year Pause ➔

A 45-Year Pause

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The HSR form, meanwhile, has largely stayed the same. Against the backdrop of these vast changes, the information currently collected by the HSR form is insufficient for our teams to determine, in the initial 30 days, whether a proposed deal may violate the antitrust laws. Our staff are put in the position of expending significant time and effort to develop even a basic understanding of key facts. They must often rely on extensive third-party interviews and materials, information that can be challenging to obtain in 30 days. Much of the key information, moreover, is known only to the firms proposing the merger, such as the exact timeline of the proposed transaction, the deal rationale, and the structure of each relevant entity. Seeking this information on a voluntary basis can leave key gaps.

The lack of relevant information is especially problematic during periods of high merger activity, including the recent surge where the number of HSR reportable transactions doubled.[10] The Commission's recent 6(b) inquiry into unreported acquisitions by Apple, Amazon, Facebook (now Meta), Google, and Microsoft during 2010-2019 also highlighted the importance of collecting more information on the firm's history of acquisitions, including non-horizontal and small prior acquisitions.[11] The study captured how these firms structured acquisitions, the sectors they had identified as strategically important for acquisitions, and how these acquisitions figured into the companies' overall business strategies.[12]

The proposed revisions to the HSR form draw on learnings from these experiences. They seek to fill key gaps that our staff most routinely encounter, such as inadequate information about deal rationale or the details of how a particular investment vehicle is structured. In addition, the current HSR form fails to capture information about key aspects of competition, such as labor markets or research and development activity. The NPRM proposes to address these and other shortcomings.

Congress also recently recognized that assessing risks to competition in today's economy will require collecting additional forms of information. The Merger Filing Fee Modernization Act of 2022 requires that merging firms provide data about any subsidies they have received from certain foreign governments and other entities of concern.[13] The NPRM proposes changes to fulfill this statutory requirement.

Many of the updates in the proposal are consistent with data already collected by antitrust authorities around the world. For example, competition enforcers in other jurisdictions already require firms to provide narrative responses with information about business lines, the transaction's structure and rationale, business overlaps, and vertical and other relationships.

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[10] FY 2021 HSR reportable transactions were double those of FY 2020—3,520 versus 1,637.
[11] FTC, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019 (Sept. 15, 2021), https://www.ftc.gov/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study; *see* Press Release, Fed. Trade Comm'n, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies.
[12] *See* Press Release, Fed. Trade Comm'n , FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021) and accompanying statements, https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies.
[13] The Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4459.

3

Accordingly, much of what would be required in the updated HSR form should be familiar to market participants and their counsel.

This NPRM reflects tremendous work by staff across the FTC, in particular from the Premerger Notification Office, the Office of Policy and Coordination, and the Office of Policy Planning, as well as from throughout the Bureau of Competition, the Office of General Counsel, and the Bureau of Economics. We are deeply grateful to this team for their diligent efforts, as well as to our partners at DOJ for their collaboration.

This proposal is designed to ensure that we can efficiently and effectively discharge our statutory obligations and faithfully execute on the mandate that Congress has given us. We look forward to the public comments.

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FTC Chair Lina Khan
A Fireside Chat at Berkeley

Editor's note: At the 2023 Berkeley Forum on M&A and the Boardroom, Professor David Singh Grewal interviewed his former student who is now the chair of the Federal Trade Commission, Lina Khan.

Professor David Singh Grewal: Hi Lina. Can you see and hear us? I think we're having some sound issues on her side I think.

Lina Khan: I can hear you all okay.

Professor Grewal: You can hear us. Oh great. Okay, wonderful. Well welcome. I'm sorry you can't be here in person. It's one of those beautiful days in San Francisco that almost justifies the real estate prices. So maybe next year. So anyway, thanks very much for joining us. You have a whole room of lawyers here in person and I think a thousand people virtually online, so it's going to be a great audience for our discussion. I thought we might start with some questions about where we are, Silicon Valley, if that's okay.

Ms. Khan: Yeah, that sounds great. I'll just say upfront, I'm so sorry I can't be there in person. Congress has scheduled an appropriations hearing tomorrow, so I have to appear and explain our budget request, but I had been looking forward to being there in person. Also, I just want to say what an honor it is to appear even virtually alongside David Grewal. David was my professor in law school and also a mentor and a friend, and it's just a real delight to get to be here with you.

Professor Grewal: Yeah, it's nice to see you again. So given though we're in Silicon Valley, what do you see as the FTC's role in enabling an innovation economy even while pursuing antitrust goals?

Ms. Khan: Yeah, so I think historically we've seen that there can be huge innovation benefits that stem from robust competition. I think a lot of this stems from the historical debate between Schumpeter and Arrow. What are the underlying market conditions that are best going to favor innovation? Schumpeter was in the monopoly camp, Arrow was in the competition camp.

You can imagine that this could vary market by market, but as a general matter, I think we've seen how strong rivalry and strong competition can really incentivize firms to produce breakthrough innovation. You can have incremental innovation, but really it is breakthrough innovation that is the paradigm shift. The introduction of a new technology oftentimes does require a significant rivalry. I think historically we've seen this when the unbundling of IBM helped unleash the American software industry. We saw how the government forcing AT&T to open up its patent vaults similarly spurred decades of innovation. And so I think we've historically seen how robust competition can be key to the paradigm shifting innovation that America has really led the world in. And so that's how we view our jobs.

I also think, as a general matter, we are charged with enforcing the antitrust laws and those lay out a certain set of considerations. So we're not really in the business of picking and choosing which mergers we think we should allow because we think it will promote innovation. There are a serious set of clear instructions that Congress has given us that courts have given us, and that's what we follow.

Professor Grewal: So, as I understand it, your mandate is competition policy, and that's not something that you're going to vary for innovation reasons, but your thought is that broadly speaking, stronger antitrust enforcement and an innovation economy go together. How would you respond to folks who worry that regulating merger activity can in effect chill innovation?

Ms. Khan: Yeah, I mean, again, I think we've seen time and time again how it's actually promoting competition, including through stopping illegal merger activity that has been key. There's a preference embedded in the laws that Congress passed and in the ways that courts have interpreted them, that really express a preference for building over buying. And so there's a preference in the case law for growth through internal expansion over growth through acquisition. In part, I think because there's also a recognition that it's the internal expansion that can be really critical in terms of promoting greater innovation. I think we see counter-arguments sometimes. And again, I think there can be space for other enforcers or other policy makers to be creating exceptions where needed. But from the FTC's perspective and enforcers' perspective, this is the tool we have and we think oftentimes it actually promotes significant innovation.

Professor Grewal: Fantastic. Let's shift to talking about non-competes because these are a different aspect of innovation that might be chilled through constraints on competition. Here in California we don't have them to the same extent as elsewhere, but we saw in January that the FTC proposed a rule to ban non-competes between an employer and its workers as an unfair method of competition. I wanted to know what your rationales for proposing the rule?

Ms. Khan: Yeah, so we were really thrilled to be able to introduce this proposal and it was really responding to a couple of things. One is that we've all seen how non-competes have extended beyond the boardroom. So they may have been introduced in a way that was primarily governing highly paid executives, but we've seen them proliferate across the economy. So we're seeing low wage workers, be it security guards or fast food workers, be covered by them. We're seeing journalists be covered by them. We're seeing gardeners. I mean really the set of professions where these non-competes have proliferated is really across the board, across income levels. And so we thought this was something that required a closer look. We've also seen over the last couple of decades, different states have gone in different directions. So California has had a longstanding policy that has basically rendered non-competes non-enforceable.

But various other states have introduced additional restrictions over the last few decades in ways that have actually created a really useful national natural experiment that has led to empirical studies that have allowed researchers to actually isolate what the effects of non-competes are on workers and also on local economies. And so when you look at that empirical literature, it tells us a couple of things. One is that it has shown that there actually is a effect on depressing worker wages. So our economists estimate that eliminating non-competes could boost worker wages to the tune of 300 billion dollars a year. But from the FTCs perspective, there's also a really important nexus to competition in a macro sense. So we've also seen how the existence of non-competes can really come at the expense of new business formation as well as innovation. And you can imagine that that would work because oftentimes it's the very workers at existing firms that can be best positioned to go start their own company or spin off a particular venture. And when that activity is being restrained through the existence of non-competes, again, you could have an aggregate effect.

So those were some of the factors that led us to issue this proposal. We got around 26,000 comments. So our team is closely studying them and will determine what the right place is to land.

Professor Grewal: Did the FTC take inspiration from California on this? How explicit was California's experience as a innovation economy without non-competes in your own analysis?

Ms. Khan: I think that's a great point. I mean, certainly when you hear counter-arguments about how non-competes are critical for innovation, I think California is a great illustration of how we've had a very innovative local economy, state economy that has not been dependent on the existence of non-competes. We did see interestingly that even in states where non-competes are non-enforceable employers sometimes do still include them in contracts. And so there can actually still be a chilling effect on workers who might not actually know that they're non-enforceable. But I think overall, California remains a great example of how there could be more tailored solutions like non-disclosure agreements or trade secrets that are more appropriate to address some of the concerns that people have.

Professor Grewal: I don't know if you can

Lina Khan ➔

Lina Khan

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tell us, but what was the tenor of the comments you received among these 26,000. Do you have a sense of what people are thinking about the rule?

Ms. Khan: Yeah, we're still making our way through. I mean, I'll say as a general matter, there is enormous support for this proposal. I think a lot of people have had experiences that they shared with us just from their day-to-day lives. One set of market participants that we heard a lot from was actually healthcare workers, nurses and doctors who increasingly find themselves covered by non-competes. Some doctors shared, for example, how during the pandemic they actually saw how non-competes were coming at the expense of healthcare being made more readily available because doctors were stuck in place and not able to move even locally to areas where there might have been a greater need for non-competes. We've also had a public comment period. We hosted a public forum where we also heard from a lot of healthcare workers. So I would say that's one community that seems very engaged here. Interestingly, the hospital association filed a comment in support of keeping non-competes, so I think we also saw some fissures within the healthcare world.

Professor Grewal: Interesting. And speaking of healthcare, last year the FTC proposed a ramped up enforcement against illegal bribes and rebate schemes that blocked patients' access to low cost drugs. And we also saw Eli Lilly, the producer of insulin medications, pledge to reduce its insulin list prices by 70 percent. That was in the headlines a couple months ago. How did the FTC achieve this? How did you tie these things together? What was your thinking about this? Did this come out of the blue?

Ms. Khan: Yeah, so one of the top priorities for the commission at this time is making sure that we're attacking the ways in which unlawful business practices may be inflating drug prices. We've seen how people are literally not able to afford lifesaving medicine including insulin because it's too expensive and in instances where that's being driven by illegal practices, we think it's enormously important for us to be attacking that head on. One of the ways in which we've heard that rebates, potentially illegal rebates may be contributing is there's a system in place right now where manufacturers end up having to pay rebates to PBMs [Pharmacy Benefit Managers], who are these middlemen in the system, and the PBMs are determining what medicines are making it to the formulary and ultimately available to patients. And so we have heard how this rebate scheme may be incentivizing manufacturers to basically make their more expensive medicines more readily available to Americans at the expense of cheaper generics. So we put the market on notice that we were looking at this closely. We have some ongoing work streams relating to that.

More generally, I think stepping back, there's a fundamental bargain at the heart of our prescription drug system, which is that brand drugs are given a period of patent exclusivity that is then followed by fair and free competition from generics or biosimilars. And I think there's been concern that this type of rebate scheme can really be coming at the expense of that core bargain and ultimately keeping those generics out of reach for Americans. So this has been a core area of focus for us.

Professor Grewal: In this case, Eli Lilly is not giving the market to generics. It's actually just decided to, if I understand this correctly, to reduce its own list prices.

Ms. Khan: Exactly. And one can speculate about the various factors that are leading them to do that. But I think no question that there's been a lot of scrutiny on the pricing practices of the handful of companies that control this market.

Professor Grewal: Fantastic. So more competition and health policies leading to lower drug prices, more health. Let's keep with the health and social welfare goals and ask, I understand your mandate is to make markets as competitive as possible. How would you approach situations where some kind of coordination might seem to be a better way of achieving some policy ends? We can think about ESG, or better labor and climate outcomes. How do we think about coordination as opposed to competition for some kinds of social goods?

Ms. Khan: Yeah, so look, to my mind, there's no question that Congress has set a general policy in favor of competition through the antitrust laws, but competition is not the only governing framework for different markets. We can imagine instances in which coordination might be necessary, instances in which public options might be necessary. And so I think for us as antitrust enforcers, we're given the tools that we have, but we need to be humble about the instances in which those tools are not applicable. So we've seen how Congress, for example, has carved out a labor exemption so that the antitrust laws are not supposed to be weaponized against workers who are looking to coordinate or organize against their employers. We've seen how in the context of agriculture, Congress has also created carve outs allowing for that type of coordination by farmers. So we entirely defer to Congress to basically identify instances in which there need to be carve outs or exemptions.

And I think for us as antitrust enforcers, we need to be humble about the tools that we've been given and the domains in which they may be applicable, but also the domains in which shouldn't. One thing which we have seen, which we've spoken up about is companies coming before us and acknowledging that their merger may pose legal concerns, but claiming that if they make certain ESG commitments that those should cure the illegality of the merger. And that's where we've really taken a hard line and said there is no ESG exemption to the antitrust laws. And so these types of illegal behaviors cannot be cured through some promise or commitment to various types of ESG values.

Professor Grewal: And this is what you wrote about in The Wall Street Journal a couple months back in terms of ESG?

Ms. Khan: Exactly.

Professor Grewal: Right. So that would be a congressional deference principle plus no ESG exception within the existing rules?

Ms. Khan: Exactly, that's a great story.

Professor Grewal: And where ESG doesn't conflict with the antitrust enforcement, FTC presumably has absolutely no problem with it.

Ms. Khan: Yeah, I mean, of course if there are no legal concerns that are in our domain, we're not going to be wading into that.

Professor Grewal: Okay. Step back. What books or readings have you found inspirational? This is a question that some of us were wondering if you even have time to do reading, but what's motivating you at the moment?

Ms. Khan: One book that I picked up recently is this new book called Data and Democracy at Work, by Brishen Rogers, who is a law professor, and it's really taking a close look at some of the workplace surveillance technologies that have been introduced across workplaces and the way that's really changing the nature of work, exacerbating some of the power assymetries in the workplace. So as we see these tools being used against workers, that's something that we're looking at as well.

Professor Grewal: Oh, great. So more theoretically, do you read anything inspirational or fun, that sounds very work related?

Ms. Khan: Nothing top of mind right now, but I aspire to it [*laughter*].

Professor Grewal: As a taxpayer, I'm glad to see you're all work and no play. That's great. So getting back to antitrust, how do you think more theoretically about market concentration as a driver of economic inequality or other outcomes like economic growth? And I know that may not be formally within your mandate, but it must be something you think about and I know the Biden Administration thinks about that problem a lot.

Ms. Khan: Yeah, I mean, I'll say as a general matter, I think one of the more interesting developments over the last decade has been that more sub-fields within economics have started studying some of these questions around competition. For a long time it was really industrial organization economists that were primarily studying competition and oftentimes doing through a micro lens. But over the last decade we've seen more macro economists research this topic, labor economists, public finance economists. And I think that research has started to surface some of these more big-picture interconnections. And so we've seen, for example, how labor markets are actually much more concentrated and that there can be a correlation between high labor market concentration and an effect on stagnant or declining wages. I think we've also seen in the aggregate how market power can enable price hikes and also in effect be enabling a wealth transfer upward.

So I think we have seen research including from, I believe it was the Atlanta Federal Reserve, that found that less market consolidation correlated with areas that were generally more prosperous and had faster income growth and lower poverty rates. So these pockets of research, I think, are telling a story that a summary of which is monopoly power can contribute to or at least be highly correlated with higher

Lina Khan ➔

Lina Khan

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rates of inequality and greater competition can promote greater growth. So that's research that we're following closely and I think also is being looked at closely by other policy makers with additional tools in this area.

