

# Recent US Antitrust Developments

## Publications

October 2022

President Biden's antitrust enforcement leadership arrived promising aggressive enforcement. Today, more than a year in, they are beginning to make good on that promise. In a recent speech at Georgetown University, Deputy Attorney General Jonathan Kanter, head of the Antitrust Division of the Department of Justice, reported that the DOJ is "firing on all cylinders." The DOJ has challenged or obtained abandonment of six mergers and, according to Kanter, has the largest number of pending civil antitrust lawsuits in the last 20 years. While the pace of merger enforcement at the FTC under Chair Lina Khan has not yet exceeded that of the final year of her predecessor, merger enforcement is up in 2022, and with several high-profile investigations pending, the expectation is for aggressive enforcement to continue. Below are notable developments in two merger enforcement actions.

### **Illumina/Grail Challenge Rejected by FTC Administrative Law Judge**

The FTC's administrative law judge (ALJ) rejected the Commission's challenge of the merger of Illumina and Grail. The FTC sought to block the \$7.1 billion acquisition of Grail, a maker of early detection liquid biopsy test that can screen for multiple types of cancer in asymptomatic patients using DNA sequencing. Illumina is a provider of DNA sequencing for these multi-cancer early detection tests. The FTC alleged that the merged entity would have the incentive to disadvantage potential testing competitors by withholding or raising the cost of the DNA sequencing and as a result, the proposed acquisition would diminish innovation in the US market for such tests. The ALJ rejected this argument, another example of the government failing to prove harm in a vertical merger case, the most high-profile loss in recent memory being the DOJ's failure to block AT&T's merger with Time Warner. The decision has been appealed to the Commission pursuant to FTC rules, and any final Commission decision may be appealed to a U.S. Court of Appeals. The FTC's emphasis on protecting innovation is a theory of harm that will continue to be emphasized by the agency.

### **DOJ Challenges Merger of Two Residential Door Hardware Producers**

On September 15, the Department of Justice sued to block ASSA ABLOY AB's (ASSA ABLOY) proposed \$4.3 billion acquisition of the Hardware and Home Improvement division of Spectrum Brands Holdings Inc (Spectrum). DOJ alleges that ASSA ABLOY and Spectrum are two of the three largest producers of residential door hardware, and that the transaction would result in

anticompetitive harm in the form of higher prices, lower quality, reduced innovation, and poorer service in the sale of premium mechanical door hardware and smart locks. DOJ alleges that the transaction would give ASSA ABLOY a near-monopoly in premium mechanical door hardware and more than a 50% share in smart locks, leaving only one significant competitor. This theory focuses on the “unilateral effects” of the merger due to the elimination of a competitor, a theory of harm that will continue to play a prominent role in agency enforcement. Notably, the parties proposed to divest portions of ASSA ABLOY business units to remedy the transaction, but DOJ alleged that the proposed “divestitures would be insufficient to preserve the intensity of existing competition.”

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Jenner & Block Japan Newsletter | October 2022

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