



Vinson&Elkins

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Energy Series

2020 Antitrust
Developments in the
Energy and
Chemical Industries

Meet the Speakers



Jason Powers

Partner

Jason Powers is a commercial and business litigator who handles large-scale controversies between businesses, including disputes relating to joint ventures and the joint development of business opportunities. Energy related litigation, especially litigation concerning the financial side of the oil and gas industry, makes up a large part of his work. Jason also focuses on matters related to antitrust law and trade regulation, including class actions. Jason is the former Chairman of the Houston Bar Association Antitrust & Trade Regulation Section and served on the Editorial Board of *The Antitrust Practitioner*, the publication of the ABA Section of Antitrust Law Civil Practice & Procedure Committee. He is also on the Board of Directors of the Houston Urban Debate League, a nonprofit organization that champions interscholastic debate programs in inner-city schools.



Darren Tucker

Partner

Darren Tucker is the chair of the firm's antitrust practice group, where he focuses on merger and non-merger antitrust investigations in the technology, energy and pharmaceutical sectors. Darren draws on both his experience as a former Federal Trade Commission attorney and his more than 15 years in private practice to provide valuable insights to clients regarding competition enforcement and policy issues. He advises clients on a range of pricing and distribution issues and helps clients close mergers, acquisitions and joint ventures worth billions of dollars annually. Darren regularly speaks and writes on antitrust issues relevant to technology, energy, and life science companies, as well as on competition agency practice and procedure. He has taught an advanced antitrust seminar as an adjunct professor at Antonin Scalia Law School at George Mason University and has served in various editorial advisory positions for publications such as *Antitrust Law Developments*, the ABA's *Antitrust Source* and *Law360 Competition*. He has been part of the leadership of the American Bar Association's Section of Antitrust Law for over a decade, where he currently serves as an officer.

Agenda

- **Looking forward: new leadership and priorities at FTC and DOJ**
- **Recent agency enforcement developments**
 - Merger policy developments
 - Data and trends
 - Merger enforcement cases
 - Non-merger agency enforcement developments
- **State and private litigation developments**

Biden Administration Antitrust Priorities

New agency leadership will define the agencies' agenda, but likely priorities include:

- Continued aggressive scrutiny of tech sector
- Greater focus on healthcare/pharma industry and labor market concerns
- More second requests
- More scrutiny of vertical mergers
- Increased focus on consummated mergers
- Some changes to HSR regulations (Sept 2020 proposed rulemaking started process)
- Bringing more cartel cases

Federal courts will remain a check on enforcement agencies

New DOJ Antitrust Leadership

- **Main Justice**

- Attorney General nominee Merrick Garland has notable antitrust experience as a jurist as well as from his time in private practice and former DOJ stints
- Gene Kimmelman recently joined as senior counselor for the DOJ's associate attorney general for a limited time; Kimmelman is a former head of the think tank Public Knowledge and served on the Biden transition team

- **Antitrust Division**

- All senior officials resigned at end of prior administration, with the exception of Richard Powers (DAAG for criminal enforcement) and Babette Boliek (Chief economist)
- Moderate and progressive wings of Democratic party pushing for preferred nominees to head the Division

New FTC Leadership

Current FTC Commissioners (2 Dems, 2 Repubs, 1 vacancy)

- Rebecca Slaughter (D) – Acting Chair; term ends Sept 2022
- Noah Phillips (R) – Term ends Sept 2023
- Christine Wilson (R) – Term ends Sept 2025
- Rohit Chopra (D) – Term expired; nominated to head the Consumer Financial Protection Bureau; his departure will create a vacancy
- Vacancy – To be filled by President Biden

Little beltway chatter on potential nominees; filling FTC vacancies may not be a priority

Merger Enforcement: Policy Developments

On February 4, the FTC and DOJ announced that the two agencies will temporarily suspend the early termination (ET) process for Hart-Scott-Rodino filings

- Agencies had largely stopped granting ET for several weeks prior to announcement

Stated rationale:

- Agency leadership transition
- Increased volume of filings

During the suspension period, the FTC will be “reviewing the processes and procedures used to grant early termination to filings”

- Suggests that ET may be granted less often once suspension ends

The agencies anticipate the suspension to be “brief”

* The grant of ET allows parties to close prior to the expiration of the initial 30-day waiting period if the agencies find the transaction poses no competitive concerns

Merger Enforcement: Policy Developments

On February 1, 2021, the FTC announced its annual update of Hart-Scott-Rodino thresholds