Professor Grewal: So if market concentration can have some of those negative effects, how do you make small businesses of specific concern of antitrust policy in a way that, say, a consumer focus on exclusion of rivals or something like that would leave out?

Ms. Khan: Yeah, I mean, I think historically ensuring that independent businesses have access to markets and are not being squelched or shut out of the market through illegal tactics is a core concern of antitrust. One area where we've seen a lot of concern from small business and independent business is in the pharmacy sector. So we've heard a lot of concerns from independent pharmacies around how the practices of some of these PBMs who have also vertically integrated, so the PBMs also have their own mail order pharmacies, may be suppressing their ability to be viable competitive players in the market. One reason why the independent pharmacy example is always interesting to me is because sometimes there can be a caricature that the small businesses are the inefficient ones and so if antitrust is protecting their ability to participate in the market, that's really protecting inefficient companies. I think what we've seen in the context of independent pharmacies is that states that have laws prohibiting chain ownership of pharmacies and so hence have a robust independent pharmacy landscape, can outcompete some of the states that have major chains. We saw this for example, during the pandemic where the states that had strong local independent pharmacies were able to distribute the vaccine much more efficiently and much more quickly than states that were dominated by the big chains. And so I think we've seen interesting examples about how actually it's sometimes the independents who can be smaller that can actually outcompete and not just go toe-to-toe with some of the big guys.

Professor Grewal: So something about resilience of supplies rather than efficiency might be something you'd look at in addition to scale?

Ms. Khan: Exactly. And I think this question of resiliency has become especially salient for us over the last few years where we've seen how through the pandemic, certain types of shocks to the system can have a much more cascading effect when you have deep concentration of production. And so thinking about how competition policy can also be important to create a system that's more resilient and less fragile is also top of mind for us.

Professor Grewal: So workers have come up a lot. How would we make workers a subject of specific antitrust concern independent of them as consumers, in effect? How do you think about them?

Ms. Khan: Yeah. So interestingly, all the antitrust statutes talk about competition and fair competition. They don't specify the market participants that competition is to benefit. So there's nothing in our statutes that says that our efforts must be directed at protecting competition just for the sake of consumers. Workers can also be extremely relevant. The FTC has been looking in its investigations to understand whether there could be harm to workers and that could be a basis for bringing some of these laws. We've also been pursuing enforcement actions in the context of non-competes.

So we brought a law enforcement action against a security company that had been imposing non-competes on its workers. We brought a law enforcement action in a highly concentrated industry where the two major players had basically locked up a lot of the talent through these non-competes. So both on the merger side as well as through our work on non-competes, we're seeing how antitrust can protect workers as well.

Professor Grewal: Lina, sorry, we had an infrastructure problem on this end, which is, you froze up a little bit at a crucial point. It was really interesting when you were saying that the antitrust statutes didn't specify the consumer as the sole focus of competitive aims. And I wanted to hear more, and you froze up and it became a little more garbled. I think I can infer what you were saying from what you said later, but if you could just repeat that point because I want to be sure I didn't miss it.

Ms. Khan: Yeah, happy to. So the short of it is, the antitrust statutes don't specify that we can only look at effects on consumers so we look at the effects on all market participants, the mergers for example, where the FTC has looked at the effects not just on patients but also on nurses or healthcare workers. And so this is a muscle that we're building in merger context, but also again, our work on non-competes in other areas.

Professor Grewal: The internet keeps trying to freeze you whenever you want to move beyond the consumer welfare standard. So I hesitate to ask about it directly, but let's talk about it directly. So if consumers are too narrow a class to capture all of the different concerns antitrust has, even its statutory basis and certainly in practice, how should we broaden beyond the consumer standard? So you've talked a little bit about that with non-competes and so on, but what are some other examples of things that have been motivating the FTC's work?

Ms. Khan: Yeah, I mean one thing that we think a lot about is the market structure at issue. Congress really focuses on competition and fair competition. And there are certain ways in which just having certain subtle presumptions can eliminate the need to be then understanding if the effects are just going to be harming consumers or workers. Congress also specifies that our job is to prohibit unfair methods of competition. That word "unfair" is really important because I think it underscores that not all forms of competition are fair game. It's not rivalry for rivalry's sake, but it's actually the role of the FTC to identify what are the dimensions of competition that are fair and desirable versus the dimensions of competition that are unfair. And so that's a role that's a bit more unique. It's not just a law enforcement role, but it also has a policy-making component that we take very seriously as well.

Professor Grewal: In that vein, what kinds of concepts, alternative concepts or new measures, if any, have you guys been working on or further developing that help to assess anti-competitive behavior in those other dimensions beyond, say, consumer welfare?

Ms. Khan: This is an area where we've been both going back to the text of the statute, but also the case law. Last year we put out a policy statement explaining what "unfair methods of competition" means and that interpretation relied on basically a century of case law. That case law identified instances in which business practices that were, say, coercive or exploitative or predatory could constitute an unfair method of competition without having to show some type of end welfare effects, be it on consumers or other market participants. That's what the case law lays out and so that's what we're going to be following.

Professor Grewal: And how do you measure or operationalize that? How have you been going about doing that?

Ms. Khan: Yeah, I mean we lay out a test where it says if a business practice is first of all a method of competition and then if it's unfair and the unfairness prong again draws on some of this case law around exploitation or coercion or predation, that's what we're looking at. I think it's fair to say that there isn't a hard and fast formula to plug this into and that then spits out an oucome. It is more of a qualitative assessment, as so much of the law and legal analysis is.

Professor Grewal: Right. Wonderful. And so in addition to the enforcement mandate, you mentioned earlier there's a sort of policymaking role that the statutes give to the FTC. How do policy issues get added to your agenda? And how do you prioritize among all the different things you could seek to work on?

Ms. Khan: Yeah, it's a great question. And this question of prioritization is one that we think about day in and day out, because we're relatively small agency, we have a huge mandate over the full global economy. I would say a couple of things. One is areas where we are hearing a lot of concerns. So one thing that we've started over the last year and a half is doing these public commission meetings where there's a component where anybody can sign up and come speak directly to the commission. And that ends up being a really useful way to just hear from the public about what are the concerns that they're seeing day in day out. One example here is we've been hearing from a lot of franchisees about concerns stemming from the power that the franchisers may have over them and the practices that they're deploying. So the other week we rolled out a franchise request for information to collect more data about the relationship between the franchisees and the franchisers, and whether there may be anti-competitive conduct there that should be on our radar.

Another area recently that's been top of our mind is cloud computing. So I think we've seen how as the cloud market has basically focused around a handful of big players, that can lead to concerns around systemic resiliency where a single outage can have a cascading effect. It also

Lina Khan ➔

Lina Khan

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affected our work on data privacy and security. So we did a similar study on cloud computing. So it's a dynamic situation where it's partly what issues are coming on our radar. I'll also say areas where we feel that we have a deficit of information that relate to our enforcement mandate can be another area where we are putting out calls for information or doing deep market studies to make sure that we're smartening up on particular issues.

Professor Grewal: And so you mentioned earlier you used academic research on non-competes and their effects. How much do you draw on policy analysis that comes from outside the agency and how much is in-house?

Ms. Khan: Yeah, we rely on the external analysis an enormous amount. We have great staff internally. We have around a hundred PhD economists. We just last month launched a new office of technology where we're bringing on data scientists, data engineers, AI specialists. So we're looking to build more of this capacity in-house, but there's no doubt that there's only so much we can do. These are also people that are spending their time on our enforcement cases. And so relying on the outside world for research ends up being quite critical for us.

Professor Grewal: Well, that seems like it might be a good place because I've backed you into a corner saying that academic work is important for you, which as a professor feels like it's my bailiwick. I wish we could be having this conversation in class. It's so great to hear you again and think about these things with you. But I think we're out of time. And so is there anything that you want to say in particular to us before we let you go?

Ms. Khan: I think it's an enormously exciting time for our viewpoint. We are fully activating all of the tools that Congress gave us. I think we've seen a lot of pressing problems that deserve our attention, and we're really pursuing this work with a tremendous degree of urgency.

Professor Grewal: Thank you for taking time out of that urge your work to talk to us today.

MA

Lucia Bonova

The EC's head of Digital Platforms on the new Digital Markets Act

Editor's Note: Jenn Mellott, a partner at Freshfields, and Professor Prasad Krishnamurthy of the Berkeley law faculty, interviewed Lucia Bonova, head of the unit—Digital Platforms at DG Competition at the European Commission, at The 2023 Berkeley Forum: M&A and the Boardroom this spring.

Jenn Mellott: Hi, everyone. We are very excited to have with us Lucia Bonova here from the European Commission where she is Head of Unit/Digital Platforms at DG Competition. I know we talked a little bit about antitrust law at the beginning of the day with Chair Khan from the FTC. But today we want to talk a little bit now about what's happening on the other side of the pond.

So we're very fortunate to have Lucia with us, who, in her 15 years at the commission has really done it all. She has headed the merger unit that looks at mergers in the telecom and other sectors. She has been in the cabinet of Commissioner Vestager. But Lucy, I want to start off by asking you about your current post at the EC where you are the new head of the unit that is responsible for enforcing the new Digital Markets Act. And so we do not have this act yet on this side of the pond. I think this morning we heard Chair Khan say that we are sort of in the U.S., the FTC is humbled, I think she said by the laws that Congress has given it. But you in Europe have been gifted a new regulation to look at and enforce. So can you start us off a bit by telling us where does this DMA come from? What is it intended to do? How does it fit with existing competition law?

Lucia Bonova: Thanks, Jenn. And I should start by saying that I'm very happy to be here, I should say humbled, but that's too much of LinkedIn. So I will just say I'm happy and excited to be here. So thank you for having me. So yes, it's a interesting relationship between the DMA, how we call it in Europe, the Digital Markets Act, and competition law because I think it's about the only situation where it's okay to be both the mother and the cousin at the same time. So DMA was born from competition law and DMA was born because we had quite some antitrust cases where we've seen that there are some systemic issues in certain markets and repeated behaviors.

And of course the problem with antitrust enforcement is that each case is separate and you each time have to start from scratch and do the case and new analysis, new facts, investigate the effects, looking at efficiencies. And that of course takes time and it's not very efficient when you know what you're looking for. And so we thought that the market was ripe for regulation and of course that has its benefits because the regulation as we set it is exempt, and DMA essentially tackles these behaviors in a very surgical and targeted manner because it's a horizontal regulation, but yet very targeted in a sense that it regulates a number of companies, large companies, the gatekeepers as we call them, which are indeed in a position where they act as a important gateway for business users to reach end users. And it also applies in a number of set limited market situations. So we call them core platform services. So you would have, let's say search, you would've browsers, operating

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systems. So all of that, the DMAs model, there is nothing less, nothing more. So it's extremely focused.

But then competition law is still also so important because it remains in the game. So it's kind of a complimentary tool, they act together. So of course where it's a known behavior in one of these situations, the DMA will do the trick, but the competition law will always be there to address the delta, the behaviorists, because since we know gatekeepers are very innovative companies, including when it comes to antitrust issues. So competition law will be there to tackle the new situations and also as you know, to investigate that because that's a kind of good policy making. But first you see whether it's kind of a wide problem before you start regulating.

Professor Prasad Krishnamurthy: So how do you see the enforcement mechanisms that have been developed by the EC for the DMA, the Digital Markets Act. How do you see them interacting with those of other countries who might think about developing their own Digital Markets Act, or their own competition systems that look after these practices? Right now, is there any kind of communication that's taking place toward some greater harmonization? And then lastly, when the EC is acting in this space, does it think of itself as a policy maker for Europe or does it also think that it's having a global impact? If it's having a global impact, how do you think about that different dimension?

Ms. Bonova: So I'm not going to say anything surprising that digital platforms are global and the challenges which they raise are also global. So it's true that Europe has been the first mover in this space. It's not surprising that it's the regulation where Europe is the first mover, because we are very good at, but it's also widely known that there are other jurisdictions looking at similar laws because I think everyone is realizing that something ought to be done and including on this side of the Atlantic, but not only, it goes around the world. So, we will all be looking at this handful of companies and trying to regulate them and ideally of course it would be done in a kind of consistent manner. So I think it would be a kind of perverse outcome if now everyone started to do something else. I mean there will be different approaches to this big question, but I mean fundamentally I think we all try to address the same type of issues, problems and behaviors.

So what is also good news is that we have frameworks for cooperation which exist in antitrust. I mean of course DMA is not antitrust, but we are building on these cooperation frameworks which we have with the U.S. and with other countries, both bilateral and multilateral. And we continue cooperating and exchanging because these regulations will interact between each other and this interaction will have to be managed I think for the benefit of everyone.

And to your question, whether we are regulating Europe or the world, the truth is that, I mean of course we regulate Europe and also the way the regulation is actually structured, it always starts with the users in Europe. So we need to designate these companies first and they need to have users, both end users and business users, in Europe. So what we are looking at reading those that have entrenched position in Europe. It will be interesting to watch how the gatekeepers will approach this compliance because this is a new situation for them and they will have to comply with Europe, which is not a small market. So let's see whether it'll have kind of a positive extraterritorial effect in the sense that it's not worth it to have a business model for Europe and a business model for U.S. and business model for Australia or China or Japan. So yeah, I think everyone is watching. I think we are a test case. So we are the first mover, so we are on the front page, but also there is a pressure because we have to make it work.

Ms. Mellott: I just want to pick up on this point you raised about cooperation because of course you're right that there's a long history of cooperation in how we enforce, say, merger control rules or monopolization and dominance rules. With respect to the DMA, we're looking more at cooperation maybe with respect to the laws themselves and how they get scoped and what are the actual words on the page. Is the EC cooperating with other countries on their efforts to actually draft up a law or are they just more kind of watching with interest?

Ms. Bonova: Well, I mean we have DMA so it's more the others are watching. I think it's a fair thing. Everyone wants to see and there is this curiosity, how did you do it? How did you approach it, and are there other ways? UK is doing their own approach. They're looking at it slightly differently than we do, but I mean fundamentally we speak to each other. So I think it would be surprising to see now something completely different coming in one of these jurisdictions. So I think on the margins there may be some differences how you tackle this, but I think fundamentally, I think that these regulations will be very, very similar.

Ms. Mellott: So it's early days, you have this new regime, gatekeepers will be designated and then we're going to get into compliance. And I read something that suggested that the DMA is self-enforcing and the rules are so clear cut that companies will just read them and know how to follow them and everything will be well, which I think those of us who work in this area and look at the regulations, no, that's not always the case. And so I'm interested to know as this plays out, what do you see successful enforcement and implementation of the DMA looking like? Assuming it's not you sitting on a beach sipping a cocktail because it's all so clear that we understand it and we just enforce them.

Ms. Bonova: Yeah, I think we read the same article, Jenn, and of course I read it before I took this job. So they told me it's easy, it's not going to be hard. It's nine to five job, it's all a self-executing. There will be a handful of specifications, but by and large it's pretty clear. Well as often is the case, the reality turns out that these things are actually pretty complicated. And so we are in the designation phase or re-designation phase we can say, because the regulation will enter into application very soon. And we are now engaging with the gatekeepers too, a little bit to read the DMA together because there's no surprise that we don't necessarily read certain provisions in the same way.

And you are asking what the successful compliance will look like and it's a million-dollar question and I ask myself really what does the success look like? I think at a very high level what I can say is that, I mean—I don't know whether I should say that—but I do not expect miracles or at least not overnight. But what I hope for is that we are on a path with these companies hopefully that will cross the Rubicon soon and realize that they have become regulated entities and that the markets will move, the markets will change, they will become more contestable. We will see emergence of new players, new business model in these areas where it's been entrenched. And I also like to think that it's such a shock like this one for these companies but it's also an opportunity for the companies to reinvent themselves and to come up with new business models. So I would say a success will look like if, let's say in a year or two I'm not going to see that we are going to have another Google search engine or of the same, let's say success, but that we've seen some entries and new app stores emerging and hopefully they're bringing more competition in the game.

