LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Unprecedented Agency Divergence On Antitrust Enforcement

By **Gregory Luib**

(August 6, 2019, 2:30 PM EDT)

Gregory Luib

The recent clashes between the U.S. Department of Justice Antitrust Division and Federal Trade Commission in the latter's case against Qualcomm Inc. is the highest profile point of divergence between the U.S. antitrust agencies in recent memory. But it is certainly not the only area of antitrust enforcement and policy in which the DOJ and FTC currently diverge.

Differences between the two agencies have developed during the administration of President Donald Trump on what constitutes an antitrust violation, which remedies are appropriate for unlawful mergers or conduct and the process for reviewing proposed transactions. These points of divergence can lead to materially different results for companies depending on which agency is reviewing their merger or business conduct.

This is the most significant divergence between the two U.S. antitrust agencies in the modern antitrust era. It raises questions of fairness, efficiency and good government. It is also providing fuel for the argument — voiced recently by a U.S. senator with antitrust oversight[1] — that there should be only a single U.S. antitrust agency.

Cases at the Intellectual Property/Antitrust Interface

There is a long-running debate over the proper balancing of intellectual property rights and incentives to innovate, on the one hand, and antitrust enforcement to prohibit the abuse of IP rights, on the other. Under the Trump administration, the DOJ has favored IP rights holders — particularly in the area of standard-essential patents, or SEPs — while the FTC has not hesitated to find antitrust violations grounded in enforcement of IP rights, including in its ongoing litigation against Qualcomm and its recent 1-800 Contacts Inc. and Impax Laboratories LLC decisions.

DOJ Views on SEPs

The greatest substantive divergence between the DOJ and FTC is the application of antitrust to licensing conduct by holders of SEPs. In numerous speeches and other venues, Assistant Attorney General Makan Delrahim has conveyed the DOJ's position that refusals to license SEPs on fair, reasonable and nondiscriminatory terms or other failures to abide by commitments to standard-setting organizations should not give rise to an antitrust claim.[2]

In December 2018, Delrahim withdrew the DOJ's support for a 2013 policy statement on remedies for SEPs subject to FRAND commitments that the agency had issued jointly with the U.S. Patent and Trademark Office.[3] That statement recommends caution in granting injunctive relief based on infringement of voluntarily FRAND-encumbered SEPs and is inconsistent with the current DOJ views on enforcement rights held by SEP owners.

Agency Clashes Over Qualcomm

More recently, the DOJ took the extraordinary step of filing two statements of interest in the FTC's ongoing case against Qualcomm, in which the FTC alleges that Qualcomm's practices relating to its licensing of SEPs and sales of baseband processors used in cellular telephones violate the Federal Trade Commission Act. In its first statement (filed in May 2019), the DOJ requested that, in the event that the district court hearing the case found in favor of the FTC, the court permit additional briefing and schedule an evidentiary hearing regarding the scope and impact of any injunctive relief.[4]

The DOJ statement noted that the FTC's request for relief appears to implicate all of Qualcomm's existing licensing agreements and then raised the concern that "there is a plausible prospect that an overly broad remedy in this case could reduce competition and innovation in markets for 5G technology and downstream applications that rely on that technology."[5] Although the DOJ claimed to take no position on the underlying merits of the FTC's claims against Qualcomm, the statement sent a clear message to the FTC, the district court hearing the case and the public at large that the DOJ thinks very little about the FTC's claims against Qualcomm.

In its second statement of interest (filed in July 2019), the DOJ expressed its support for Qualcomm's request that the U.S. Court of Appeals for the Ninth Circuit stay the injunction imposed by the district court after it found for the FTC.[6] The DOJ statement criticized both the finding of liability by the district court and the remedy it imposed: "Qualcomm is likely to succeed on the merits because the district court's decision ignores established antitrust principles and imposes an overly broad remedy. Additionally, the public interest favors a stay because the order threatens competition, innovation, and national security."[7]

The statement also conveyed the DOJ's general tendency to prioritize IP protection over antitrust: "That the court found it anti-competitive to engage in conduct arguably allowed by patent law creates unnecessary tension between antitrust and patent law when both 'share the common purpose of promoting innovation and enhancing consumer welfare.'"[8]