- The size of transaction threshold for reporting proposed mergers and acquisitions under will *decrease* by \$2.0 million, from \$94 million in 2020 to **\$92 million** for 2021
- The new thresholds will take effect on March 4, 2021, applying to transactions that close on or after that date

The amounts of the filing fees have not changed, but the thresholds that trigger each fee have decreased:

Fee	Size of Transaction
\$45,000	More than \$92.0 million but less than \$184.0 million
\$125,000	\$184.0 million or more to less than \$919.9 million
\$280,000	\$919.9 million or more

Merger Enforcement: Policy Developments

- In June 2020, the FTC and DOJ released new Vertical Merger Guidelines, which explain how the agencies assess mergers and acquisitions involving companies at different levels of the supply chain
 - The new Guidelines generally take a positive view of vertical transactions and reflect existing enforcement patterns
- DOJ releases new Merger Remedies Manual
 - Strong commitment to structural remedies, spelling out the narrow circumstances in which DOJ believes conduct remedies may be appropriate
- FTC expands and updates Merger Retrospective Program

Merger Enforcement: Policy Developments

- Agencies continue international cooperation efforts
 - Cooperation agreements signed with Australia, Canada, New Zealand, the United Kingdom, Nigeria, and South Korea
- FTC proposes HSR rule changes
 - Broaden HSR filing requirements to include holdings of affiliates of the acquirer
 - Exempt transactions involving acquisition of 10% or less of an issuer's voting securities
- FTC launches retrospective analysis of technology sector transactions

Merger Enforcement: Application to Energy and Chemicals Industry

Oil & gas

- Reserves and production – rare
- Pipelines – moderate
- Terminals – moderate
- Refineries – frequent
- Oilfield services – frequent
- Wholesale & retail – frequent

Chemicals

- Globally-traded commodities – rare
- Specialty and regionally-shipped chemicals – frequent

Electricity

- Generation – moderate
- Transmission – rare
- Is “clean energy” different? (so far, no)

Merger Enforcement: Data and Trends

- Initial investigation

- From 2010 to 2019, the federal agencies opened an initial investigation in 9.6% of reported energy transactions and 21% of reported chemical transactions, while the average across all industries was 15%
- The rate of initial investigations in reported chemical industry transactions stayed the same from 2018 to 2019 (21%). By contrast, the rate of initial investigations in reported energy industry transactions jumped from 6% in 2018 to 9.6% in 2019

- Second request

- From 2010 to 2019, the agencies issued a second request on average in 2.3% of reported energy transactions
- From 2010 to 2019, the agencies issued a second request on average in 5.5% of reported chemical transactions

- Enforcement action

- From 2010 to 2019, the agencies brought a total of 25 actions involving energy mergers (6% of all actions), and 35 actions involving chemical mergers (9% of all actions)
- From 2010 through 2019, the federal agencies have obtained the following remedies in merger enforcement actions: structural and behavioral remedies in 196 cases, structural remedies alone in 14 cases, and behavioral remedies alone in 25 cases

Merger Enforcement: Cases

Evonik Industries Ag/Peroxychem Holding Company

- FTC alleged acquisition would eliminate competition for production of hydrogen peroxide, leaving only one producer in the Pacific Northwest and only three in the southern and central United States
- Commission also cited history of price fixing in hydrogen peroxide industry
- Court denied TRO and PI because
 - FTC failed to consider substitutability of products across end uses
 - Industry practices of blind bidding and long-term contracts made coordination unlikely
 - Evonik already resolved some of the FTC's concerns by agreeing with the Canadian Competition Bureau to divest a small plant in western Canada
- *Takeaways: Failure to establish relevant market is the principal reason the agencies lose merger challenges in court; courts will consider fix-it-first remedies*

Merger Enforcement: Cases

Arko Holdings/Empire Petroleum Partners

- FTC Administrative complaint and proposed consent agreement relating to Arko Holdings Ltd.'s \$400 million acquisition of retail fuel outlets and other interests from Empire Petroleum Partners, LLC
- The FTC's complaint alleged that the acquisition would substantially lessen competition for the retail sale of gasoline and diesel fuel in seven local markets across Texas, Michigan, Indiana, and Maryland
- The FTC alleged that these fuel markets are small and highly localized, and that the number of competitors post-transaction in all local markets would be three or fewer
- Under the consent order, the parties committed to divesting one retail station to an independent buyer in each of the seven local markets within twenty days after finalizing the acquisition
- *Takeaway: FTC concerns in retail fuel transactions are highly localized*