Ms. Mellott: If you don't mind, I want to ask just one more question about the DMA. I think looking around the room, I see some people that are at companies that may be designated as gatekeepers and are in that process, but there's probably a lot of folks in this room who are customers, suppliers of the potential gatekeepers or interact with them in other ways. And I'm curious if you think those folks have some role to play in compliance efforts and there's no formal complaint mechanism under the DMA, but is that something that you envisage in your day-to-day ongoing compliance once this is all running?

Ms. Bonova: No, but thanks for this question because there is this kind of a myth that I have to debunk which is, indeed we don't have this kind of formal complaint mechanism, but that's something that you have to understand in the kind of European context because what that means is that we have that in the antitrust, and that means that whatever complaint comes in, we need to investigate, we need to address, we need to issue a decision. There is just lots of bureaucracy about a complaint about the collusion between funerary services in the city of Milan. So basically we wanted to depart from that system, but that doesn't mean that we do not listen to third parties. I think to the contrary, and I think it's super important because we do it for them in a way this has to work for these business users.

So we are, and I think that it's informative in two respects. One is really to identify where the problems are, because there is one thing that we know, and that is there may be an obligation which is either self-executing, or less so, but there's all kinds of dark patterns which may be put in place which we don't necessarily see or are not aware of. So we really want to hear where the issues are and also we are engaging actively with potential beneficiaries and other stakeholders on the possible compliance solutions because these compliance solutions need to work in practice for the gatekeepers, so that we also engage with gatekeepers. It has to be something that works in their business model and it has to be something which brings benefits to those we are trying to boost or to protect. And we organize workshops. So I don't know whether you heard of those, but it's also a big event with over a thousand people connected, which asks specific

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obligations or issues. So we had one on self-preferencing, we had one on app stores, we had one on interoperability. Soon we will have one on data obligations, so you can register and listen in. So this is really a dialogue we are trying to moderate between the gatekeepers and the possible solutions.

Professor Krishnamurthy: So as an academic I'm often less interested in what jurisdictions do and more concerned that they all do something different, so that then there's some possibility of study. And here there really is. So one thing that I found to be really different from the standpoint of U.S. antitrust law are the affirmative obligations that the DMA places on the main platforms to not either favor their own complementary products or services, or prohibit or exclude those of other parties. It's a much stronger requirement on vertical interaction or complementary than exists under U.S. antitrust law. And so I was interested in your thoughts on how you think enforcement of those rules is going to develop over time, if there are particular practices that you have your eye on if you're able to say something like that or ones that you think might be a concern in the future. And I raise an additional kind of economic point, which is that within economics, it is understood that a incumbent firm with market power can win competition for complimentary services without having to exclude its rival simply on the basis of its deep pockets. And I was wondering if you were also interested in enforcement of that particular issue, that exclusion that happens without direct exclusion but nevertheless has a market dampening effect.

Ms. Bonova: Yeah, so I think you are looking at precisely our first workshop on self-preferencing which actually focused on this question. So to make it clear, DMA does not prohibit or even regulate all forms of self-preferencing. So we have the DMA deals with let's say two forms. One is self-preferencing in rankings, so everyone knows which antitrust case is the matter of this provision, it's a Google shopping type of case. And the other scenario is self-preferencing on the basis of use of data. And that would be more kind of let's say Amazon Marketplace situations. And we know that this type of, from market trust cases, we know that these type of behaviors are harmful because they are kind of allowing the incumbent toward the platform to undercut its rivals. And it's extremely difficult then to get in. And so the DMA actually sets the ground for this type of self-preferencing situations. Then there may be others, but if those arise then we would have to really go through an antitrust case because this is really two limited sets of situations where we know that this type of self-preferencing is harmful. There are many other types of self-preferencing which we haven't studied through antitrust case. And also that's why we have these tools still at hand, which will allow us to, if there are facts to look into, whether there is other types of self-preferencing including the one you are mentioning. So we haven't looked at those specific cases yet.

Professor Krishnamurthy: We also wanted to make sure we left some time to talk about mergers as well. I also want to maybe make a small point on this. I happen to be a member of the California commission to review state antitrust law, and I'm on the mergers committee. And so we are to draft a report on how state antitrust law could be reformed. And I believe there's probably a lot of expertise in this room that I could learn from. So please contact me after the discussion. You can find me easily on the Berkeley website.

Ms. Mellott: All right, no more plugs.

Professor Krishnamurthy: It's for the public interest. But on this topic of mergers. So there's been an impression in recent years I think broadly held across the major jurisdictions that merger enforcement has gotten tougher. And so we were interested in your views on whether that's the case and if so, why? If not, why not? And then even more broadly, how maybe people think that way because the nature of the mergers are different. Different firms, different industries are raising different types of anti-competitive concerns.

Ms. Bonova: Yeah, it's a good question. So I will speak clearly for my jurisdiction. I think that anyone who is following our activity, we would rather say that we've been consistently, I don't know whether aggressive is the word. A word about being consistently intervening in cases. We've been also criticized for being actually overly interventionist. So I would say that in Europe the data show that when you look at our intervention rate, it's very stable over time. Then I should say that I think that this kind of perception comes from the fact that some other agencies don't have the same starting point. So if you were under enforcing and you start enforcing, then you look aggressive. And then in Europe of course today is the right day to speak about it. But you have DMA, which is a new agency, and when you're a new agency you don't really have the track record.

So it's very difficult to say whether they are being more aggressive than before. But you raised a very good question about the type of the cases we see and I think that's maybe, it's a little bit kind of mixing of the narrative because one is the intervention rate, but the main question is what type of cases we are intervening in. And if you look, let's say when I started 15 years ago or so, you would see these big industrial mergers, typically horizontal cases, the typical series of harm of creation, of reinforcement, of dominant position with a typical structural remedy, and that's it. And it's true that if we were now looking at these statistics and the data in a kind of more granular manner, and you would look at the cases that we've been intervening in lately, you see more and more conglomerate cases and vertical cases. And these are very different cases because you are no longer looking at the cases when someone or the incumbent is buying a copycat. You are looking at cases where in the tech industry, where you have the data accumulation cases.

Where the harm comes actually from something very different. And I think Google's Fitbit is a good example of that because it might have come as a surprise that we intervened, but it was a very specific fear of harm which really came from this data accumulation and you have the kind of serious harm about the decreasing interoperability which go into really all kinds of dark or not so dark patterns that gatekeepers may have, or large companies when they acquire a kind of different company which fits in their ecosystem. So it's very different cases, that is true. And that maybe can be perceived as aggressive enforcement because it's true that 10 years ago, you don't do this case when you are a crane company and then now you acquire forklifts. It's complimentary products, but the portfolio can serve better the customers. And so this would be the comparison between Google Fitbit, why is it selling cranes or forklifts, what do they have to do with each other? But yeah, it makes sense to the market.

Ms. Mellott: It's interesting because I think when I started practicing competition law, we would sit here in the U.S. and say, oh what is the EC doing? You have cases like Dow/DuPont that felt like a departure from what had come before. And we would sit here and say, well the DOJ and the FTC are so sensible and what is happening over in Europe? We don't say that anymore. But one area where I think the EC approach in recent years has clearly changed is with respect to jurisdiction and how you're using Article 22. For folks who aren't initiated in the room, Article 22 is a mechanism by which the commission can have cases referred from countries within the EU so that it can look at cases that have an EU component. And historically this mechanism was used in cases that were reportable in the country that referred it. So you file your merger in Germany, they say actually we think the EC should look at this because it has a European-wide dimension and they refer it up.

But that all changed last year in the Illumina/Grail case. This transaction was referred up to the commission even though it wasn't reportable in any member state, and in fact Grail had no sales in Europe whatsoever. This kind of change in approach, where you've actually put out new guidance on how you think about Article 22, creates really a lot of uncertainty for companies when they're thinking about how do I draft my SPA, what conditions precedent do I include? What does my timeline look like with this risk hanging over my head that this crazy thing could happen that two years ago I would never have thought about? What advice do you have for companies that are trying to navigate what the Illumina/Grail case and the new Article 22 guidance from the commission actually mean?

Ms. Bonova: Get yourself good lawyers. That's in short. No, but it's true. We re-calibrated our approach. So there is nothing to hide. But step back for a moment and think about why we have done it. Because precisely when we enacted the merger regulation, as many people know it, we were reasoning in terms of thresholds. Turnover thresholds, how much sales you have in Europe, if you have sufficient amount of sales in Europe and in member states, then you have a European dimension. And this really by and large reflected the cases we should be looking at.

But a little bit linking to my previous point, the nature of cases changed because now you see these transactions where you acquire companies much earlier on, which are nascent, which have no turnover whatsoever, these innovation cases, and we see the problems. Basically what we've said is that we have this tool which we haven't been using, but we should start using it so that we can call this transaction in.

And there was the whole debate in Europe

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whether we should revise the merger regulation and come up with some kind of a new threshold which would be tackling this size of transactions. We looked at it and when you reason in terms of thresholds, you'll always find the odd case which somehow doesn't fit in your new threshold. So this is again a very targeted and surgical solution because it allows us to look only at the cases which we should be looking at. So it's not a horizontal notification with a new threshold and now you have 300 new boxes of papers in your office every year. It's really targeted. We took jurisdiction in one case, Illumina/Grail within 18 months of the application. So that shows how effective it is because it really allows us to look at this subset of cases which are problematic.

I agree with you that it's new, it's new for the companies, it's new for the lawyers because now they cannot predict what are these guys going to do. That's why we have also issued our guidance, there is Q&A. So I would say now, that getting in touch early on, see whether this is a case which is of interest. But I think a good lawyer like those who are in the room today, I think will be able to guess fairly well which cases could be of interest to the commission under this new guidance. And if not, you just call me.

Professor Krishnamurthy: So, now this is going back to the Digital Markets Act again. Another area of this act that I think for American antitrust lawyers is really something to look at, is the standards that are being demanded or put in place for interoperability potential on the platforms. So for an American antitrust lawyer, one thinks about the treatment of antitrust law and interoperability, there is one doctrine called the essential facilities doctrine, which is very rarely invoked, not for decades. And the only area of law in which we have substantial rules that make competitors deal with one another is in our telecommunications act. And we do that through a rulemaking regime that is really quite detailed and has its own administrative overlay. So what struck me as being not very self-executing in the DMA is that that kind of interoperability is being potentially imposed on platforms with prospective rivals or even with prospective complementary producers. And so I'm curious as to whether, how that plan is to be enforced, whether rulemaking is something that can happen in that space and just in general your thoughts.

Ms. Bonova: Yes, and you are right, it's not self-executing, and that is also why it's in a separate article under "other obligations." So it's a very clever tool. So I mean it concerns really the interoperability messaging. So again, it's something very specific. And so we have this Article 7 which says this is the objective, and there is a possibility for gatekeepers or also for us to issue a specification decision. So to go really into how this should be done because obviously I want to interpret, but if you don't want to interpret and interpret what is my standard, what is your standard because if you apply mine, it'll be less costly to me, but more costly to you. So there is this possibility of these specification decisions. I mean of course when we are doing this, that's kind of an obvious question, should we have some kind of standard? And I think it's a very relevant question, but I think the DMA consciously decided not to do that. Why? Well, the first reason is, what standard? It's not for the commission to really be a standardization body, not yet. We may get there, but not yet. And the second is the inherent timing aspect, which is associated with this type of exercises. So coming up with a common standard in an industry like this, it's an extremely lengthy process and we wanted to have something quickly. So of course the industry could somehow converge over a standard group, then we could take that into account in the application of this obligation, but at this stage it is not our intention to become a standardization body. We already have enough on our plate.

Ms. Mellott: So, Lucia, it's getting late in the day. We have I think one panel standing between us and cocktails. You are probably jet-lagged from flying over from Europe. And so I think it's a good time to ask you a deep philosophical question.

Ms. Bonova: Oh my god, not about the book.

Ms. Mellott: So when we talk about the DMA, the way merger enforcement has been trending, we have for example, to the situation Prasad just raised, do you have situations where interoperability just becomes so difficult to deal with that a company says, I pull this product off the market, it's just not even worth it for me to offer it if I have to do all of this. Or in the merger world, that enforcement gets so aggressive that companies just say I'm not going to do this transaction. Or very relevant for folks here in the Valley that startups say, god, it's actually a lot harder for me to get funding because I'm closing off all these strategic acquisitions that I could do as an exit because they're all called "harmful to innovation competition" or "killer acquisitions." And I'm curious if at the commission, if you ever think about this question of whether there's a risk that too much enforcement actually does the opposite of what it is you're trying to do and removes innovative and important products from the market that consumers like or makes it difficult to do transactions that actually would be useful and lead to investment in new startups.

Ms. Bonova: Yes, we think about it. That may be surprising, but we do. Of course, this is always the question whether to regulate or not, how to regulate, when to regulate. These are exactly the questions you are trying to ask because you do not want to kill the innovation. You want to promote the innovation. And when we were thinking specifically about DMA, there are various models we were exploring, and we landed with this very targeted model precisely because of this—because we don't want to kill the innovation, we want to promote the innovation and we really hope that this is going to happen with lowering the barriers, with increasing contestability of the market with gatekeepers changing their business models, with new business models emerging. And maybe the facts will prove us wrong, but I really hope not. But of course if you reason like this, then you should never regulate. But I'm pretty sure that there's academic theory about when to regulate and not.

Professor Krishnamurthy: There is, and also academic theory on when to ask philosophical questions. So I have one that's based on the conversation we were having earlier as we talked. I noticed there are a number of younger lawyers in the audience, which to me means people who look younger than me. And when we had talked about this, I said, do people go from practice in front of your commission to serving in a role. And you said no, generally no. And I think it's then a much more siloed relationship between the regulators and the bar, and the parties. And that's very much less the case in the United Statues. This is a plug for younger attorneys here to go work for an agency at some point.

Ms. Mellott: And then come back as a private practitioner.

Professor Krishnamurthy: We've had some broader thoughts on those different systems and so I wanted you to share those with them.

Ms. Bonova: So how many people are connected with that? That might determine what kind of answer I'll give. Yeah, I think it's cultural in a way. In Europe we have this, at least in the commission, it's kind of on an old-fashioned public administration French model where you grow up, you go to university and then you sign up and then you die there. And maybe, in between you change from one ministry to another, or at least you change the corridors in your own ministry. So this is the type of model. And there is also this whole obsession about the integrity and independence of public service in Europe. And personally I always wondered why because it completely disregards the integrity people bring with them.

So obviously there would be benefits with the revolving doors to see people get state-of-the-art knowledge, and to know who the company is because of course if you joined the commission at the age of 25, by the age of 40, it's not the same world as the one you left 15 years ago and you have never set a foot in the company, so it's not always good. But no, this is what it is. I really hope I'm not going to die there. It's not that I'm looking for employment offers or anything, but no, they're doing that. But that's how it is. But it's true, it's very cultural and you see that both models work. So I don't know why we are in Europe so scared of sending people out and letting them to come back.

Ms. Mellott: Well with that, I think we're at the end of our time. Thank you so much, Lucia, it was really great.

Ms. Bonova: Thank you.

Ms. Mellott: I think Lucia's email address is publicly available if you want to send the employment offers her way. Thank you all.

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The Power of Global Regulators

The Discussion at the Tulane Institute

Editor's Note: This panel at the 35th annual Tulane Corporate Law Institute in New Orleans examined "The Impact of Regulatory Developments in the Current M&A Market. Chaired by Richard Hall of Cravath, head of the fimr's Mergers and Acquisitions Practice for EMEA, the panelists included Paul Rosen, Assistant Secretary of the Treasury for Investment Security; Ann Beth Stebbins, a partner at Skadden; Ethan Klingsberg, a partner at Freshfields and co-head of the firm's US Corporate and M&A advisory group; Debbie Feinstein, a former FTC Director of the Bureau of Competition, and now a partner at Arnold & Porter and head of the firm's Global Antitrust Group; and Gar Bason from Davis Polk, a partner and co-head of Mergers & Acquisitions at the firm.

Richard Hall: The focus here is on regulatory merger control regimes, antitrust national security, and the like. What's going on, and what should deal makers be doing about that? We' like to touch on three separate issues here. First, what's going on with international merger control regimes, what's going on with national security and foreign investment regimes, and then what does it all mean for deal makers. To kick it off, Debbie, why don't you let us know what's going on with the merger control regimes, both domestically and internationally.