To be fair, the FTC's case against Qualcomm is largely a holdover from the administration of former president Barack Obama and may or may not be supported by a majority of the sitting commissioners. Two Democrat-appointed commissioners voted out the complaint against Qualcomm within days of Trump's inauguration and over the strenuous objections of then Commissioner Maureen Ohlhausen.[9]

However, although Commissioner Christine Wilson publicly criticized the recent district court decision finding Qualcomm liable for violating the FTC Act[10] (itself a notable step for a sitting commissioner), there does not appear to be majority support for unilateral dismissal of the complaint by the current commission — particularly in light of Chairman Joseph Simons' recusal from the matter.[11] As such, FTC staff will continue to prosecute this case. Further, the current iteration of the FTC has shown its willingness to prioritize antitrust enforcement over enforcement of IP rights in two other high-profile matters.

FTC v. 1-800 Contacts Inc.

In November 2018, the commission issued its 1-800 Contacts decision, in which Simons and his two Democrat-appointed colleagues ruled that the online contact lens retailer violated the FTC Act in its settlement of trademark infringement litigation against several of its competitors.[12] Each of the challenged settlement agreements included provisions that prohibit the parties from using each other's trademarks, URLs and variations of trademarks as online search advertising keywords, as well as provisions requiring the parties to employ negative keywords to prevent their ads from displaying whenever a search includes the other party's trademarks.[13] The 1-800 Contacts majority condemned these settlement agreements under an abbreviated, quick-look analysis, rather than engaging in a full balancing of competitive harms and benefits under a rule of reason analysis.[14]

In 1-800 Contacts, Commissioner Noah Joshua Phillips issued a lengthy, pointed dissent with a particular focus on the majority's failure to take into account the IP context in which the trademark settlement agreements occurred: "Predicating antitrust liability on an ex post judgement [sic] about the strength of intellectual property infringement claims — or ignoring the context of their protection entirely — not only will reduce clarity in the law, but also threatens to chill the procompetitive investment that is one of the hallmarks of trademark law."[15] The 1-800 Contacts decision is currently on appeal to the U.S. Court of Appeals for the Second Circuit.

FTC v. Impax Laboratories LLC

In March 2019, the commission unanimously found that Impax Laboratories, a generic drug manufacturer, violated the FTC Act in settling its patent lawsuit against branded drug manufacturer Endo Pharmaceuticals PLC.[16] Impax was the commission's first decision in a so-called pay-for-delay case since the 2013 U.S. Supreme Court decision in FTC v. Actavis Inc.,[17] which held that settlements of branded-generic patent litigation are subject to rule of reason analysis.

In some sense, the decision merely represents a continuation of the FTC's bipartisan condemnation of patent litigation settlements that the commission believes delay generic drug entry. Yet, the decision is remarkable because, despite the Supreme Court's holding that the rule of reason should apply, the FTC effectively adopted another bright line test, conveying its view that any payment from a brand to a generic firm that exceeds avoided litigation costs or the value of fair services provided by the brand is effectively per se unlawful.

The FTC reached this conclusion in large part by evaluating the parties' patent settlement as a whole for purposes of identifying restraints on competition, while taking a piecemeal approach to its analysis of the parties' procompetitive justifications for the settlement.[18] This allowed the FTC to ignore the pro-competitive benefit from the patent license that allowed Impax to enter nine months before expiration of the original Endo patents and to remain on the market thereafter while all other would-be generics were blocked from later-acquired Endo patents.[19]

According to the FTC, such benefits to competition must be ignored unless they have a sufficient link to the challenged restraint, which the commission defines as a "payment in exchange for the elimination of the risk of entry."[20] Under this formulation, in which harm to competition is built into the very definition of the challenged restraint, it is difficult to imagine how one could apply the rule of reason, as required by Actavis.