Merger Enforcement: Cases

Peabody Energy/Arch Coal

- FTC filed complaint targeting joint venture that would have combined coal mining and sales operations in Southern Powder River Basin (SPRB)
- On September 29, 2020, the district court granted the FTC's request for preliminary injunction
- The court found that coal producers face competition from other energy producers, but that competition between coal companies remains and that the proposed joint venture was likely to substantially lessen this head-to-head competition
- The FTC's success in challenging the joint venture stands in contrast to the courts' rejection of the FTC's effort to block another SPRB transaction in 2004
- *Takeaway: even when recognizing long-term industry trends, courts and agencies remain focused on the potential for near-term harm to customers*

Merger Enforcement: Cases

Alimentation Couche-Tard Inc./Crossamerica Partners LP

- FTC filed a complaint in D.D.C. alleging that Alimentation Couche-Tard Inc. (ACT) violated the terms of a February 2018 settlement order requiring it to divest retail fuel stations in Minnesota and Wisconsin to approved buyers no later than June 15, 2018
- Also alleged that ACT failed to provide complete information about its divestiture efforts in March through May of that year
- ACT agreed to pay a \$3.5 million civil penalty pursuant to Section 5(l) of the FTC Act
- Assistant Director for Compliance of the FTC Competition Bureau's compliance division warned that the case shows that "[a]ny deadline in a Commission order is a 'real' deadline, and failure to meet the deadline can have real consequences"
- *Takeaway: enforcement agencies hold parties to their consent decree commitments and reporting obligations*

Non-Merger Enforcement

- Overall number of new criminal antitrust cases publicly filed by the DOJ in 2020 remains below historical levels
 - Continues a trend from 2017
- Congress reauthorized Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA)
 - A successful corporate leniency applicant may receive full immunity for itself and may also obtain leniency for employees who also cooperate with DOJ
 - ACPERA mitigates civil liability by de-trebling potential damages and removing joint and several liability
- Antitrust Division's Procurement Collusion Strike Force ramps up
 - Spent inaugural year training investigators and adding USAO and state partners
 - Brought its first indictment in October 2020
- Supreme Court poised to rule in *AMG Capital Management v. FTC* on ability of FTC to obtain restitution under Section 13(b) of FTC Act

State & Private Litigation Developments

- **Antitrust injury and antitrust standing**
- **New market manipulation cases**
- **State action cases, starring DOJ**
- **Filed rate doctrine**
- **Other developments**

Litigation: Antitrust Injury and Antitrust Standing

Antitrust injury

- An injury of the type the antitrust laws were intended to prevent, and which flows from the anti-competitive nature of the conduct

Antitrust standing

- The plaintiff is a suitable or efficient enforcer of antitrust law.
 - *City of Long Beach v. Total Gas & Power N. Am.* (S.D.N.Y.)
 - *Prime Int'l Trading v. BP* (2d Cir., U.S.)

Litigation: Market Manipulation

- **WTI Futures**
 - *Mish Int'l Monetary v. Vega Capital London* (N.D. Ill.)
- **Ethanol**
 - *Midwest Renewable Energy v. Archer Daniels Midland* (C.D. Ill.)
- **California retail gasoline**
 - *California v. Vitol Inc.* (N.D. Cal.)

Litigation: Dormant Commerce Clause & State Action Immunity

- **Drilling permits and leasing activity**
 - *Black v. Occidental Petroleum* (D. Wyo.)
- **Power line construction permitting**
 - *NextEra Energy v. Paxton* (5th Cir.)
- **Utility rates for renewables users**
 - *Ellis v. Salt River Project* (9th Cir.)

Litigation: Filed Rate Doctrine

- **Alleged Algonquin Pipeline manipulation**
 - *PNE Energy Supply v. Eversource Energy* (1st Cir.)

Other Litigation Developments

- **Twombly review of pleadings**
 - *In re Caustic Soda Antitrust Litigation* (W.D.N.Y.)
- **Rule 11 implication of pleading error**
 - *Bartlett v. BP West Coast Products* (W.D. Okla.)
- **Market definition evidence**
 - *Kentucky v. Marathon Petroleum Co.* (W.D. Ky.)
- **Settlements**
 - *In re Pre-Filled Propane Tank Antitrust Litigation* (W.D. Mo.)
 - *In re Liquid Aluminum Sulfate Antitrust Litigation* (D.N.J.)

THANK YOU

The content of this presentation is intended for educational and informational purposes only. It does not constitute the provision of legal advice or services by the speakers or by Vinson & Elkins LLP.

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