Debbie Feinstein: Thanks. Well, it's a pleasure to be here, and the very fact that you've invited an antitrust lawyer to a meeting of corporate lawyers tells you something about how much people are thinking about antitrust issues in their deals these days. It's always been an issue, but I think now we're looking at something unlike anything that I've seen in my many decades of doing this. I've worked at the FTC twice, and I think you're seeing a level of enforcement rhetoric certainly that is unparalleled. You're seeing a level of disagreement among commissioners that is different than we've ever seen.

If you haven't had a chance to look at Commissioner Christine Wilson's noisy exit as she indicated her resignation from the FTC, it is really something you rarely see from an administrative agency, certainly nothing that's ever been seen from the FTC. She basically said, "I am resigning because this is all screwed up, and I can't take it anymore. It's wrong," and then wrote a letter to the president expressing all of her concerns really not so much with the policy of what the FTC is doing. There have always been disagreements. The FTC is set up for maximum disagreement. You have by definition commissioners from different parties. But what she was complaining about were process things, secrecy, the lack of transparency, things that were always the hallmark of the agency. So you've got that backdrop.

You've got this populist movement where for the first time in, I should say, probably 50 years or more, the President of the United States is talking about antitrust in his State of the Union speech. We're just seeing it talked about in a way that we didn't before. So how that has manifested itself is that both the Federal Trade Commission and the Department of Justice are saying a lot about how they're going to come down much more aggressively against mergers. The rhetoric is at an all-time high, and it's manifesting itself in a couple of ways.

First, they're bringing more lawsuits against deals that might have been settled before or might have been cleared. I think it's more likely that they would have been settled. Second, you're seeing extreme reluctance on the part of both the FTC and the Department of Justice to settle deals. It used to be that they would take remedies. They would put you under a consent order to make certain divestitures, or if it was a vertical deal, a deal between suppliers and a customer, a deal not to disadvantage competitors, you would enter into an agreement that required certain provisions. Heads of both agencies have said that they are very skeptical about remedies, which is interesting, because when I was at the FTC, we did a remedy study that said more than 80 percent of them succeeded. But there's real focus on those that don't and the concern that they want 100 percent perfection.

The second thing you see is I always laugh that we call this a regulatory panel. Whenever I was at the FTC, I would start every speech by saying, "We are not a regulator. We are a law enforcement agency. We can't wave a magic wand. We're not like the European Commission that can decree a merger unlawful and then after the fact, maybe if the deal can stick together forever, there can be an appeal. We're not like the FDA, which determines whether a drug can get on the market. We're a law enforcement agency." That is what I always said when I was there. I think certainly this FTC wishes that it were not a law enforcement agency and that it were a regulator instead. You see a number of things that they are doing from a process standpoint to impede deals.

Aside from just the rhetoric, which I do think is having a chilling effect on deals, the next thing they did early on was the close-at-your-peril letters. What they were doing is they were letting the waiting period on a deal expire, sometimes after 30 days, sometimes after issuing a second request and getting the documents, and then they would write a letter that would say, "Just because the waiting period has expired, that doesn't mean your deal is okay. We are continuing to investigate, and we can come after it at any time." I remember when clients first asked me about that and said, "What do you think?", I said, "Well, it's like saying the sky is blue." They've always had the authority to do that, and they have challenged deals that have been closed. They can come and look years later. The question is are they going to do so?

To date, I haven't found a single person who has said that they are continuing to have an investigation on a deal that went through the Hart-Scott waiting period. One of the commissioners, one of the Republican commissioners, has said he's not aware of any, and you would think he would be, of any ongoing investigation. So I don't know if they're happening as much as they were, but that issue has died down a little bit.

Mr. Hall: If I could just jump in there for a moment. Appreciating that those letters always were, "The sky is blue," and accepting that even after they started issuing those letters 15, 18 months ago, they haven't done much about it, why do you think they started issuing those letters?

Ms. Feinstein: I think it's twofold. I think, one, they don't want to be seen as clearing transactions. I've always told people that the FTC and DOJ do not clear transactions. They simply decline to take action against them. You don't get a clearance letter the way you do in some regimes. The second is I think they wanted to deter people in as many ways as they could from doing transactions. So I think there's a hope that if they deter enough transactions that they won't have to take in activity.

The second process thing that they're doing is prior approvals. Right now, to get a deal blocked, the FTC or DOJ has to go to court and convince a federal court judge not to allow the transaction to proceed. The FTC, but not DOJ, has put in their consent decrees that you have to get their prior approval to undertake transactions. This isn't new. This is something that happened many years ago. In fact, when Coca Cola tried to buy Dr. Pepper, they litigated for a decade over whether there should be a prior approval clause in the order for future transactions.

The difference there is it does turn the FTC into a regulatory body, because the FTC can just say up or down on your deal without any recourse to a judge. That would dramatically change the landscape of your future deal-doing. It used to be that we could say almost any deal could get done, not all deals, but many deals could get done with a consent order and divestitures. Now you have to face the prospect that any such consent decree will include a prior approval provision, and that would change it.

Then I think the third thing that I want to say about process is they're less transparent about

Regulators ➔

Regulators

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what's going on. I've literally had conversations with staff where they say, "We're issuing a second request." I say, "On what theory?" They say, "I'm not really sure. I was directed to issue a second request." That to me is really disappointing. You hear Paul saying, "Look, when you tell us that your deal is happening and there's an inflection point in two weeks, we try really hard to do that."

The FTC rhetoric has been the opposite. One of the top officials when asked about, "Do you pay attention to the fact that there are timing implications and there are drop-dead dates?", the response was, "We are not a concierge service," which is a very different reaction than I tried to instill when I was in the government, which is, "Look, we have a job to do. We are law enforcement agencies, but we are also civil servants. These are the taxpayers paying us to do their job, and we live in a capitalist society. If we're going to challenge a deal, we challenge it, but we will be abundantly transparent. It's better. Basically, if we can get something without twisting ourselves into pretzels and we know we're going to let the deal go through, we should do it on a timely basis and not screw things up." I think that's just a very different mindset than exists at the government these days.

Mr. Hall: So just on that point, Debbie, and turning to you for a moment, Ethan, as you think about advising a client moving into a potential negotiation on a transaction that might get a second request on one of these unclear theories, which Debbie just referred to, what effect does that have on how you think about negotiation and setting up for the negotiation, setting up the merger agreement, if we don't quite know on what theory somebody might be wanting to make a second request?

Ethan Klingsberg: Clearly, as Debbie articulated it, the theory is—I call it the sand in the gears theory, because all they want to do is slow you down, as opposed to bringing to a head an actual substantive issue. That's what I'm hearing Debbie say. I think we've seen that repeatedly in deals, and they're actually very conscious, the agencies, of our drop-dead dates and of all our mechanics. The idea is if they can manipulate them to get us to a point where we're 18 months out, we're at the drop-dead date, and the deal is maybe not as good for one party as it was for the other, and then you take into account whatever reverse termination fee has to be paid, then they're hoping that it will be worth it for someone to let everything die.

So that leads, I think, into all sorts of interesting mechanics we can start building into merger agreements and into processes that—Debbie, on our knees—would be worth talking about. What's your view now on timing agreements, for instance? Should we be just accelerating and trying to say, "Oh, you want a second request? Okay. As long as we're not producing a complete ocean of documents, we'll give you all the documents. Let's keep it moving." We don't have to go out to 18 months. We don't even have to go out to beyond 12 months to get there and have the opportunity to litigate. We could start building more mechanics into the merger agreement to keep ourselves on this expedited timeline as a way of defeating the sand in the gears strategy, which the agencies are using at this point.

Ms. Feinstein: So—a couple of things. Let me tell you about the normal process and how I think it may evolve. So while I was at the FTC, I had a Wall Street Journal rule, which is if the deal was going to make the front page or two of the Wall Street Journal, I was definitely calling the FTC or the DOJ the morning of the announcement to say, "We have this deal. We'd like to come in and talk to you. We're not going to file our Hart-Scott right away. Let's start engaging." Then you would file your Hart-Scott. By statute, the government has 30 days to decide whether to issue a second request, but the parties can withdraw filing and refile to get 60 days. Then you get the second request, and by statute, there's 30 days after you comply with the second request by which the government has to make a decision.

That time period is completely unworkable, because for all of the layers of government to work, it means that staff the day it gets the materials has to have its recommendation memo ready to go. They said, "We can't do that. If you make us do that, we won't talk to you. We won't talk to you about settlement. You need to give us time." So they entered into timing agreements, and the timing agreements originally were just very like, "Give us another 30 or 60 days." They were very low-key.

They've expanded. They are now Christmas trees, where every new person puts on an ornament of something to dress it up. Now you have timing agreements at the Department of Justice that say "Not only will you give us another 90 or 120 days to review it, but then if we decide to sue you, you'll agree to at least a six-month period of discovery and litigation," to which you want to say, "You just had a year of getting every document in the company. What more could you possibly need? We're the ones who need discovery. If we're willing to do it in three months, you should be willing to do it in three months." They don't. So that automatically means that if you're getting a second request and you have to litigate, you have to build in all of this time.

So the question now is I think more and more people are going to make that courtesy call, because they still do want to work with staff, but they're not going to enter into timing agreements that give nearly that much time. What does that mean? Why would you ever give a timing agreement? Why would you voluntarily give the government more time? Well, the second requests ask for everything in the company, and you have to be in a position where you can negotiate. If you don't give staff more time, staff will sometimes say, "Look, if you're not going to give us time, I've got to be prepared to litigate, just in case that's what the commission wants to do. So I can't negotiate with you." Then you're stuck with how do you certify compliance if you haven't gotten any modifications? So you have to be ready to do everything you think is reasonable, have some friendly lawyers on standby to be the expert witnesses if you ever end up in court, and have the government sue you to say you haven't actually complied with the second request.

We haven't seen it yet, but I think more and more lawyers I'm talking to are saying, "We're being prepared to basically just put that forth and take our chances as to whether or not the government will really sue to get more time on the grounds that we didn't adequately certify the compliance with the second request when we've turned over millions of documents, reams of data, and lots of narratives." So it hasn't happened yet, but people are certainly thinking about it in a way that I've never heard before.

Gar Bason: But Debbie, it's fair to say, though, that the approach that you articulated before, which is very much consistent with what I've always seen, which is, "It's a level playing field. We're going to play straight up. We're going to be cooperative," as people's cynicism, say, or pessimism, grows about the ability to get a non-tilted playing field at the FTC or DOJ on this topic, I see skepticism about the benefits of timing agreements just rising exponentially. In other words, "If there's going to be a fight, let's get to it."

Mr. Hall: Well, as chair of the panel, I'm going to unilaterally assert a timing agreement to say I want to come back to timing agreements in a moment. But Ethan, I'd actually like you to respond to something that Debbie said earlier about the role that the FTC sees for itself. For almost a year now, they've been threatening to issue these new merger guidelines, and we've been worried about what they're going to say. How is that affecting how you are thinking about advising clients? In light of Debbie's comment that the FTC views itself as a law enforcement agency, rather than a regulator, but what's your reaction as we see the possibility of new merger guidelines coming?

Mr. Klingsberg: As I said, and this goes to Gar's point, it's less about the substance, because we just know that it's sand in the gears. They just want to slow us down. So if there are more new guidelines out there, I don't know how much there's going to be a bunch of intense, substantive antitrust analysis on it, because if it's a headline deal and if it's the right client, then they're going to give us a hard time.

Ms. Feinstein: Yeah, I don't think we need to see new merger guidelines to know how to advise our clients. We've heard enough about it. I actually do think there's a very decent chance merger guidelines come out next week. It's the big ABA antitrust spring meeting. People like to make news during that, and the enforcers always have their own summit on Monday. So we'll see if it happens then. If it doesn't, I'm going to be curious why not, because they have been at it a while.

But here's what I think the new guidelines will say, and it's what we've been hearing, which is lower concentration levels are going to be a concern. We've evolved to a world where if you're reducing the number of competitors from two to one, three to two, four to three, you're going to get challenged absent extenuating circumstances. Four to threes, 50/50. Five to fours, sometimes, but not often. I think you're going to see that shift. I think you're going to see lower concentration levels. I think you're going to see deals where a higher number of competitors get challenged. That's number one.

Number two, they are hyper-focused on potential competition. It's not a new theory. The latest Facebook deal was not a new kind of challenge. They've been happening, not super often, but we brought those kinds of cases. We settled those kinds of cases. We got $100 million once for settling a potential competition case. So that's

Regulators ➔

Regulators

continued

not new. But they, I think, are going to write things in the guidelines that will make it easier when they go to court.

Then I think you're going to see more about vertical transactions. They have been losing every challenge they've made to vertical transactions, and I don't know that that's necessarily because they've been bringing challenges that wouldn't have been brought before. The Illumina/GRAIL transaction was a 4-0 vote. The Republican commissioners voted for that challenge. So that tells me that that's one that would've been brought across almost any administration. But they're losing those cases. So I think the guidelines are going to say things that they can use with a judge to basically say, "This is why you should worry about this."

While they would like to think they can muck things up with process, they've actually had to go to court a lot. They've been losing a lot of those challenges. Jonathan Cantor says, head of the antitrust division, when confronted with the losses is this: "But you're not paying attention to the deals that were abandoned under the threat of litigation. That's as important to us. That's as much of a win. In fact, it's a great win, because we don't actually have to go to court." The interesting thing is that I'm told by practitioners that a number of the deals that he's saying were abandoned because of antitrust were actually abandoned for other reasons. But the fact remains that even if you're winning and getting your deal done, the question is how many people are going to be willing to go through that 18 month process with some uncertainty? Anytime you're before a federal judge, there's uncertainty as to whether or not your deal's going to get done.

Mr. Klingsberg: Well, Debbie, what about novel theories like the impact on wages as opposed to the traditional impact on consumers? Is that going to be in merger guidelines, or is that just something being articulated creatively?

Ms. Feinstein: No. So the concern that the government has been expressing is that some transactions may lead to buyer power for employees. So imagine every law firm in America merged. I'm guessing that partner salaries would go down. Certainly associate salaries would go down, because you'd be able to say, "Hey, if you want to work as a lawyer, you've got to work with us, and this is what we're paying you." That would be that, and that's the concern that they have about some transactions. Not a particularly novel theory. It's just the application of it has been to look at employee issues in every single deal. Even where there's no plausible explanation as to why you would expect that there would be a problem, they're looking at that. They're looking at whether or not they can look at a deal's impact on privacy and whether or not there would be a concern there. So far, they've all been tethered in antitrust, not just, "Well, we don't like these two companies combining, because we think one of them is good on environmental issues and the other isn't." But they're going to look at that, and I think you're going to see in the guidelines this broader, old-school approach to what they like and do not like.

What I've always said is they need to be careful. I think the agency wants to be a domestic CFIUS and look at all of the ways a deal might be good or bad on ESG, on privacy, on employees, on wages and competition. I just think the agency is going to be a little challenged to do that. When I was at the FTC, and people asked me to do take that approach, I would say, "We don't have the expertise to do that." I also didn't think we had the mandate to do it as broadly. CFIUS clearly has the mandate to look at all of these issues in a deal. I always thought the competition folks were supposed to look at the competition aspects, and then if other policymakers wanted to have people look at other aspects of it, they could.

Mr. Hall: Well, on that note, why don't we turn a little bit off the antitrust and merger control and onto foreign direct investment, national security, a little bit back to CFIUS, but also internationally?

Ms. Feinstein: Doesn't everyone want to hear from Paul again after that? [See "Paul Rosen, head of CFIUS, Reveals How it all Works," The M&A Journal, Vol. 23. No. 10.] Going back to predictability, let me just spend a few minutes on ex-US regimes. I took great comfort in Paul's comments. Timeliness, efficiency, that's not the story outside of the US, where we see regimes that are more opaque, have more political influences, bring more uncertainty to a transaction.