Vertical Merger Enforcement

Other than the DOJ's view that antitrust has little, if any, role to play in the area of SEPs, the topic Delrahim has publicly addressed most often is the DOJ's aversion to behavioral remedies — that is, remedies involving conduct restrictions or requirements, as opposed to structural changes such as divestiture. From the start of his tenure as the head of the Antitrust Division, Delrahim has conveyed his view that vertical merger enforcement generally should not include behavioral remedies.[21]

The antitrust agencies' historical use of such remedies, while more regulatory in nature than structural remedies, has allowed companies to proceed with otherwise efficiency-enhancing vertical transactions. Although the FTC has made statements indicating its alignment with the DOJ on this issue, in practice, the FTC has been much more willing to use behavioral remedies to address vertical concerns raised by transactions it has reviewed during the current administration.

U.S. v. AT&T Inc./Time Warner Cable

The DOJ's opposition to behavioral remedies reached its apex in the AT&T/Time Warner matter, where the agency opted to challenge the transaction in court rather than accept a nonstructural fix to prevent the vertical foreclosure effects the DOJ was concerned about: AT&T's alleged ability to raise its video distribution rivals' costs by threatening to withhold certain Time Warner programming, including CNN.[22] In a high-profile loss for the Antitrust Division, the district court denied the agency's effort to block the transaction, a decision ultimately upheld by the U.S. Court of Appeals for the D.C. Circuit.[23]

It has been widely speculated that the DOJ's challenge to the AT&T/Time Warner transaction was based at least in part on political considerations.[24] However, even that explanation for the DOJ's court challenge, to the extent it is accurate, represents a significant point of divergence with the FTC, which appears to have steered clear from any direct political interference in its enforcement efforts, no doubt aided by its status as an independent agency rather than one housed within the executive branch.

DOJ Consent in Bayer Corp./Monsanto Co.

In another high-profile matter, the DOJ required divestitures to address vertical concerns raised by Bayer's acquisition of Monsanto. Among other things, the DOJ alleged that the vertical integration of Bayer's "dominant position" in seed treatments and Monsanto's "strong position" in corn and soybean seeds would harm competition in the markets for genetically modified corn and soybeans.[25] Rather than impose a firewall or other behavioral remedy, the DOJ required Bayer to divest the intellectual property, research and development projects and other assets related to the seed treatments at issue.[26]

FTC Consents With Behavioral Remedies.

In sharp contrast, the FTC has pursued behavioral remedies to address vertical concerns in several otherwise nonproblematic transactions over the past two and a half years. In Broadcom Inc./Brocade Communication Systems Inc., the FTC imposed firewall requirements to address its concern that the combination of Broadcom — a supplier of integrated circuits for fiber channel switches — and Brocade — one of only two suppliers of fiber channel switches — would increase the likelihood of coordination between the two fiber channel switch competitors.[27]

In Northrup Grumman Corp./Orbital ATK Inc., the FTC relied on firewalls and a nondiscrimination requirement to address its vertical concern that Northrup would disadvantage its missile system competitors by foreclosing them from Orbital's solid rocket motors, a key input into missile systems.[28] Finally, in Staples Inc./Essendant, the FTC imposed firewalls to address its concern that confidential business information would be shared between Essendant, an office products wholesaler, and Staples, an office products retailer that competes with companies supplied by Essendant.[29]

Senior FTC officials have made statements characterizing the FTC's views on behavioral remedies as consistent with those of the DOJ.[30] FTC officials also have asserted that the agency pursues such remedies only in limited circumstances.[31] The fact remains, however, that the FTC appears to be more willing than the DOJ to entertain firewalls and other behavioral remedies as fixes for transactions raising vertical issues.[32] This represents a substantive point of divergence and has potentially significant implications for companies pursuing vertical mergers, depending on which agency they appear before.

Disgorgement as a Conduct Remedy

The DOJ and FTC also diverge in their pursuit of disgorgement as a remedy for unlawful conduct. The FTC obtained disgorgement of unlawful profits in a recent settlement of a so-called product-hopping case and has pursued this extraordinary remedy in other cases filed during the Trump administration. Meanwhile, the DOJ has not sought disgorgement in any cases filed during that same period. Nor has the DOJ given any indication that it will seek this remedy for antitrust violations.

