

Antitrust and Competition Law

FTC Files Administrative Complaint to Unwind Minority Investment Without Simultaneous Consent Decree— *In re Altria Group, Inc. and JUUL Labs, Inc.*

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On April 1, 2020, the Federal Trade Commission (FTC or the Commission) voted 5-0 to challenge Altria Group's acquisition of a 35% stake in e-cigarette vendor JUUL Labs.^[1] The Commission has published a public version of the complaint^[2] and an administrative trial is scheduled to commence on January 5, 2021. This appears to be the first time the Commission has filed an administrative complaint to unwind a minority stake in a competitor without a simultaneous antitrust settlement. In other words, this has the potential to be the first FTC litigated case against a minority investment.

Potential Antitrust Concerns Raised by Partial Interests in Competitors

The Commission typically reviews mergers involving the acquisition of an entire company or a finite set of assets for competition concerns. But even minority interests can raise antitrust issues in certain circumstances. The FTC has challenged minority interests where a partial-interest acquisition gives a firm effective control over a competitor or "substantially lessens competition" by changing the competitor's post-acquisition incentives.^[3]

Section 13 of the Horizontal Merger Guidelines outlines three situations in which a partial-interest acquisition, short of effective control over a competitor, may implicate antitrust concerns:

- First, a partial interest may be anticompetitive by permitting a competitor to influence the key competitive decisions of the counterparty by, for example, leveraging a voting interest in the target firm or governance rights to appoint board members and control significant business decisions.
- Second, a partial interest may dampen the incentive to compete by sharing in the losses inflicted on a rival.
- Third, a partial interest can provide a competitor with non-public, highly confidential business information that may increase the risk of unilateral or coordinated anticompetitive behavior.^[4]

Importantly, the Commission typically has pursued these types of administrative complaints with concomitant consent decrees, under which the parties agree to cease and desist disputed conduct, provide for other appropriate relief and admit to all jurisdictional facts set forth in a draft complaint for settlement purposes only. For example, in *Matter of TC Group, LLC, et al.*, the FTC challenged the acquisition of a combined 22.6% stake in a rival energy company by two private equity firms with an existing controlling interest in a competitor energy company.^[5] The Commission complained of reduced competition resulting from the firms' right to board seats at both companies, veto power over the target company's actions and access to non-public competitively sensitive information from or about the two energy-sector competitors, which collectively would substantially lessen competition.

Antitrust challenges to partial interest acquisitions rarely result in litigation. However, in *United States v. Dairy Farmers of America, Inc.*, the Department of Justice (DOJ) sued to challenge the defendant's partial acquisition of a local dairy under Section 7 of the Clayton Act.^[6] The defendant milk marketing

organization constituted the largest dairy farmer cooperative in the nation. Seeking to secure a steady stream of raw milk sales for its farmers at the highest price, the defendant acquired 50% ownership interests in the two milk processing firms that respectively competed for school milk contracts in most of Kentucky and Tennessee.^[7]

DOJ asserted that the partial interest acquisitions gave the defendant the economic incentive and actual ability to reduce competition between the local dairies in violation of antitrust law. After the defendant converted its common voting shares in the companies into non-voting shares, the district court granted summary judgment, holding the defendant lacked the actual ability to control the dairies through its ownership. On appeal, the Sixth Circuit reversed. The court held that the defendant's control or influence over the local dairies could cause anticompetitive effects and that the district court erred by ignoring the original terms of the acquisition agreement, which gave the defendant the actual ability to reduce competition for school milk contracts.^[8] The court further noted that "divestiture, as opposed to voting restrictions," would be the proper remedy for overlapping partial interests that reduced competition.^[9] On remand and prior to trial, the defendant sold its interest in one of the dairies to another firm.^[10]

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The Administrative Complaint

The FTC may issue administrative complaints when it has "reason to believe" that federal trade and competition laws are being violated and it appears to the Commission that a proceeding serves the public interest. The Commission's 5-0 vote in favor of the complaint starts the administrative proceeding. Here, the FTC challenges the parties' \$12.8 billion equity deal and non-compete agreement. The Commission specifically alleges that the agreements constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and Section 5 of the FTC Act, and substantially lessened competition in violation of Section 7 of the Clayton Act.^[11]

Altria is a leading producer and marketer of traditional tobacco products, such as Marlboro cigarettes. JUUL Labs, a startup company, popularized new e-cigarette products. By July 2018, JUUL had attained a reported value of \$15 billion. According to the complaint, it was around that time that Altria sought to invest in JUUL. Prior to the deal, Altria and JUUL allegedly monitored each other's prices and competed vigorously in the national market for e-cigarette sales. According to the FTC complaint, in late 2018 JUUL surpassed Altria and its 'traditional tobacco' competitors to claim the top market share.

In December 2018, Altria acquired a 35% stake in JUUL in exchange for approximately \$12.8 billion, raising JUUL's valuation to \$38 billion. The deal contains a six-year non-compete provision, which JUUL allegedly sought to prevent Altria from competing with its own e-cigarettes. Weeks prior to the deal's announcement, Altria discontinued its "MarkTen" e-cigarette product—a move the company claims to have made due to concerns about children vaping, but the FTC alleges was a result of the transaction.

Commissioner Chopra's "Concurring" Statement

On April 2, 2020, Democratic Commissioner Rohit Chopra filed a concurring statement. The Commissioner supports the Commission's complaint insofar as evidence suggests that JUUL used the transaction to remove its competitor, Altria, from the e-cigarette market, enhance its valuation and issue billions in dividends to "company insiders."^[12] The Commissioner agrees that the terms of the deal violate Section 7 of the Clayton Act and Section 1 of the Sherman Act. His statement, however, criticizes the complaint as "too narrow" because it "excludes several counts of potential wrongdoing."^[13] Specifically, the Commissioner complains about the agency's failure to bring claims against JUUL and Altria for conspiracy to monopolize in violation of Section 2 of the Sherman Act, and for installing an illegal board advisor from Altria in violation of Section 5 of the FTC Act.