CFIUS is an established body. It's been around since the seventies. It's been functioning for decades, but there's been a proliferation of new regimes that don't have the same expertise and experience, and they're operating in a politicized environment, where they might have political appointees who are foreign ministers, who have a broader mandate than just national security, and are thinking more about industrial policy, other things of national interest to a particular jurisdiction, no clear definition of what's national interest, what's national security. So you're operating, again, in a very opaque environment outside of the US. So it's tough for us as dealmakers. How do we predict what might be important to a regulator outside of the US in these unchartered waters, where they're still learning the way? So I'm going to take this opportunity to go back to Paul, because he was the good news on this panel. How do you coordinate with regulators outside of the US for their CFIUS-like processes?

Paul Rosen: Well, I'm certainly not going to give you advice on how to engage with foreign regulators. That would be slightly outside my scope.

Ms. Feinstein: How about how to engage with antitrust regulators?

Mr. Rosen: Yeah, right. That, too. I represent-

Ms. Feinstein: They're encroaching on your turf here.

Mr. Rosen: I'm here on behalf of the Treasury. Let me make that clear. So the international piece of what we do on the inbound screen is important, and here's why. We have, first of all, our authorizing statute, as updated in FIRRMA. The Foreign Investment Risk Review Modernization Act in 2018 talks to this explicitly, and we have a whole team that is dedicated to engaging with our allies and partners about their own inbound screening regimes and helping them set up their own inbound screening regimes and then working with them to help execute on those screening regimes.

Why is that important? Well, as CFIUS does more and more in this space, obviously, certain investors may seek to go elsewhere if they have nefarious intent. They may seek to go execute a transaction where maybe there is less rigor or no rigor, if their goal is to get at sensitive technology. So what we're trying to do is help our partners and allies build up their own screening mechanisms. What that means is over the last several years, we have worked with and helped over 30 countries set up their own inbound screening regimes, and we also engage in technical exchanges.

How do we look at a case? How do we think about national security risk? How do we run our process? So there's an ongoing exchange on technical information and, where appropriate, intelligence information. So whether it's our own Five Eyes [the U.S., Canada, New Zealand, and the U.K.] or beyond, we spend a lot of time engaging with that community to try to address our core mandate, which is to mitigate these national security risks.

It's the analysis and the facts of each case that we look at, no matter the country of origin, although I'm always surprised when the CFIUS annual report comes out at how many deals involving Chinese acquirers do get done. They're there. Again, we go through the facts, and if there's no risk or there's a risk that can be mitigated, we clear it. I think one of the observations that I've seen is that when we do clear a transaction, again, we can clear a transaction straightaway. We can clear a transaction with mitigation, which is a binding national security agreement, or we can recommend a block to the president, which often leads to an abandonment of that transaction. But in those first two categories, when we do clear a transaction, for confidentiality reasons and otherwise, we don't comment on the nature of how we clear the transaction. So it's up to the transaction parties to tell the world and describe to the world that they've cleared CFIUS. Oftentimes, that's all they say, but in many of those instances, we've cleared the transaction subject to pretty strict mitigation requirements.

Mr. Hall: So against all of that background, let's come back to the question of what do transactional lawyers do? What should we be doing in this regulatory environment, merger control, foreign investment, and the like? So yeah, three basic questions for us. Can we get our deal done, how long will it take to get our deal done, and how should we reflect the regulatory risk, the regulatory process, the regulatory consequences in our merger agreement or definitive purchase agreement? So we touched on this a little bit earlier, but let's now go specifically to how we manage the timeline, both pre- and post-signing. So Gar, do you want to kick us off here?

Gar Bason: Sure. The slide says parties should anticipate substantially longer timelines to closing. An observation I'd make, which several panelists have made yesterday as well, is you have to also think about timing to reach a signing. That's because it takes longer now, and that's in part because of the fundamental asymmetry between risk for seller and risk for buyer. If you're a seller right now, and I'm not intending

Regulators ➔

Regulators

continued

to be hyperbolic about it, but if you're a seller who's not a melting ice cube, not compelled to sell, there's a very real part of you that says, "Why am I doing this?," because unless a transaction has no antitrust complexity associated with it, you're looking at a timeline that's longer, and more important than that, you're looking at a risk allocation that means your board needs to assume a very real, statistically meaningful risk that the transaction won't close.

So you come back to the Clint Eastwood question, "Do you feel lucky?" Many people are answering that, "Yep, sure. Let's go ahead." But many are not. In that sense, I think you can have a debate about the philosophy behind a regulator taking an aggressive view on what the law is or what the law should be. My view is it has an impact on sellers in the form of deterrence.

Okay. So at that point, we now pivot to what you do as part of that. The first bit is self-explanatory and in many senses not terribly different to what's always been the case. We identify stuff, where you are going to get approvals. Then you come to what's been the most interesting development here. It's always been the case that corporate lawyers need Debbie and her colleagues, but to an even greater extent now, like the old song, the farmer and the cowman can be friends, because we really can't do anything now in all but the simplest transactions without a very clear thought as to what we're going to do, how we're going to do it, and who we're going to do it with.

To me, that breaks down, and Debbie can talk through this, into two areas. One, what's going to be our strategy with respect to divestitures? I find that generally tends to be a more harmonious dialogue between buyers and sellers. Mostly people can agree on what might be a template for doing that. The second prong of this is what's the strategy insofar as risk allocation to get it done? Covenant, hell or high water, reasonable best efforts, and reverse termination fee.

Mr. Hall: So Gar, if I could ju:st stop you there, coming back to the first of those two points. Asking Debbie: Is it your experience that in this pre-signing period the antitrust lawyers for buyer and seller get together, that there is actually normally an agreement as to the level of risk and the possibility for remedies?

Mr. Bason: I'm not sure. Just to correct, I wasn't suggesting that buyer and seller always agree on the assessment of just how risky it is unless you have a lie detector machine there. But in most cases, I've seen people have a fairly good agreement on, "I think we're going to have to divest this and this and maybe conduct remedies on that and that."

Ms. Feinstein: Yeah, I would agree with that. I think usually when I talk to my counterparts, we're rarely flagging issues that the other one didn't even think about. The question is really, "How long will it take, and what will we have to do to solve the problem, and are the parties willing to do it?" That really ends up being what the issue is. Many deals can be divested, but if you have to agree to a prior approval clause, the seller's like, "You should do it." Then the buyer responds with "I'm not opening up every deal I do for the next ten years to not being able to go to a federal court judge." So that's the kind of issue that I think you have in this pre-signing period, which is one thing.

The other thing is you want to be really ready to engage with the authorities. You don't want to be in a situation where you're signing the deal and only then beginning to discuss, "Okay. How do we tell the story? What do we do? How do we engage with them, and how do we make sure that we have the facts?" There's always tension there, right? The business doesn't want to open up, especially the seller's business, everybody, to basically having all kinds of conversations.

On the other hand, I've had surprises when the senior executives say, "The customers will love this. We never compete with the other side." Then you start digging in, and you find, "Maybe the customers won't love this, and we actually do compete with the other side." So managing that in the pre-signing period can be tricky.

Ann Beth Stebbins: Debbie and Gar, what about international coordination and the tactic of running out the clock and using other agencies and other jurisdictions to do the dirty work?

Ms. Feinstein: Well, certainly the FTC got accused of that in Illumina/GRAIL, of trying to get the EC to block a deal that it couldn't. There's always been cooperation between the agencies. I think there should be. I think it's mostly better for the parties when they do that. I've rarely seen the clock just run out. Interestingly, the FTC has shown a willingness, even while the European Commission or the CMA is analyzing, investigating a transaction to nevertheless go ahead and start the court proceedings. They're not saying what they could, which is, "We're not even going to begin until we know whether we have to." So

I've seen fewer deals just have the clock run out, in part because companies are realizing this, and they're putting in longer walkaway periods in their agreements. Gar?

Mr. Bason: Yeah, and so I have a question for Debbie. In terms of ways to deal with it, all right. So let's assume people say, "Yep, selling X would solve things." Then you get into the debate whether, "Will we do that only if required, or will we offer it voluntarily?" Assuming you do have consensus on that, then you get to the hierarchy of the most ideal. The most ideal would be to show up on the day you signed, I suppose, with an agreement that you've already agreed to sell X. That's usually a little bit more easy to articulate than to do. But do you think now that this FTC sees a huge amount of difference between you show up with a solution in hand or you work out during the process what it is that you'll sell?

Ms. Feinstein: I don't think this commission is probably a whole lot different than other commissions on that narrow issue. When I was at the FTC, even if parties brought divestitures to us on day one, whether they either said, "We're going to divest" or they even had an agreement in hand, we were still going to look behind that. So when RJR made an acquisition and already had an agreement in hand to divest to Imperial, we nevertheless looked at that agreement. We vetted Imperial to see if we thought they would be a sufficient buyer. We looked at the terms between the parties and made sure that there were sufficient protections, transition services, and the like that would be good. At the end of the day, we still put the parties under a consent decree, even though they had brought us the agreement upfront, because we wanted to make sure it happened. Agreements can get undone. They don't close. People can amend the terms in ways that are unsatisfactory.

So I think that's always going to be an issue. The problem now compared to before is that the government is saying, "We're skeptical of any divestitures." So the idea that you can try to put the perfect package together and if you have to add a few more things to it, you will, or you'll change some terms of the agreement, but you'll ultimately get to a consent decree with some predictability, and not every deal could be resolved. There were plenty of times when I talked and talked and talked with people when I was at the agency about whether or not there was a divestiture, and at the end of the day, we couldn't get it done. Sometimes we went to court, and only then did the parties come talk to us about settlement agreements. So not every deal can necessarily be fixed. I think it's just a higher standard to convince the authorities that a divestiture will actually solve the problem now than it used to be. But it'll help you in court.

Mr. Hall: I was just going to just come back, I think, Gar to your comment about strategy and also the discussion of timing agreements that I cut off a bit earlier. Accepting what Debbie says that with the current antitrust authorities in the US, turning up with a pre-agreed buyer or a fix-it-first strategy may not be convincing to them. But if your strategy is going to be to test the agencies, if you are confident you need a divestiture to solve a problem, are you better off testing the agencies by saying, "We've got our buyer," the classic fix-it-first?

Mr. Bason: Also put a pin in that, because what I think about in that debate is it's fine to say, "Well, after we announce we're going to go and find a buyer," that's a little bit like the old economist joke. Assume the existence of a can opener, because again and again and again, buyers find that once they've announced a deal and they are a forced seller for a particular asset, finding a buyer that's viable from the government's perspective, and getting a deal done on acceptable economic terms are three different things. So you really have a tension in the sense between achievability as a commercial matter of your on sale and the package that would work for the government's perspective. Again, if you are, sadly, cynical or realistic about your ability to convince your regulator, that might make you think that fixing it first, if you could do that, is a better alternative.

Mr. Klingsberg: I think the Holy Grail, and this happens these days, is before you even file, you've done self-help. Yes, it's a pain in the ass, because you're delaying your filing. A lot of times, the client is looking at you like, "We're divesting before they even caught onto this?" But if you can close your divestiture, and then you have to be doing it generally from the buy side pretty much every time, I think at the very least, you're going to be narrowing what they're going to look at on the second request, and you're going to be taking the easy issue off the table, the easy issue from the regulator's point of view or the agency's point of view off the table on that. Then also, to your point about if you end up with a consent decree on the divestiture, then

Regulators ➔

Regulators

continued

you end up with this prior approval, which you really want to avoid. So yes, I agree it's hard, but I think if it's the type of asset that you can close a sale of, even if that means delaying your filing until the fourth or fifth month, which seems really counterintuitive, it could really benefit you in the long run.

Ms. Stebbins: I would add a fourth criteria to Gar's three criteria, all of which I agree on. These days, most of the times you're going to be asking the divestiture buyer to stick with you through litigation and cooperate through litigation, because you want to have the threat of litigation. Not only do you have to find a buyer, but there is also going to be sometimes a fire sale price and all of the other things that Gar said, but you're also going to want them to agree that they will stick through litigation with you. Particularly if you have an obligation to litigate, you're going to want to litigate the fix, because that's been successfully done recently. That used to be very hard to do. Companies litigated the fix when I was at the agency a number of times and were unsuccessful. We convinced the government, we convinced the courts that the divestitures did not meet the standard that we needed to basically replace the lost competition. But you saw in the recent United Health case that there was a divestiture and the parties convinced the judge that it would be sufficient to take away the problem. The judge was also convinced that on the vertical part of the transaction, the supplier input part of the transaction, that there was no concern. The government filed a notice of appeal and then quietly and for reasons that nobody has yet articulated publicly withdrew that appeal. So what you've got is this weird situation where people are emboldened, that if they were ready to litigate anyway, boy, they're seeing the government lose some cases, but they don't want to have to go through that litigation. So there's that tension. Some people will be, "I'm not afraid to litigate. I want this deal. I'm going to stick in there for two years, and I'll make it worth the seller's time." Interestingly, what I haven't seen is ticking fees or purchase price goes up if I have to litigate or anything like that. That hasn't gotten into the mix yet, and I would look to the corporate lawyers to ask if you're hearing more of that.

Mr. Hall: Well, on that note, Ethan, you've done everything Gar said. You've prepared. You've agreed the strategy, and now the time comes for we mere corporate lawyers—I don't know whether we're the farmers or the other people in that joke, Gar—but what are we seeing in merger agreements now on deal terms as we try to manage all of this?

Mr. Klingsberg: Sure. So first of all, as the outside dates are just getting longer and longer because of this need to preserve the option to litigate, I think if you had gone into clients in boardrooms when they're considering an M&A deal two years ago and said, "Well, we think this deal is capable of being cleared, but you're going to have to litigate," you would've gotten a lot of gagging. Nowadays, there seems to be much more enthusiasm for litigation as one of the strategies to use to get the deal cleared. That's why we're seeing the outside dates expand, and we're seeing most deals—I think we have near sixty-five percent of the deals—are including a hard obligation on the part of the parties to litigate to get the deal cleared. So we're going out to 18 months pretty regularly on deals that we think are going to get second requests, and then there's even a handful of deals where there's the ability to extend all the way out to 24 months.

Mr. Bason: Although Ethan, I always have a chuckle at that. I had someone say to me, "Well, it's an 18 month drop dead date with an ability to extend for six months." I said, "Okay, so it's 24 months you're at. "No, no, 18 with an ability to extend for six months." There's no difference.

Mr. Klingsberg: That's what I'm saying.

Mr. Bason: I agree with the numbers. I think you're seeing people in tough antitrust situations agree to essentially two years' commitment, which is a horrifying thing in terms of the seller's burden of complying with covenants and watching its customers fade away, et cetera, et cetera, and employees.

Mr. Klingsberg: It makes the interim operating covenants really tricky.

Ms. Stebbins: Oh, and financing, too.

Mr. Hall: Yeah. Well, it's a burden for the seller on the interim operating covenant. It's a burden for the acquirer on its finances.

Mr. Klingsberg: One important point to keep in mind is the way the CMA interplays with this timeline, because as I understand it, the CMA will let you close, but they will say, "We're going to continue our investigation, and while we're continuing it, anything that impacts the UK, which for instance, for an internet company is the entire business, you have to hold separate." So that's just saying you can close as long as there's no injunction or legal restraint on closing. So say then you decide to close and the CMA will say fine, but then all of a sudden, you're closing into a hold separate. So it's very important if there's a risk of CMA review to build in this burdensome condition concept into your closing conditions so that it's not only that you're clear to close or there's no impediment or restraint on closing, but also that you're not closing into extreme remedies or temporary remedies, such as holding separate, and their investigations could go on for over a year.

Ms. Stebbins: That's a risk you have to decide not only for the UK, and that's sort of a newer issue, because with Brexit, the Competition Markets Authority is being much more active. But Australia is another place where I've had deals where as the seller, we had that. You close unless there's an injunction, and I know of at least one case where Australia said they were going to continue to investigate their transaction after it was closed. That was a risk that was embedded in the agreement that the buyer would take. So there are some risks to buyers in those situations, and thinking about them upfront and how you're going to write those closing conditions is very important.

Mr. Klingsberg: Also, another point that Debbie will always emphasize is make sure that not only has your waiting period expired, but any timing agreement you've entered into has expired.