The FTC entered a settlement with Reckitt Benckiser Group in July 2019 that included the payment of $50 million in disgorgement relating to Reckitt's allegedly anti-competitive efforts to switch consumers from one version of its opioid addiction treatment Suboxone to another version in order to avoid generic competition.[33] The FTC's complaint alleged that Reckitt's former subsidiary, Indivior PLC, "coerced" patients to switch from the tablet version to a film version of the drug through a "false and misleading safety claim" and significant price increases for the former, as well as false safety claims in a citizen petition filed with the U.S. Food and Drug Administration.[34]

The FTC also is seeking disgorgement in Shire ViroPharma Inc., where the FTC alleged that the defendant maintained its monopoly over the drug Vancocin by filing sham citizen petitions before the FDA and thereby delaying generic competition.[35] The U.S. Court of Appeals for the Third Circuit recently affirmed dismissal of the FTC's complaint on jurisdictional grounds, finding that the FTC failed to allege an ongoing or imminent violation of the FTC Act.[36] However, the FTC has given no indication that this ruling will reduce its appetite for disgorgement.

Although having to disgorge unlawfully obtained profits may be a low-likelihood event, it can be a large-impact event for an antitrust defendant. The FTC settled a pay-for-delay case with Teva Pharmaceuticals Industries Ltd. in 2015 for $1.2 billion.[37] More recently, in a sham petitioning case filed by the FTC during the Obama administration, a district court ordered AbbVie Inc. to pay $448 million in disgorgement.[38] The FTC-DOJ divergence on whether to seek disgorgement for antitrust violations means a company may face drastically different remedies, depending on which agency reviews its business conduct.

Merger Review Process

Time is almost always of the essence for merging parties seeking to hold a deal together during a government review. Research by Dechert LLP shows that reviews of significant transactions currently

take just over 12 months on average.[39] Certain aspects of the merger review process unique to the FTC or the DOJ can have a significant effect on the timing of the agency's investigation of a given transaction, which ultimately can affect the viability of the transaction.

FTC Administrative Litigation

Perhaps the most glaring difference between the agencies is the FTC's administrative litigation capability. If the FTC opts to challenge a Hart-Scott-Rodino-reportable transaction, it typically seeks a preliminary injunction in federal court under Section 13(b) of the FTC Act,[40] and, if successful, litigates the challenge before the agency's administrative law judge, whose decision can be appealed to the commission and then a U.S. circuit court of appeals. In contrast, the DOJ is limited under Section 15 of the Clayton Act to seeking a preliminary or permanent injunction in federal court.[41]

Although the FTC's unique structure is not new, a merger challenge under the Trump administration demonstrates the effects that this structure can have on the timing of a transaction reviewed by the FTC. In an unprecedented maneuver, the FTC challenged the merger of titanium dioxide manufacturers Tronox Ltd. and Cristal USA Inc. in its administrative court seven months prior to seeking a preliminary injunction in federal court.[42] As a senior FTC official explained, because the parties were still waiting for antitrust approval from the European Commission, they could not close the transaction; as a result, there was no need for the FTC to seek an injunction to prevent the closing.[43]

Tronox cried foul, arguing that the FTC was trying to run out the clock on the merger by utilizing the slower-moving administrative litigation.[44] Tronox even took the extraordinary step of asking a court to force the FTC to file its PI action.[45] The FTC eventually obtained a PI against the proposed merger, the FTC's administrative law judge ruled the transaction was unlawful, and Tronox entered into a divestiture agreement to address the FTC's competitive concerns.[46] However, the entire process took over two years from deal announcement to completion of the FTC review and required the merging parties to extend their termination date twice for a total of 12 months.

Agency Timing Agreements

In 2018, the DOJ and the FTC each issued model timing agreements for use in extended merger reviews under the Hart-Scott-Rodino Act, which provides the agencies only 30 days to complete their reviews after parties have complied with a second request.[47] Prior to August 2018, the FTC did not use a model timing agreement as a starting point for negotiations with merging parties. The fact that the FTC now has a model timing agreement reflects convergence in the agencies' use of such agreements. However, there are material differences in the two agencies' model timing agreements that can have significant implications for the timing of a merger review and ultimately the ability of merging parties to keep their deal together.

