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Updates and Trends in Vertical M&A Transactions

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Antitrust enforcers in the United States and abroad, traditionally, have applied relatively lenient scrutiny to mergers between a supplier or input provider and a customer (so-called "vertical transactions"). That stereotype, however, is now squarely in question. In the last year, the Federal Trade Commission (FTC) has challenged three proposed vertical transactions – two of which have been abandoned by the parties. And just last week, the Antitrust Division of the Justice Department filed suit to block another vertical transaction. This increased enforcement, combined with the 2021 withdrawal of the Vertical Merger Guidelines,[1] signals an era of uncertainty for certain kinds of vertical transactions that, in the past, would have closed with few if any remedies. In this alert, we discuss the agencies' recent enforcement actions and the implications for companies considering vertical transactions.

Recent Challenges to Vertical Transactions

Lockheed-Aerojet. In January 2022, the FTC challenged Lockheed's proposed acquisition of Aerojet, a supplier of missile propulsion systems used in missiles made by Lockheed and other defense prime contractors. The FTC alleged that the merger would lessen competition by giving Lockheed control over critical components that its rival prime contractors and propulsion suppliers need to compete. The FTC further alleged that Aerojet has access to competitively sensitive information about Lockheed's rivals and the merger would grand Lockheed access to that proprietary information.[2]

In a similar transaction involving Northrop Grumman's proposed acquisition of Orbital ATK, only a few years earlier in 2018, the parties settled similar agency concerns with behavioral remedies, including (i) a commitment to continue selling rocket motors to rivals; and (ii) an agreement to segregate the business with a firewall.[3] Reportedly, Lockheed and Aerojet proposed a firewall here, but the proposed remedy was rejected by the FTC.[4] The parties abandoned the transaction earlier this month after the FTC had filed suit, seeking to enjoin the deal.[5]

NVIDIA-Arm. In December 2021, the FTC sued to block semiconductor chip supplier NVIDIA Corp.'s acquisition of chip designer, Arm, Ltd. The FTC alleged the transaction would provide NVIDIA control over critical Arm technology and enable the merged firm to limit production and prevent Arm from licensing innovations that conflict with NVIDIA's business interests. The FTC further alleged the merger would provide NVIDIA with competitively sensitive information regarding Arm licensees, many of which are NVIDIA competitors.[6]

This merger complaint was the first brought under the leadership of FTC Chair Lina Khan, after a lengthy investigation, in which, the Commission cooperated with other investigating authorities, including the United Kingdom's Competition and Markets Authority (CMA), the European Commission (EC), and China's State Administration for Market Regulations (SAMR).

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Again, the parties offered remedies – here, to spin-off Arm's licensing business as an independent entity, albeit under NVIDIA's ultimate control – but they did not satisfy the FTC.[7] Reportedly, the FTC sought input from third-parties before rejecting the proposal, as it typically does.[8] In the UK, NVIDIA offered remedies during the Phase I review such as (i) equal access and open licensing for Arm's intellectual property; and (ii) safeguards for confidential information. But these commitments were insufficient to prevent a Phase II investigation.[9] The parties abandoned the transaction earlier this month.

Illumina-Grail. In March 2021, the FTC challenged Illumina's proposed acquisition of Grail, maker of a noninvasive, early cancer detection test. Illumina is the only provider of DNA sequencing products essential to these kinds of early detection tests, according to the FTC complaint. The FTC's complaint further alleged that the merger would enable Illumina to raise the prices of Grail's future competitors and impede their development of products that would rival Grail's technology.[10] The agency originally filed a motion for preliminary injunction in federal court in May 2021, but withdrew the request, citing the reduced risk of the transaction in closing considering the ongoing EC review.[11] The EC took up a review upon a recommendation from several member states.

Illumina offered 12-year supply contracts to its customers with guarantees of continued supply and no price increases.[12] The companies also offered, supposedly, "far-reaching behavioral remedies" to the EC, but the details of these remedies were not made public.[13] The EC review remains ongoing and the FTC administrative trial is seeking to enjoin the transaction recently concluded, with a decision expected in the coming months.

Key Takeaways for Parties Considering Vertical Transactions

New Theories of Alleged Harm. While economic analysis has traditionally been used to demonstrate procompetitive benefits of vertical transactions to consumers (e.g., lower costs), the agencies in these cases allege that the potential for the merged firm to disadvantage market participants outweighs any potential benefits. The focus of the agencies' claims appears to be on harm to others' ability to compete. According to the agencies, such harm might arise where one or both of the merging parties has a high market share in its respective market.

Bipartisan Enforcement. Each of the three FTC challenges to a vertical transaction in the last year has followed a unanimous Commission vote. This bipartisan consensus indicates that we are likely to see a continued increase in challenges to M&A activity across all administrations.

Intra-Governmental Cooperation. Competition agencies regularly cooperate with other government agencies with relevant expertise. For example, in Lockheed's proposed vertical acquisition of Aerojet, the U.S. Department of Defense reviewed the transaction and made undisclosed recommendations to the FTC.[14] In 2018, Broadcom's hostile takeover of Qualcomm was halted by a presidential order because the transaction raised national security concerns.[15] In connection with NVIDIA's proposed acquisition of Arm, the UK Secretary of State for Digital, Culture, Media, and Sports (DCMS) requested a public interest intervention and directed the CMA to review the transaction for national security concerns.[16] DCMS was particularly concerned with the integral role semiconductors play in the United Kingdom's infrastructure, especially in defense and national security.