Ms. Stebbins: Yeah, and to the closing condition point with the CMA being a voluntary regime, too, it also makes it tricky. How do you build that into your condition if you don't know if the CMA is going to take an interest?

Mr. Klingsberg: It usually requires some creativity in the famous schedule, where, say, HSR plus everything on the schedule. You have to make sure you know what you're doing on that schedule for CMA and some of these other voluntary regimes, where it's voluntary, but they're going to look at it. Then all of a sudden, you're stuck with something extreme, like a hold separate.

Ms. Stebbins: Right. It's another reason why the antitrust lawyers say, "Please, please, please call us early." While I can do a Hart-Scott analysis usually in about an hour or two, doing foreign filing analyses is not an hour or two job. It can be a week or two job, because in many of the jurisdictions it isn't simple numbers. It isn't just, "What are your revenues? What are your assets?" It's also, "What's your market share?" So you have to decide, "Well, what are the plausible markets that I could have?" That's not an easy question, right?

I joke that I get paid a lot of money to tell you whether or not Cheez Whiz and Easy Cheese are in the same product market. That's actually a case I had. I could, "Raise your hands," and my guess is it would be half would go up and say yes and half would go up and say no. There's a lot of analysis that goes into that question. You have to do that just to figure out whether or not you need to make a filing in countries like Spain, which has a market share test, and figuring out what the right market is. So this is just my plug for please call your friendly antitrust lawyer early and often.

These discretionary regimes, too, there are more and more of them where there's not a threshold. So it's not just subjective test of you have X amount of revenues in that particular jurisdiction. I think it's up to 50-plus jurisdictions that there's discretion that they might be interested, no threshold required.

Mr. Klingsberg: Well, it's a similar issue with CFIUS, right? Because there's lots of buyers, foreign buyers who will get a report saying, "No CFIUS filing is mandatory, but it's very important to us to get the comfort". Then that's not a fun message for a target board to hear, and you've really got to go in and have your messaging on the buy side very crisp so that you can convince the target board to accept the CFIUS closing condition when it's not a mandatory filing.

Mr. Rosen: One of the things CFIUS has, which is unique, is strict timelines. Now, for those 40 percent of cases that don't make it through in the first tranche, there's usually an issue. There's a risk. There's something that needs to be dealt with, and sometimes that can bleed into multiple withdrawn/refile periods. But we really try not to go there unless there's something critical that still needs to be resolved. But I was going to say oftentimes in the last ten days of a statutory

Regulators ➔

Regulators

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period, we are working day and night to try to get this done before the deadline, because we, I don't want to restart the clock. I want to get this case off my books, and I want to do everything we can to resolve any national security risk in that period. But sometimes the parties are like, "You just gave us a 40-page national security agreement. I've got to take it to my board in this country. There are factors outside of our control." But those strict timelines do form a basis, which is quite unique, to try to get stuff done.

Mr. Klingsberg: In my experience with CFIUS, I know there are these timelines, but as you said, there are often extensions or re-pull and refile. The best way is to be very proactive in the messaging to CFIUS and not wait for CFIUS to come back to you and say, "Oh, you know what? This is the way we think your business works, and this is the issue we have," but to figure that out ahead of time and go to CFIUS proactively early on and say, "We just want to make sure you understand that this is the way it really works, and that's why this issue that we think you could have is not a problem" or you say, "This is the mitigation that we're going to offer up," not to wait until we're pulling and refiling, pulling and refiling it, and then getting the messages. It's very hard, at least in our experience, to change once you're in that if you haven't already started shaping early on.

Mr. Rosen: Just on that point real quick, that's a very important point. I'll also say before you even submit a filing to CFIUS, we will engage in an informal consultation process before you're on the clock to engage in some of these issues as well. That's an opportunity that not everybody takes advantage of, but is one way to get ahead of level-setting on, "What's the nature of the transaction we're dealing with? What's the commercial rationale? What is the technology involved?"

Mr. Klingsberg: That goes back to Ann Beth's point about if it's discretionary and you're on the buy side, you really have to figure out all those points that Paul just mentioned and convey that to the target board so that they're not freaked out that you're insisting on this condition that you don't have to have.

Mr. Bason: But ironically, whether it's a closing condition from the get-go or a springing CFIUS condition, to me, it has gotten to be the place that the timing issue is never going to be CFIUS where you're anticipating difficult antitrust clearances, because you could do one, two, three national security agreements in the time that it takes to do a second request and go wrestling with the antitrust regulators in Europe and the United States, because there, you're really looking at a 12 months to 18 to 24. I'm not saying CFIUS breezes through, but even complicated CFIUS cases, you have a real hope of resolution far shorter than that.

Mr. Hall: I better assert my own timing agreement again.

Ms. Stebbins: Can I make two quick points on timing? One is that you do have to go through a pre-notification period with most European jurisdictions. So this notion that you can put in your agreement, "We'll all file within 20 days of signing the agreement," no, Europe tells you when you are ready and when you can file. That's the key point that I wanted to make.

The second thing is if you are going to make a divestiture, you don't walk in on it with day one, but you want to see how things play out, it is always better to make the first move with staff. If you have got an adverse staff recommendation and you're coming into the bureau director's office or a higher-up's office with an offer to divest, it's probably too late. People have gotten their heads around something. It's going to take you way longer to then go back to staff. So you need to take your best shot with staff, especially now. You have no chance of getting, I think, current management to overturn staff. But if you've got staff onboard and fighting for you, you have a shot.

Mr. Klingsberg: Back to the merger agreement. So with the timelines, and I think a big part of this is higher interest rates, which are present value or the cost of having 18 months is a lot more now than it was a year ago, and in addition, a lot of these targets are paying. They're burning cash and paying on their debt. So we're seeing more mechanisms included in merger agreements to make the buyer pay for time. I think a lot of buyers are excited about doing this, because they want to distinguish themselves, and targets feel obligated to do that.

So there's the old-fashioned ticking fee, which continues to be out there. We're seeing ticking fees also that are increasing as time goes on. Then in the JetBlue/Spirit deal, there's actually a provision that as time goes on and there's no regulatory clearance, there has to be a payout not to the company, but to the shareholders, which I think is an interesting technique, because it arguably sets the incentives a little better, because you don't ever want the target to think, "Well, if we can stretch this out another couple weeks, we're going to get another payout."

So the payout goes directly to the shareholders, which is actually an interesting point also on reverse termination fees. There could be real benefits sometimes to the targets. I think going back to T-Mobile, where T-Mobile got Spectrum, which turned out to be game-changing for them as the regulatory termination fee, and I think the regulators probably take that into account, if part of the impact of delaying and blocking the deal will be to help the target. So anyway, there's this idea of sending the payment, either the interim payment, or I have done it for the regulatory termination fee, it can go directly to the shareholders. Then we have the concept of the regulatory reverse termination fee increasing with time. There has also been a number of deals both in private and also even some public deals where the buyer is providing financing, actual revolving credit agreements or unsecured loans, to the target because the target's going to be out there for so long, being tied up with this deal while it burns cash. Finally, less favorable but still something to compensate the target for all the hassle of second requests and the time, are to pay for the buyer on an interim basis to fund the litigation and other transaction costs during the second request process.

Mr. Hall: So Gar, we've seen all of these tools start to appear, start to become a little bit more common. What's your sense of where we are going in all of this? Two years from now, will every deal have a ticking fee? What do you think we're going to do?

Mr. Bason: I suspect fewer ticking fees, more reverse termination fees. Reverse termination fees used to be the white elephant in the jungle if we went back whatever, five, seven years ago, and now they're quite regularly discussed. But the one thing I would mention, I was once roundly spanked by a client where a transaction failed. We had a very big reverse termination fee. It was 10 percent. I felt particularly proud, and somehow that came out. The CFO said, "Gar, are you a moron? Do you know what's happened to our company in the last couple of years? We've been crushed. Your reverse termination fee is a drop in the bucket, and by the way, it's taxable."

So it's important to take those with a grain of salt. But I do see RTF discussions being a part of every complicated regulatory deal, along with covenants. This is where Debbie will help us. I often see sellers ask for the moon, the sun, and the stars in terms of aggressive regulatory covenant and reverse termination fee. But then I see buyers say, "Well, wait a second. If you have the gun to my head, why do I have to also put a second gun to my head on the covenants." What's your reaction to that?

Ms. Stebbins: I think that's right. I think there are two concerns that people have. One is just, "I don't know what crazy new thing the government's going to come up with, and I don't want to have a blank check." Right now, the prior approval provisions are very narrow. They're limited to the market at issue. But imagine that you're a tech company who rather than "You won't buy another company in this space that's similar to the one you bought, you won't do any transactions over $500,000 in size without government approval." You're not going to agree to that.

Second, I think some companies, and I never used to think this was an issue, I'm a little less certain now, you don't want to give the roadmap of agreeing to make a divestiture of this business or this kind of divestiture, and would prefer something more open-ended so that it doesn't have a roadmap. So that's usually why buyers say, "Look at the big breakup fee, a billion dollars here, two billion there. That's enough to get me to do just about anything that's reasonable, and I want to do this deal and I'm not going to walk." That usually ends up being persuasive enough.

Mr. Klingsberg: The interesting thing that's happening now is even with hell-or-high-water, we're seeing targets insist on reverse breakup fees. The reason for that is there's a lot of questions about how you enforce hell-or-high-water, right? One, there may be just a no, and then there's no way of satisfying that. There was a case where Whirlpool went to the court in the Southern District of New York saying, "We want an order of specific performance on our hell-or-high-water." The judge said, "Well, there's another three weeks," and denied the order, but then looked at the buyer and said, "I don't want to see you back here in three weeks." The deal did close. For specific performance, you really need something specific that can be done and that's doable. So there's a lot of anxiety around

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Regulators

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that. But as we've gotten to more strong regulatory covenants, still, it's become more pervasive to have reverse termination fees. As reverse termination fees have become more pervasive, they've come down generally as a percentage. Not everybody's getting 10 percent like Gar got.

Mr. Hall: Just on Ethan's point, we've got a couple of slides coming up. We won't go through them in detail, but to emphasize his point, it is interesting to see how reverse termination fees are being linked to covenants, how more deals are getting reverse termination fees, but the size of the termination fee isn't going up. If you'd asked me in the abstract, "Richard, what would you predict if there was a massive uptick in regulatory enforcement action and you saw an uptick in the percentage of deals with RTFs? Where would you think the percentage would go?" I would've said, "I would've thought the percentage would go up." We just haven't seen that. So Gar, any sense from your own experience, is there something driving that or is it just negotiation?

Mr. Bason: I think it's just negotiation. Also, in a sense, I think a lot of buyers were less than completely thoughtful about agreeing to gigantic seven, eight, ten percent reverse termination fees. While I think the dilemma is mostly that of the seller when there's a failed deal, if a buyer goes out and announces this transaction, they're going to tout it as absolutely essential to their strategy, "This is great, the link to the next hundred years of our company." Then you face the, (a) "You failed to get the deal through" and (b), "Well, actually, this isn't so important for our strategy." You also have the incredibly unpleasant task of telling your board, "Oh, by the way, we need to write a check for 750 million dollars." I think to a greater extent, buyers are focusing on that. As the probability of that occurring gets larger, I think general counsels are more sober with their CEOs about just what that means and that in turn links to the board dialogue.

Ms. Stebbins: And just to the point you made earlier, too, Gar, it's not that valuable to a seller, because you've been sitting out there with this deal announced.

Mr. Bason: And your employees are gone. Your customers are gone.

Ms. Stebbins: Right. It just needs to be high enough—and billions of dollar reverse breakup fees are high enough--that it basically assures that the seller, that they will take reasonable efforts. You're seeing reverse breakup fees in deals that used to be just standard "you'll use reasonable commercial efforts to get the deal done," and everybody knew that reasonable commercial efforts would be enough. Here they want to give you a little more incentive. So you're seeing reverse breakup fees in deals that three years, five years ago, never would've had them.

Mr. Hall: So as the clock is ticking down on our panel, if I could just come back now briefly to your earlier comment about interim operating covenants, Gar, as deals have stretched out, what are you seeing in the IOC area? Any interesting developments or predictions for the future?

Mr. Bason: I just think the interim operating covenant in my mind always used to be something that you settled at 10:00 at night on the night that you were signing, when two business persons got together and said, "Yeah, that's okay. That's okay." Now it occupies a far greater amount of time, because as you contemplate that your deal time clock may be 18 months, as a seller, you worry about a great deal of things. "What happens when the economy turns? If it does, can you reduce effectives? Can you sell assets?" You have often seen companies, buyers and sellers on a collision course, because the asset that a seller might want to divest in tough times happens to be an asset that the buyer wants strategically. These get cast into very sharp focus, to me at least, in ways that haven't, meaning that the IOC discussions are far more difficult.

Mr. Hall: It's an unfortunate coincidence that we've just been through COVID and a great deal of popular discussion about IOCs. For the first time in a long time, senior people are getting very worked up about IOCs, and that is then piling on—

Ms. Stebbins: Those disclosure schedules are no longer left to a second-year associate.

Mr. Hall: Yes. Yeah, yeah. So one final thing. You commented earlier, Ann Beth, about the impact of regulatory delay on financing. What have you been seeing in that area, and any predictions of the future?

Ms. Stebbins: Yeah, that's challenging when we're talking about 18 months, 24 months out. Commitments have typically been 6-month financing commitments. I think it makes it much more challenging for deals relying on financing if there's regulatory hair.

Mr. Hall: Yeah, and we heard yesterday from one of the panels about the difficulty of the financing markets generally. I think Cravath's experience is it's very expensive to get a financing commitment longer than 12 months and bordering on the impossible for below investment grade or challenged borrowers. So that's another factor here making deals harder in the regulatory environment. So on that, one final run around the panel, starting with you, Ethan. We did this panel a year ago. We made a few predictions. We got some of them right, some of them wrong. You were on the panel last year. What's your prediction for the coming year?

Mr. Klingsberg: Well, first of all, I'd say there's a lot of deals that just aren't being done, right? So it's hard. I'm not going to make a prediction that tons of deals will be blocked, because I just think the number of deals that are being passed on is much more than I think we imagine.

I think now this is even infecting the private equity space, which really had been immune from all this for a long time. On the CFIUS side, I think where maybe the biggest influence is going to be is just the sovereign wealth funds are so important to getting deals done now to make the equity checks work. I think we've figured out a way of navigating, bringing in all that sovereign wealth money and cutting back their rights, as Paul alluded to, so that we can shape it and still get private equity deals done. But there's a case pending now for Thoma Bravo. So I think that if the antitrust starts infecting and making the private equity side hard, then that could really slow down our workload. But I would also say on the optimistic side, I reiterate clients are pretty pumped about litigating, much more so than they ever were. So I think we're going to continue to see deals get through because litigation is just going to be the way we respond. There's also this idea of abandoning timing agreements, expediting and getting rid of this idea of 24 months or even 18 months and figuring out a way to move more quickly.

Mr. Hall: Debbie, you weren't on the panel last year, so none of your predictions were wrong. What are your thoughts for this year?

Ms. Feinstein: Deals can still get done. More will get challenged. They will take longer. More of them will end up in court, and you're going to need to think about antitrust a lot more than you used to.

Mr. Hall: Assistant Secretary Rosen, you are exempt from the requirement to make a prediction. Feel free to waive the exemption.

Mr. Rosen: Well, I'm not going to weigh in on specific predictions, but what I'll say is I think some years ago, even two, three years ago, CFIUS was certainly not a household name and perhaps it's not today but more and more people, particularly on the deal side, understand that CFIUS exists, understand what it does and I think in the year and years to come, that is going to be even more acute when it comes to deals and national security risks that keep popping up in deals. So I think stay tuned.

Mr. Hall: Ann Beth?

Ms. Stebbins: Biden has not yet blocked a deal. The president can block a deal under CFIUS. I think we're going to see Biden block a deal. I don't know what it's going to be, but I think everyone wants to look tough on China, and in an election year, what we don't know through our intelligence agencies as deal-makers, I think will be translated into some sort of China risk, and Biden will block a deal to be tough on China.