Perhaps the most significant difference in the timing agreements is the limitation on the number of custodians and depositions included by the DOJ but not the FTC. As part of its recent effort to streamline the merger review process, the DOJ has limited the number of second request custodians each merging party has to search to 20 individuals. Similarly, the DOJ has limited the number of depositions to 12 per merging party. Although in practice these numbers may be higher — the DOJ reserves the right to increase the number of custodians and depositions on a case-by-case basis — the FTC model timing agreement contains no limits on custodians or depositions.

In addition, the DOJ has staked out a goal of completing second request investigations within six months.[48] Although this requires merging parties to produce documents and data on an expedited and rolling basis, which may not always be feasible, the six-month goal represents a laudable attempt to reduce the duration of merger reviews. The FTC, meanwhile, has stated its interest in shortening merger reviews, but has not identified any specific changes to its review process.

Results from the first half of 2019 show that the DOJ's streamlining efforts may be paying off: More than 80% of the DOJ's significant investigations concluding during that period lasted fewer than 10 months, while 75% of the FTC's significant investigations lasted more than 16 months, and only one lasted fewer than 10 months.[49]

There are other differences between the DOJ and FTC timing agreements, although the impact of these differences on timing is less clear. For example, the DOJ specifically identifies the earliest date on which the parties may certify substantial compliance with their second requests, while the FTC does not. The DOJ begins with a default period of 60 days following substantial compliance before the parties can close their transaction, while the FTC uses a default of 60-90 days. As a final example, the FTC requires that the parties have a good-faith basis for believing that they can consummate their transaction on the closing date (no doubt inspired by the Tronox/Cristal matter discussed above), while the DOJ does not include this requirement.

Conclusion

Under the Trump administration, each antitrust agency is enforcing the antitrust laws in a manner that presents risks to businesses not faced at the other. The DOJ is less likely to allow behavioral remedies to fix vertical mergers, while the FTC is more likely to challenge as anti-competitive a company's enforcement of its IP rights and to seek disgorgement of profits as a remedy for an antitrust violation.

The DOJ's model timing agreement includes unique limitations designed to speed up the merger review process, while the FTC continues to use its distinct structure for reviewing HSR-reportable transactions. This unprecedented degree of divergence between the two U.S. antitrust agencies raises serious questions of fairness, efficiency and good government. Still, this state of affairs is likely to continue for the remainder of this administration, and businesses need to be prepared for divergent treatment before the DOJ and FTC.

Gregory P. Luib is counsel at Dechert LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See Mike Lee, Just One Agency Should Enforce Antitrust Law, Wash. Exam'r, June 17, 2019, https://www.washingtonexaminer.com/opinion/op-eds/just-one-agency-should-enforce-antitrust-law ("[G]iven the different policies and procedures each agency follows, some industries are subject to a different standard of review just due to an accident of history that determined which agency would have jurisdiction.").

[2] See, e.g., Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., The "New Madison" Approach to Antitrust and Intellectual Property Law, Keynote Address at University of

Pennsylvania Law School, at 5 (Mar. 16, 2018), https://www.justice.gov/opa/speech/file/1044316/download.

[3] See Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., "Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law, Remarks at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute, at 6-7 (Dec. 7, 2018), https://www.justice.gov/opa/speech/file/1117686/download; see also U.S. Dep't of Justice & U.S. Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013), https://www.uspto.gov/sites/default/files/documents/Final_DOJ-PTO_Policy_Statement_on_FRAND_SEPs_1-8-13.pdf.

[4] See Statement of Interest of the United States of America at 3, FTC v. Qualcomm Inc., No. 17-cv-00220-LHK (N.D. Cal. May 2, 2019), https://www.law360.com/articles/1156135/attachments/0. Pursuant to 28 U.S.C. § 517, the DOJ may file a Statement of Interest in any federal or state court "to attend to the interests of the United States." Id. at 2 n.1.