In the Commissioner's view, the complaint contains facts sufficient to claim a conspiracy to monopolize by alleging: (1) JUUL insisted and Altria understood that Altria's exit from the e-cigarette market was a non-negotiable condition to partial acquisition; (2) the written agreement required Altria to halt e-cigarette market activities *as well as* commit Altria's financial resources to further entrenching JUUL's dominant position; and (3) Altria took affirmative steps to deliver JUUL competitive advantages over rivals, including leasing shelf space for JUUL products. Although such claims "are uncommon," the Commissioner urges that "the Commission should not hesitate to include the charge when the facts warrant given the extreme perniciousness of this type of conduct."^[14]

Commissioner Chopra also believes that installation of the Altria board observer at JUUL violated Section 5 of the FTC Act. According to Commissioner Chopra, this provision entailed a "significant risk that [the board member] may have had access to competitively sensitive information on a wide range of topics related to JUUL's business strategy, just like any other board member."^[15] Commissioner Chopra voices a strong dissent to the Commission's "inaction," which he feels will "reinforce a view that corporations can simply appoint their officers to be 'observers' on competitors' boards, undermining one of the key purposes of the Clayton Act in guarding against the sharing of sensitive information between competitors."^[16]

In short, the Commissioner views the complaint as "unnecessarily narrow" because of his concern about the "impact of reduced competition on products with health and safety risks raises broader concerns" about customers' health and wellbeing.^[17] This additional viewpoint does not have legal significance for purposes of the operative complaint. However, Commissioner Chopra's statement is notable as the latest in a series of statements by the Democratic Commissioners criticizing the approach of the Commission's Republican majority.^[18]

Conclusion

This administrative action underscores potential competitive issues arising from partial-interest acquisitions of competitors, even where a stake establishes less than effective control over a competitor. Businesses in the current regulatory environment are therefore well-advised to consider the antitrust deal risk arising from such acquisitions, which may become the subject of an FTC administrative action if they tend to 'substantially lessen competition' under the Horizontal Merger Guidelines.

This is a case to watch, since there was no simultaneous consent decree. If the case is ultimately litigated, there may be additional lessons about what aspects of minority interests, if any, violate antitrust law. Moreover, it is another example of the significantly different view of the two Democratic Commissioners—a view that could become the majority view if a Democrat were to win the 2020 Presidential election.

[1] FTC, Press Release, FTC Sues to Unwind Altria's \$12.8 Billion Investment in Competitor JUUL (Apr. 1, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitor-juul>. See generally FTC, Enforcement, Cases and Proceedings, *Altria Group/JUUL Labs, In the Matter of* (last updated Apr. 2, 2020), <https://www.ftc.gov/enforcement/cases-proceedings/191-0075/altria-groupjuul-labs-matter> (periodically updated case timeline).

[2] Complaint, *In the Matter of Altria Grp., Inc. & JUUL Labs, Inc.*, Dkt. No. 9393, Cmm'n File No. 1910075, (Apr. 1., 2020), https://www.ftc.gov/system/files/documents/cases/d09393_administrative_part_iii_complaint_public_version.pdf.

[3] Mike Moiseyev, What's the interest in partial interests? (May 9, 2016), <https://www.ftc.gov/news-events/blogs/competition-matters/2016/05/whats-interest-partial-interests>.

[4] DOJ & FTC, *Horizontal Merger Guidelines* § 13 (2010).

[5] See *In re TC Grp., Inc., Riverstone Holdings LLC, Carlyle/Riverstone Global Energy & Power Fund II, LP, and Carlyle/Riversone Global Energy & Power Fund III, LP*, FTC Case No. 0610197 (Jan. 25, 2007), <https://www.ftc.gov/enforcement/cases-proceedings/0610197/tc-group-llc-riverstone-holdings-llc-carlyleriverstone-global>.

[6] *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850 (6th Cir. 2005).

[7] *Id.* at 852-53.

[8] *Id.* at 859.

[9] See *id.*

[10] See OECD, Directorate for Financial and Enterprise Affairs Competition Committee, *Antitrust Issues Involving Minority Shareholding and Interlocking Directorates*, ¶ 19 (Feb. 19, 2008), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-other-international-competition-fora/uswp3minor.pdf>.

[11] See Complaint, *supra* note 2, at 1.

[12] FTC, Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter, *In Matter of Altria Group, Inc. and JUUL Labs, Inc.*, Comm'n File No. 1910075 (Apr. 2, 2020), https://www.ftc.gov/system/files/documents/public_statements/1570265/statement_of_comm_chopra_in_the_matter_of_altria-juul.pdf.

[13] *Id.* at 3.

[14] *Id.*

[15] *Id.* at 4.

[16] *Id.* at 5.

[17] *Id.*

[18] See, e.g., FTC, Dissenting Statement of Commissioner Rohit Chopra, *In the Matter of Rent-to-Own Market Allocation Scheme*, Comm'n File No. 1910074 (Feb. 21, 2020), https://www.ftc.gov/system/files/documents/public_statements/1567201/dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_rent_own_store_swaps_1910074.pdf (criticizing Commission decision not to claim violations of Section 5 of FTC Act where rent-to-own industry market allocation scheme involved a potentially illegal board overlap).

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