Mr. Hall: Gar:

Mr. Bason: Our practice thrives on complexity. I think next year, we'll provide lots of it, and I hope it will be better than people fear.

Mr. Hall: So my prediction is we'll be talking about this issue 12 months from now in Tulane. So see you all. Thank you. Thank you, everyone.

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Regulatory Merger Control Regimes – What is Going On and What Should Dealmakers be Doing in Response?

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Agenda

- Merger Control Regimes
- Foreign Direct Investment / "National Security" Regimes
- What Does All This Mean for Deal-Makers?
    - Managing the Timeline: Enhanced Deal Preparation Pre-Signing
    - New (or not so new) Regulatory Strategies
    - How Deal Terms Are Evolving In Response to the Regulatory Environment

2

Merger Control Regimes Globally

3

Merger Control Regimes Globally

- More of them
  - Over 140 "antitrust" pre-merger notification regimes
    - U.S. Department of Justice/Federal Trade Commission, European Commission, Chinese State Administration for Market Regulation, Competition Canada, UK CMA, Australian Competition Commission, Brazilian CADE
  - Consistent increase in:
    - Absolute number of pre-merger notification regimes
    - The number of "suspensory" regimes rather than merely "notification" regimes
- Reviews take time
  - US - 20 significant investigations in 2022:
    - 15.4 month average
    - twice that of a decade ago
    - Up from 11.4 in 2021
  - EU – 18 significant investigations in 2022:
    - Average phase 1 remedy investigation duration was 8.3 months (down from 10.3 months in 2021)
    - Average phase 2 remedy investigation duration was 18.4 months (down from 19.2 months in 2021)

4

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Merger Control Regimes Globally (Continued)

- Globally, merger control authorities are becoming more influenced by broader questions of national "industrial and trade policy" than by narrow competitive concerns
  - E.g., national infrastructure policy, food chain security
- They are also more alert to the opportunity to use merger clearance as an opportunity to advance other political objectives
  - E.g., climate change, enhanced data privacy objectives
- They also seem more influenced by political leaders and less by career technocrats

5

Specific Issues in the U.S. Department of Justice and Federal Trade Commission

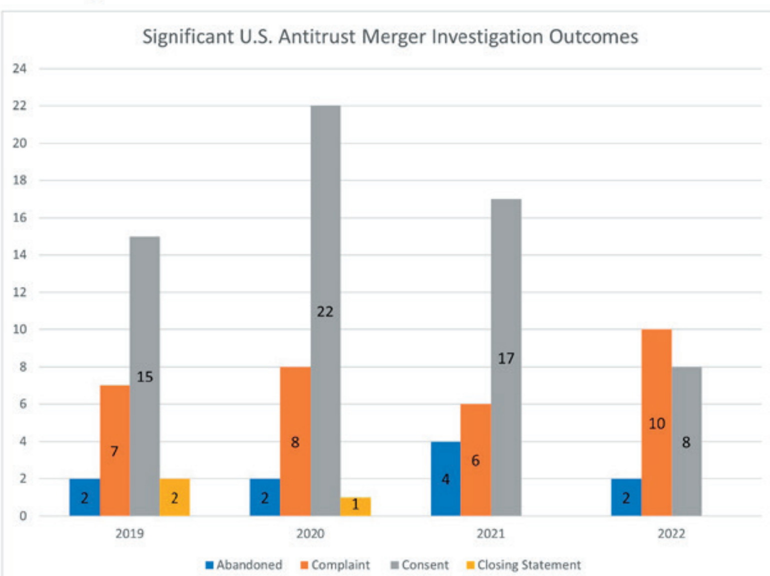
6

Specific Issues in the U.S. DoJ and FTC

- The top people really do set the agenda
  - Much more policy focus in selection of DoJ and FTC leadership
- Increased openness to new theories of antitrust enforcement
  - The agencies are focusing on non-traditional theories of harm, including:
    - Eliminating nascent competitors/killer acquisitions
    - Effect on labor markets
    - "Moat-building or data-aggregation strategies by digital platforms"
    - "The cross-market effects of a transaction"
    - "Roll-up plays by private equity firms"
  - For many theories it remains unclear what evidence would cause the DoJ or FTC to challenge a merger
- Active across many industries – not just tech and pharma

7

Specific Issues in the U.S. DoJ and FTC (Continued)



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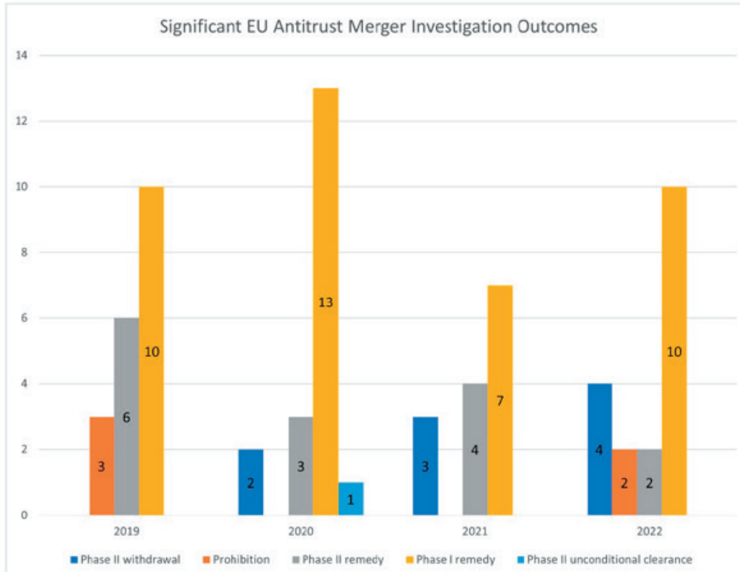
Specific Issues in the U.S. DoJ and FTC (Continued)



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Specific Issues in the U.S. DoJ and FTC (Continued)

- Greater reluctance to accept structural or behavioral remedies
  - Greater uncertainty *ex ante* as to whether these remedies will be acceptable
- Increased willingness to litigate merger challenges in court
  - AAG has made clear DOJ will litigate, even if that means losing some cases
- FTC
  - Fewer enforcement actions than prior years
  - Lost a number of merger challenges
  - But some mergers have been abandoned in face of challenge, e.g., Lockheed/Aerojet
- DoJ
  - Lost 3 of 4 litigated cases
  - But AAG Kanter points to numerous mergers abandoned after DOJ challenges
- Both agencies have stopped granting early terminations of HSR filings except in rare cases

10

Specific Issues in the U.S. DoJ and FTC (Continued)

- Issuing more second requests to gather information related to new theories
- FTC issuing "close-at-your-own-risk letters" after HSR deadlines expire
  - But reportedly no active investigations of those deals
- FTC including "prior approval" provisions in all divestiture orders
  - Requires merging parties to seek FTC approval before closing future transactions -- typically in each relevant market at issue in the order but may be broader
  - Prior approval requirements last a minimum of ten years
  - Overrides HSR filing thresholds
  - Reverses the "burden of proof" under HSR – contrast "need for FTC approval" with "expiration of waiting period"
- New Merger Guidelines expected shortly
  - Likely to lower bar substantially for FTC or DoJ to challenge a merger

11

Foreign Direct Investment / "National Security" Regimes

12

Continued ➔

Foreign Direct Investment / "National Security" Regimes

- Expansion of FDI regimes globally
  - Significant expansion in Europe, e.g., the EU-wide cooperation framework, the U.K. National Security and Investment Act 2021 and proposed, new or amended FDI regimes in a majority of EU member states
  - Significant restructuring in 2020 in China, with responsibility shared across China's State Administration for Market Regulation, Anti-Monopoly Bureau of the Ministry of Commerce and National Development and Reform Commission
- Expanded jurisdiction and lowered thresholds
  - E.g., expansion of CFIUS under FIRRMA in 2018 and substantial expansion of Australian FIRB jurisdiction in 2021
- More mandatory filing regimes with potentially harsh penalties
  - E.g., mandatory CFIUS filings can be enforced with fines up to the value of the transaction, mandatory filings under the U.K. NSIA can be enforced with criminal penalties

13

Foreign Direct Investment / "National Security" Regimes (Continued)

- Robust risk assessments
  - Industries with "national security" implications
  - Access to personal data
  - Presence of direct or indirect involvement of government ownership or acquiror
- Close review of transaction structures and parties involved
  - *E.g.,* looking though limited partnership vehicles to determine where the money is coming from
  - Review of individual PE sponsor management
- Dynamic environment
  - Can "the best interests" of a country be separated from political preferences and industrial policy?
  - The question of whether a foreign company threatens "national security" may be related to geo-political assessments of risk
  - Decision makers in many jurisdictions are political appointees – such as government ministers

14

Foreign Direct Investment / "National Security" Regimes (Continued)

- <u>Challenges for advisors</u>
  - Particularly with "national security" regimes, it is increasingly difficult for M&A participants to learn or predict what will be objectionable and why
  - No clear definition of what constitutes "national security"
- <u>Increasing level of cooperation between reviewing agencies of "allied nations"</u>
  - All EU member states will become aware of any deal formally notified in the EU through cooperation mechanism

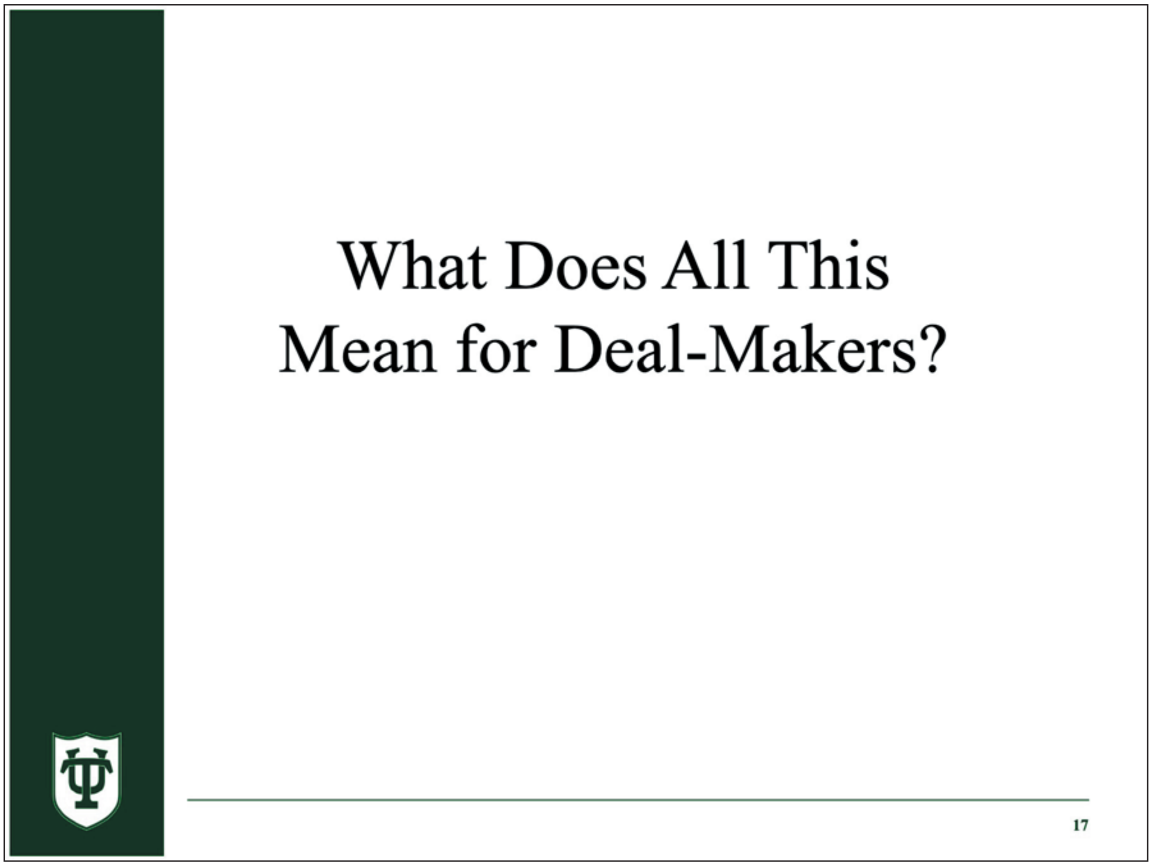
15

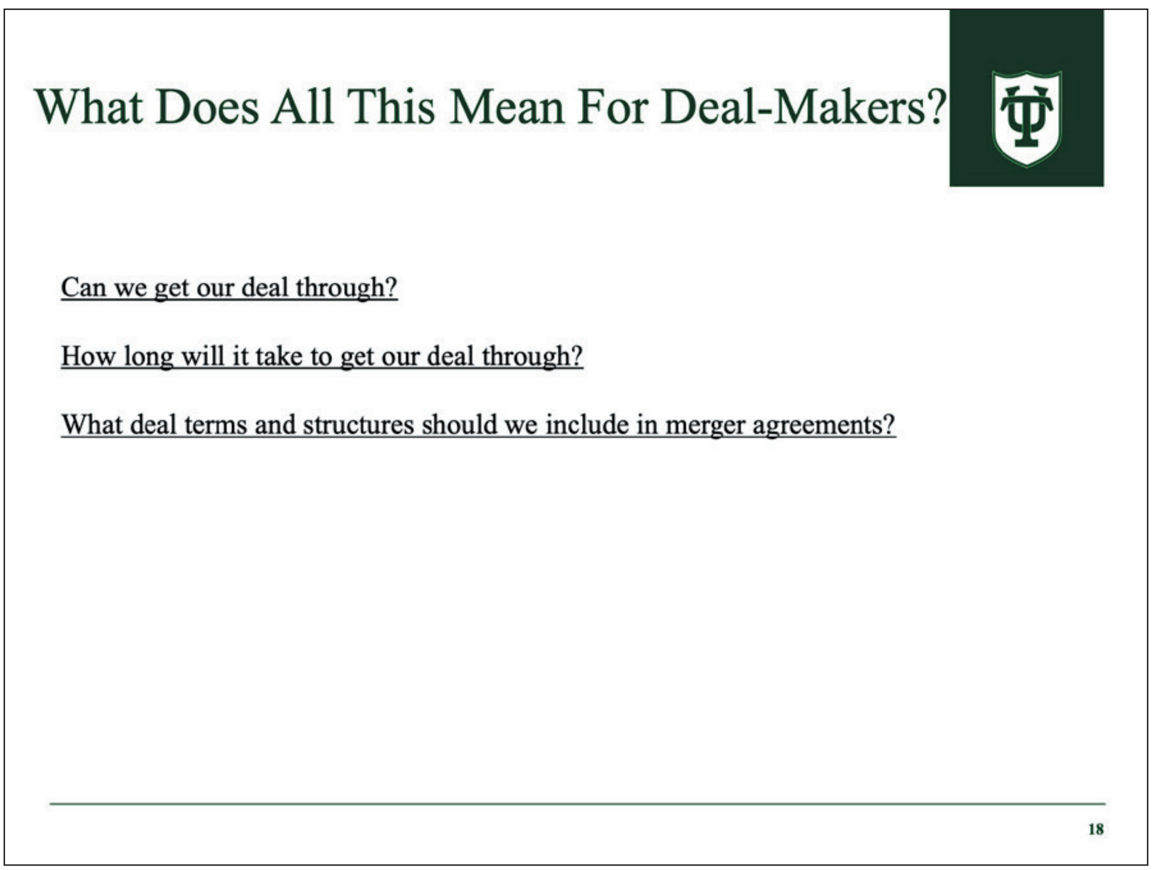
Foreign Direct Investment / "National Security" Regimes (Continued)

- <u>CFIUS notification process</u>
  - Voluntary filing regime, with certain mandatory requirements
  - Two different filing paths
    - Declarations (i.e., short form filings with 30 day review period) are an attractive option for <u>*certain*</u> transactions
    - Notices – longer form and longer review period
  - Top-line number of covered transactions before CFIUS (whether short-form or long-form) increased significantly in 2021 (up 39% when compared to 2020)
  - CFIUS continues to devote considerable resources to identifying "non-notified" transactions
    - What happens if CFIUS reaches out post-closing?