[5] Id. at 5.

[6] See United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal, FTC v. Qualcomm Inc., No. 19-16122 (9th Cir. July 16, 2019), https://www.justice.gov/atr/case-document/file/1183936/download.

[7] Id. at 3.

[8] Id. at 8 (citation omitted).

[9] The FTC's complaint against Qualcomm and Commissioner Ohlhausen's dissent are available at https://www.ftc.gov/enforcement/cases-proceedings/141-0199/qualcomm-inc.

[10] See Christine Wilson, A Court's Dangerous Antitrust Overreach, Wall St. J., May 28, 2019, https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055. The 233-page district court decision in FTC v. Qualcomm is available at https://www.ftc.gov/system/files/documents/cases/qualcomm_findings_of_fact_and_conclusions_of_law.pdf.

[11] See Alexei Alexis, FTC Chair Simons Recuses from Qualcomm Antitrust Case, Bloomberg Law, Nov. 2, 2018, https://news.bloomberglaw.com/mergers-and-antitrust/ftc-chair-simons-recuses-from-qualcomm-antitrust-case-1.

[12] See Opinion of the Commission, In re 1-800 Contacts, Inc., FTC Docket No. 9372 (Nov. 7, 2018), https://www.ftc.gov/system/files/documents/cases/docket_no_9372_opinion_of_the_commission_redacted_public_version.pdf. Commissioner Wilson did not participate in the 1-800 Contacts decision.

[13] See id. at 9.

[14] See id. at 18-41. The majority also condemned the settlement agreements under a second, abbreviated analysis, concluding that there were direct anticompetitive effects from those agreements.

See id. at 42-50.

[15] Dissenting Statement of Commissioner Noah Joshua Phillips at 26, In re 1-800 Contacts, Inc., FTC Docket No. 9372 (Nov. 7, 2018), https://www.ftc.gov/public-statements/2018/11/dissenting-statement-commissioner-noah-joshua-phillips-redacted-public.

[16] See Opinion of the Commission, In re Impax Laboratories, Inc., FTC Docket No. 9373 (Mar. 28, 2019), https://www.ftc.gov/system/files/documents/cases/d09373_impax_laboratories_opinion_of_the_commission_-_public_redacted_version_redacted_0.pdf [hereinafter FTC Impax Decision]. The FTC had previously settled with Endo. See id. at 3 n.3.

[17] 570 U.S. 136 (2013).

[18] See FTC Impax Decision at 35-36.

[19] See id. at 31-32.

[20] Id. at 32.

[21] See, e.g., Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Antitrust and Deregulation, Remarks at American Bar Association Antitrust Section Fall Forum, at 5-9 (Nov. 16, 2017), https://www.justice.gov/opa/speech/file/1012086/download.

[22] See Complaint at 15-19, United States v. AT&T Inc., No. 17-cv-02511 (D.D.C. Nov. 20, 2017), https://www.justice.gov/atr/case-document/file/1012916/download.

[23] See United States v. AT&T, Inc., No. 18-5214, slip op. (D.C. Cir. Feb. 26, 2019), https://www.cadc.uscourts.gov/internet/opinions.nsf/390E66D6D58F426B852583AD00546ED6/$file/18-5214.pdf.

[24] See, e.g., Matthew Perlman, Dems Ask DOJ If Trump Pressured AT&T-Time Warner Review, Law360, Mar. 8, 2019.

[25] See Complaint at 13-16, United States v. Bayer AG, No. 18-cv-01241 (D.D.C. May 29, 2018), https://www.justice.gov/atr/case-document/file/1066656/download.

[26] See Competitive Impact Statement at 23-25, United States v. Bayer AG, No. 18-cv-01241 (D.D.C. May 29, 2018), https://www.justice.gov/atr/case-document/file/1066681/download.

[27] See Analysis of Agreement Containing Consent Order to Aid Public Comment at 1-3, In re Broadcom Limited and Brocade Communications Systems, Inc., FTC File No. 171-0027 (July 3, 2017), https://www.ftc.gov/system/files/documents/cases/1710027_broadcom_brocade_analysis.pdf.