16

Continued ➔


What Does All This
Mean for Deal-Makers?
17


What Does All This Mean For Deal-Makers?
Can we get our deal through?
How long will it take to get our deal through?
What deal terms and structures should we include in merger agreements?
18

Managing the Timeline

19

Managing the Timeline:
Parties should anticipate substantially longer timelines to closing

- Policy changes (e.g., big is bad) have resulted in more scrutiny for M&A
- More in-depth reviews and second requests
  - Novel theories of harm may make for more complex reviews
- Multi-jurisdictional reviews may extend timelines or kill deals
- Divergent regulatory outcomes are a key challenge
  - It only takes one regulator to kill a deal
- Parties should be prepared to litigate

20

Continued →

Managing the Timeline: Preparation

- Identify required approvals
  - Will the parties file in voluntary jurisdictions, e.g., CMA filing in the UK?
- Identify regulators that may have an interest in the transaction
  - CMA may investigate even if minimal sales in the UK
  - Assess likelihood of Article 22 referral to the EC
- Prepare for coordination/cooperation among regulators
  - Anticipate coordination with foreign competition authorities and other domestic regulators (e.g., CFIUS, FCC)
- Agencies will request waiver to permit sharing of information among regulators
  - Generally granted with exception of China

Bottom Line: Critical to consider strategy from the earliest stages of deal, and tactics will need to evolve based on issues raised by regulators.

21

Managing the Timeline: Strategy

- Identify jurisdictions where there may be substantive issues
- Identify jurisdictions that are more amenable to remedies
  - May influence timing of filings – leverage remedy in one jurisdiction to obtain approval in another jurisdiction
- Determine whether to voluntarily file with in relevant jurisdictions
  - Does a voluntary filing prevent closing for a defined period?
  - Does an investigation prevent closing?
- Prepare for Article 22 referral to EC if transaction has potential effect on competition in the EU
  - Even if thresholds for EC jurisdiction are not met

Enforcement authorities will coordinate with each other and may take different approaches. Coordination and consistency are key.

22

Managing the Timeline: Other Constituencies

- Commitments to customers, suppliers, labor
  - Old playbook included outreach to constituencies that could have concerns about transaction
  - Negotiate arrangements that take away ammunition
  - No longer as useful
- Competitors
  - Regulators listening to competitors as they develop new theories
- Other regulators / state actors
  - May be competing state interests
  - Use of merger clearance to advance other political objectives
  - EU Foreign Subsidies Regulation (beginning in September 2023)

Range of issues and the interplay is layered and complex. Efforts to resolve one issue could result in unintended consequences with another constituency.

23

Managing the Timeline: Fix it First

- FTC "prior approval" policies are deterrent to seeking remedies
  - FTC approval before closing future transactions for a minimum of ten years
  - Overrides HSR thresholds and not subject to HSR process (e.g., time periods)
- If reasonable probability that a divestiture is required, upfront agreement to divest may make sense
  - Conduct process without a fire sale
    - Process may not be as robust
  - Strengthen position with regulators
  - Strengthen litigation position
- Divestiture conditioned on main deal closing
- Has to be under the right circumstances
  - Other regulators (e.g., CFIUS) may still need time to complete review

24

Continued ➔

How Deal Terms Are Evolving In Response to the Regulatory Environment

25

Outside Dates – going longer and longer

- "Sand in the gears" strategy of the agencies = Pressure on parties to expand Outside Dates to accommodate option to litigate
  - 65% of public company mergers in 2022 had undertaking by the buyer to litigate against the antitrust agencies to obtain clearance
- **18 months** is increasingly common for high profile mergers (including by PE buyers) where a "second request" or UK CMA review is anticipated
  - *L3Harris Technologies* / *Aerojet Rocketdyne* (2022)
  - *Thoma Bravo* / *User Testing* (2022)
  - *Kroger* / *Albertsons* (2022)
  - *Thoma Bravo* / *Ping Identity* (2022)
  - *Broadcom* / *VMWare* (2022)
  - *Chevron* / *Renewable Energy* (2022)
  - *Google* / *Mandiant* (2022)
- Ability to extend out to **24 months** is now becoming more common
  - *CVS* / *Signify Health* (2022)
  - *Amazon* / *iRobot* (2022)
  - *Amazon* / *OneMedical* (2022)
  - *Fontier* / *Spirit* and *JetBlue* / *Spirit* (2022)

Novel approaches of UK CMA to timing and ability to close interplay with not only Outside Date, but also articulation of regulatory closing condition

26

Time is not on your side – allocating the cost of regulatory impacts on the timeline

- Why are merger agreements increasingly including mechanisms to compensate for time delays?
  - High interest rates = meaningful decrease in present values of bids with long timelines to closing
  - Many targets are burning cash and incurring expensive debt

- Ways that targets are making antitrust-challenged bidders pay for extended time periods
  - After specified period, ticking fee commences
    - *L3Harris Technologies / Aerojet Rocketdyne* (2022) and *TD Bank / First Horizon* (2022)
  - Rate of ticking fee steps up with time
    - *Tegna / Standard* (2022)
  - Interim cash pay-outs by buyer directly to target *shareholders* as timeline extends
    - *JetBlue / Spirit* (2022)

27

Time is not on your side – allocating the cost of regulatory impacts on the timeline (cont.)

- Interim cash payments by buyer to the target itself as timeline extends
  - *AbbVie / Soliton* (2021)
- Regulatory reverse termination fee increases with time
  - *Google / Mandiant* (2022)
- Buyer provides unsecured financing to target while merger is pending
  - *Amazon / OneMedical* (2022)
- Buyer pays for target's regulatory clearance transaction costs (legal fees, economists) as incurred
  - *ThomaBravo / ForgeRock* (2022)

28

Continued ➔

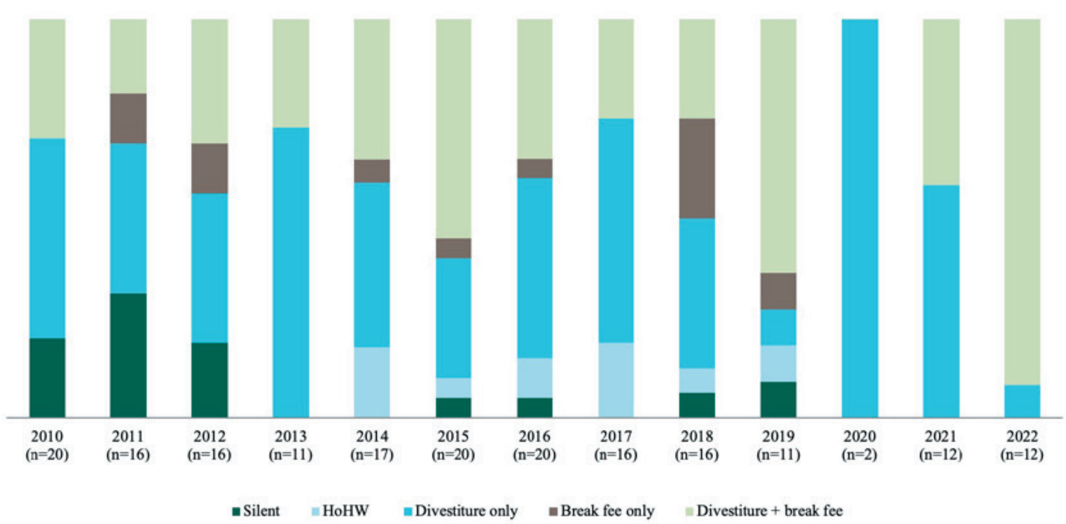
Structuring the Regulatory Covenants

- Merger agreements are legislating strategy and tactics for both (i) accelerating the timeline and (ii) allocating risk:
  - 'Hell or high water' (HOHW) covenants have become rare, as have "reasonable best efforts" covenants that lack express limitations
    - Regulatory covenants in every transaction that drew second requests in 2021 or 2022 had express limitations on the scope of required regulatory efforts
    - ~90% of public mergers in 2022 had express limitations on the required regulatory efforts of the buyer even though only a small fraction of those mergers ended up being challenged
  - Private equity buyers are shifting their approach to regulatory covenants
  - Buyers with multiple touchpoints with regulators are crafting covenants to protect against risks of remedies unrelated to the proposed merger
    - See, e.g., *Cargill / Sanderson* (2022), *Google / Mandiant* (2022)
  - What does "reasonable best efforts" without express limitations mean?
    - See, e.g., *MAPS Hotels*, *Hexion v. Huntsman*, *Falstaff Brewing*
  - Why is it increasingly common to have regulatory reverse termination fees even if a HOHW undertaking
    - see, e.g., *Whirlpool* case in SDNY

29

Divestiture undertakings are increasingly paired with reverse termination fees

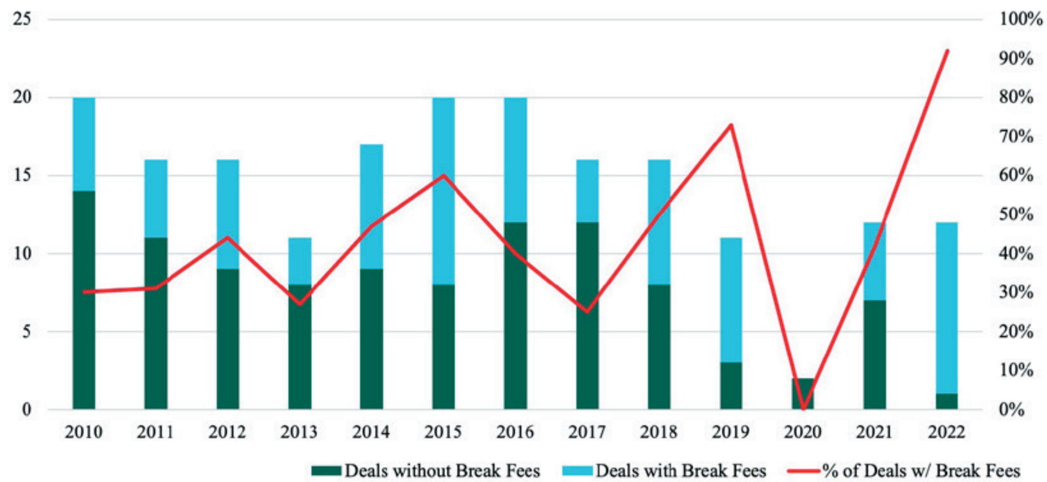
Survey of transactions that drew second requests



30

While the percentage of deals with reverse regulatory break fees has been increasing…

Survey of transactions that drew second requests



31

…average break fee value as a percentage of deal value has been decreasing

Average values from 2020-2022

% of Equity Value

Range: 2.44% to 11.47%

Mean: 5.64%

Median: 5.19%

Standard Deviation: 2.80%

% of Enterprise Value

Range: 1.57% to 10.76%

Mean: 4.65%

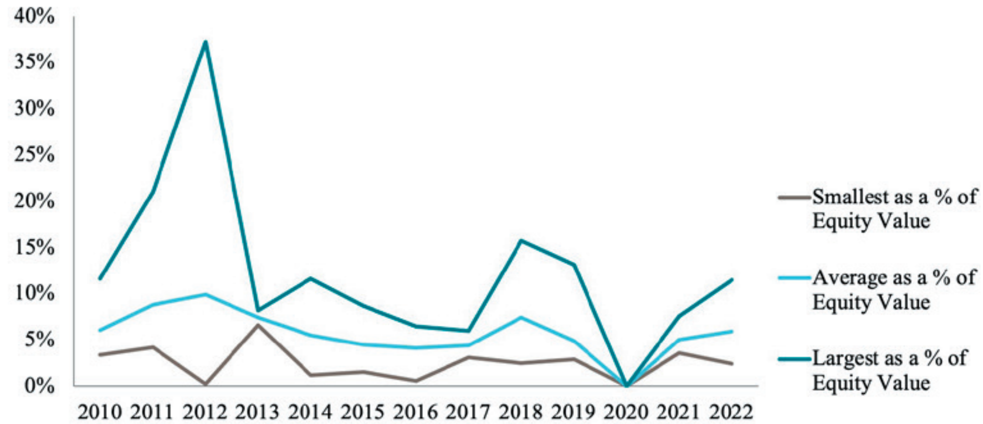
Median: 4.57%

Standard Deviation: 2.19%

32

Continued ➔

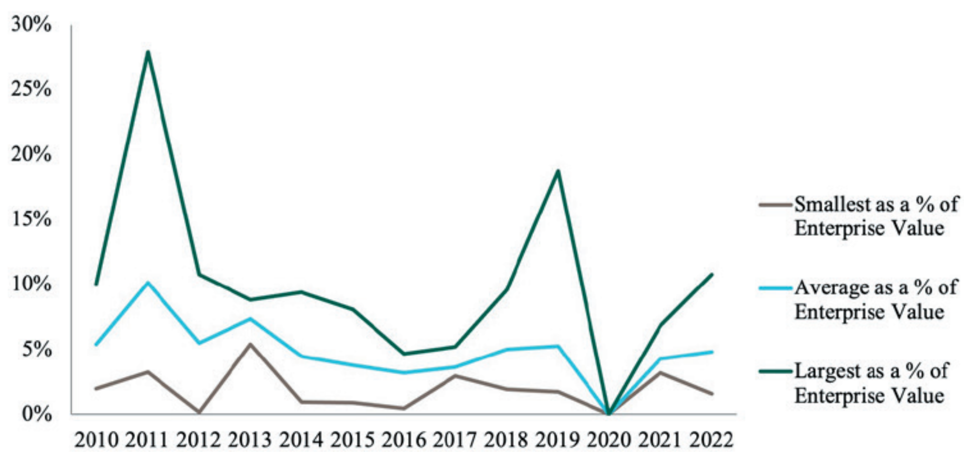
For equity value



* In 2018, one deal that was abandoned after the Second Request had a reverse regulatory break fee of 15.77% of equity value and 9.60% of enterprise value; excluding this outlier deal from the analysis reduces the average as a % of equity value from 7.45% to 6.07% and average as a % of enterprise value from 5.00% to 4.23%, which is consistent with the generally decreasing trend.

33

And for enterprise value



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34

Deal Terms and Structures: Impact on Interim Operating Covenants

- Increased regulatory delay and risk creates two distinct issues for structuring of interim operating covenants
  - Delay means the IOCs will operate further in the future, making it more difficult for both sides to agree the scope of the IOCs and their exceptions
  - Closing risk is increased due to risk of seller breach (or buyer alleging breach) if IOCs too tight/business conditions change
  - Both push sellers to advocate looser IOCs
- Possible solutions:
  - Covenants "stepping down" or exceptions "stepping up" over time
  - Across the board weakening of IOCs
    - May be linked to COVID-related IOC litigation
    - New exceptions linked to "ordinary course" annual business planning
- Potential specific "hot button" IOCs:
  - Interim financing at the target
  - Changes to "Material Contracts"
  - Compensation changes (including incentive compensation) for senior management
- Interplay between regulatory "gun jumping" concerns and IOC consent rights

35

Deal Terms and Structures: Impact on Acquiror Financing

- Increased regulatory delay and uncertainty is testing the acquisition financing market
- Investment grade acquirors
  - Can get > 365 day commitments
  - But it gets expensive
- Non-investment grade, strategic acquirors
  - Very difficult to get > 365 day commitments
  - Very high fees, including ticking fees
- Private equity
  - There is still skepticism in the bank market about the need for very long outside dates for private equity buyers

36

Continued →

Deal Terms and Structures: Special Issues in Cross-Border Transactions

- Increased regulatory delay and risk creates special issues in cross-border public M&A
  - "Certain funds" rules will exacerbate the acquisition finance challenges
  - Many jurisdictions limit the extent to which acquirors and targets can agree
    - Additional regulatory approval conditions
    - "Pain thresholds" in connection with required regulatory approvals

- Some jurisdictions limit the "outside date" for receipt of approvals
  - The German "as tendered" trading structure
  - The U.K. "pre-conditional offer" structure

37

What's Next?

38

Acknowledgment

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39

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