[28] See Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment at 2-3, In re Northrup Grumman Corp. and Orbital ATK, Inc., FTC File No. 181-0005 (June 5, 2018), https://www.ftc.gov/system/files/documents/cases/1810005_northrop_grumman_orbital_analysis_6-5-18.pdf.

[29] See Analysis of Agreement Containing Consent Order to Aid Public Comment at 3-4, In re Sycamore

Partners II, L.P., Staples, Inc., and Essendant Inc., FTC File No. 181-0180 (Jan. 28, 2019). Commissioners Chopra and Slaughter voted against accepting the proposed consent order in Staples/Essendant. Their statements and other materials related to this matter are available at https://www.ftc.gov/enforcement/cases-proceedings/181-0180/sycamore-partners-ii-lp-staples-inc-essendant-inc-matter.

[30] See, e.g., D. Bruce Hoffman, Acting Director, FTC Bur. of Competition, Vertical Merger Enforcement at the FTC, Remarks at Credit Suisse 2018 Washington Perspectives Conference, at 8 (Jan. 10, 2018), https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc (arguing that no one should have been surprised by DOJ's challenge to the AT&T/Time Warner transaction and that no one should be surprised if the FTC requires structural relief in a vertical matter).

[31] See, e.g., Statement of Bureau of Competition Deputy Director Ian Conner on the Commission's Consent Order in the Acquisition of Orbital ATK, Inc. by Northrup Grumman Corp., File No. 181-0005, at 2 (June 5, 2018) ("The Bureau of Competition typically disfavors behavioral remedies and will accept them only in rare cases based on special characteristics of an industry or particular transaction.").

[32] The FTC also recently imposed behavioral remedies in a horizontal matter involving a joint venture among competing producers of polyethylene terephthalate, or PET. Those remedies included restrictions on sharing competitively sensitive information among the JV partners, as well as a prohibition on the JV partners influencing the JV's board of managers. See Analysis of Agreement Containing Consent Order to Aid Public Comment at 4, In re Corpus Christi Polymers LLC, Alfa, S.A.B. de C.V., Indorama Ventures Plc Aloke Lohia and Suchitra Lohia, and Far Eastern New Century Corp., FTC File No. 181-0030 (Dec. 21, 2018), https://www.ftc.gov/system/files/documents/cases/181_0030_pet_analysis_12-21-18.pdf.

[33] See Press Release, FTC, Reckitt Benckiser Group plc to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addition Treatment Suboxone (July 11, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc. https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc. The Commission's consent agreement was part of a broader settlement Reckitt reached with the federal government that involved a total payment of $1.4 billion to resolve all investigations and claims into the company's conduct relating to opioid addiction treatments.

[34] See Complaint for Injunctive and Other Equitable Relief at 67, FTC v. Reckitt Benckiser Group Plc, No. 19-cv-00028 (W.D. Va. July 11, 2019), https://www.ftc.gov/system/files/documents/cases/reckitt_complaint_7-11-19.pdf. The FTC's settlement with Reckitt also includes several behavioral restrictions that are substantially more regulatory than those typically found in antitrust consent decrees. Those restrictions, which apply to the marketing of follow-on drugs by Reckitt, address disposition of drug inventory, order fulfillment, and pricing. See Joint Motion for Entry of Stipulated Order for Permanent Injunction and Equitable Monetary Relief at 8-9, FTC v. Reckitt Benckiser Group Plc, No. 19-cv-00028 (W.D. Va. July 11, 2019), https://www.ftc.gov/system/files/documents/cases/reckitt_joint_motion_for_stipulated_order_7-11-19.pdf.

[35] See Complaint at 45, FTC v. Shire ViroPharma Inc., No. 17-cv-00131 (D. Del. Feb. 7, 2017), https://www.ftc.gov/system/files/documents/cases/170216viropharma_unredacted_sealed_complaint_.pdf.

[36] See FTC v. Shire ViroPharma Inc., No. 18-1807, slip. op. (3d Cir. Feb. 25, 2019), https://www2.ca3.uscourts.gov/opinarch/181807p.pdf.

[37] See Press Release, FTC, FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go to Purchasers Affected by Anticompetitive Tactics (May 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill.

[38] See Anne Cullen, $448M Win in AbbVie Case Not Enough, FTC Tells 3rd Circ., Law360, Mar. 29, 2019.

[39] See Dechert LLP, DAMITT Q2 2019: New Industry Analysis Sheds Light on Significant Investigations by Sector (July 25, 2019), https://www.dechert.com/knowledge/publication/2019/7/damitt-q2-2019.html [hereinafter DAMITT Q2 2019 Update] (average duration of investigations in first half of 2019 was 12.1 months).

[40] See 15 U.S.C. § 53(b).

[41] See 15 U.S.C. § 25. This article does not address the issue of whether the FTC faces a lower standard when it seeks a PI than the one typically applied to a DOJ request for a preliminary or (more likely) permanent injunction. However, a perceived difference in the standards is one of the cited rationales for Congressional bills introduced in recent sessions that would limit the FTC's use of administrative litigation in the merger review context. See, e.g., Press Release, U.S. Sen. Mike Lee, Sens. Lee, Hatch, Tillis, and Grassley Introduce SMARTER Act (May 15, 2018), https://www.lee.senate.gov/public/index.cfm/2018/5/sens-lee-hatch-tillis-and-grassley-introduce-smarter-act.

[42] See Complaint, FTC v. Tronox Ltd., Docket No. 9377 (FTC Dec. 5, 2017), https://www.ftc.gov/system/files/documents/cases/docket_no_9377_tronox_cristal_part_3_administrative_complaint_redacted_public_version_12072017.pdf; Complaint, FTC v. Tronox Ltd., No. 18-cv-01622 (D.D.C. July 10, 2018), https://www.ftc.gov/system/files/documents/cases/001_2018-07-10_complaint_tronox.pdf.

[43] See Leah Nylen, FTC Won't Challenge Mergers in Federal Court If Deal's Closing Not Imminent, Hoffman Says, MLex, Apr. 13, 2018.

[44] See Press Release, Tronox Ltd., Tronox Seeks Opportunity for Decision on Merits of Proposed Cristal Acquisition (Jan. 23, 2018), https://www.tronox.com/tronox-seeks-opportunity-for-decision-on-merits-of-proposed-cristal-acquisition/.

[45] See Emergency Complaint for Declaratory Judgment and Injunctive Relief, Tronox Ltd. v. FTC, No. 18-cv-10 (N.D. Miss. Jan. 23, 2018), http://investor.tronox.com/static-files/ee05e431-f2a3-4bef-9a02-e04178261dd2. Tronox voluntarily dismissed its complaint in March 2018.

[46] See FTC v. Tronox Ltd., No. 18-cv-01622, slip op. (D.D.C. Sept. 12, 2018), https://www.ftc.gov/system/files/documents/cases/tronox_pi_opinion_redacted.pdf; Initial Decision, FTC v. Tronox Ltd., Docket No. 9377 (FTC Dec. 14, 2018), https://www.ftc.gov/system/files/documents/cases/docket_9377_tronox_et_al_initial_decision_

redacted_public_version_0.pdf; Analysis of Agreement Containing Consent Order to Aid Public Comment, In re Tronox Ltd., National Industrialization Co. (TASNEE), National Titanium Dioxide Co. Ltd. (Cristal), and Cristal USA Inc., FTC Docket No. 9377 (Apr. 10, 2019), https://www.ftc.gov/system/files/documents/cases/171_0085_tronox_aapc.pdf.

[47] See U.S. Dep't of Justice, Model Timing Agreement (Nov. 2018), https://www.justice.gov/atr/page/file/1111336/download; FTC, Model Timing Agreement (rev. Feb. 2019), https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_2-27-19_0.pdf.

[48] See U.S. Dep't of Justice, Frequently Asked Questions, Voluntary Requests and Model Timing Agreement, at 5 (Nov. 2018), https://www.justice.gov/atr/page/file/1111331/download.

[49] See DAMITT Q2 2019 Update.