International Investigations and Cooperation. Vertical transactions are receiving heightened scrutiny from regulatory agencies around the world, including, most notably, the U.S. antitrust agencies, EC and European Union member states, and SAMR. Further, antitrust agencies across the globe are increasing cooperation. For example, in the NVIDIA-Arm transaction, the EC indicated it is "cooperating with competition authorities around the world."[17] It appears that this increased cooperation may lengthen the merger review period. Coordination among agencies was the suspected reason behind the unprecedented eight-month SAMR pre-filing investigation.[18] And in the Illumina-Grail

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transaction, the EC has exercised the ability to take referrals from member states without those member states independently having jurisdiction to review the transaction under their own merger control regimes.[19]

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[1] Fed. Trade Comm'n, *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines Commission File No. P810034* (Sept. 15, 2021), here.

[2] Compl. [Redacted-Public Version], *In the Matter of Lockheed Martin Corp. and Aerojet Rocketdyne Holdings, Inc.*, Docket No. 9405 (Feb. 14, 2022), https://www.ftc.gov/system/files/documents/cases/d09405_-_assignment_of_joint_motion_to_dismiss_complaint_-_public_1.pdf, ¶¶ 12–15.

[3] Curtis Eichelberger, *Confluence of government actors likely to place Lockheed, Aerojet merger under greater US scrutiny* (Aug. 2, 2021), https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/confluence-of-government-actors-likely-to-place-lockheed-aerojet-merger-under-greater-us-scrutiny.

[4] Lockheed Martin, *Lockheed Martin Reports Fourth Quarter And Full Year 2021 Financial Results* (Jan. 25, 2022), https://news.lockheedmartin.com/2022-01-25-Lockheed-Martin-Reports-Fourth-Quarter-and-Full-Year-2021-Financial-Results; *Aerojet Rocketdyne, Aerojet Rocketdyne Holdings, Inc. Announces Update on Proposed Merger Transaction with Lockheed Martin* (Jan. 25, 2022), https://www.rocket.com/article/aerojet-rocketdyne-holdings-inc-announces-update-proposed-merger-transaction-lockheed-martin.

[5] Aerospace, *Lockheed Martin Cancels Aerojet Rocketdyne Merger After Antitrust Pressure* (Feb. 14, 2022), https://dot.la/lockheed-martin-cancels-aerojet-rocketdyne-2656663782.html; *see* Fed. Trade Comm'n, *Statement Regarding Termination of Lockheed Martin Corporation's Attempted Acquisition of Aerojet Rocketdyne Holdings Inc.* (Feb. 15, 2022), https://www.ftc.gov/news-events/press-releases/2022/02/statement-regarding-termination-lockheed-martin-corporations.

[6] Compl. [Redacted-Public Version], *In the Matter of Nvidia Corp. SoftBank Group Corp., and Arm, Ltd.*, Dkt No. 9404 (Dec. 2, 2021), here, ¶¶ 7–12 .

[7] Flavia Fortes, Curtis Eichelberger and Austin Peay, *Nvidia-Arm deal blocked by US FTC, remedies didn't address concerns* (Dec. 2, 2021), https://content.mlex.com/#/content/1341929.

[8] *Id.*

[9] Competition Markets and Authority, *Digital Secretary asks CMA to carry out further investigation into NVIDIA's takeover of Arm* (Nov. 16, 2021), https://www.gov.uk/government/news/digital-secretary-asks-cma-to-carry-out-further-investigation-into-nvidias-takeover-of-arm.

[10] Compl. [Redacted-Public Version], *In the Matter of Illumina Inc. and Grail Inc.*, Docket No. 9401 (March 13, 2021), here, ¶¶ 1, 11–14.

[11] Curtis Eichelberger and Austin Peay, *Illumina closes Grail deal while EC continues review, US FTC trial starts Aug. 24* (Aug. 18, 2021), https://content.mlex.com/#/content/1317564.

[12] MLex, *Illumina offers contract to customers for 12-year supply with guarantees of continued supply, no price increases* (April 1, 2021), here; Curtis Eichelberger and Nicholas Hirst, *Illumina, Grail fix for merger's anticompetitive harms adopted by five*

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companies (Nov. 2, 2021), https://content.mlex.com/#/content/1334057.

[13] Natalie McNellis, *Illumina makes EU remedy offer for Grail acquisition; deadline extended to March 25* (Jan. 28, 2022), https://content.mlex.com/#/content/1354851.

[14] U.S. Dep't of Defense, *DoD Statement on Proposed Lockheed Martin and Aerojet Rocketdyne Merger* (Jan. 25, 2022), https://www.defense.gov/News/Releases/Release/Article/2910941/dod-statement-on-proposed-lockheed-martin-and-aerojet-rocketdyne-merger/.

[15] Federal Register, *Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited* (March 12, 2019), https://www.federalregister.gov/documents/2018/03/15/2018-05479/regarding-the-proposed-takeover-of-qualcomm-incorporated-by-broadcom-limited.

[16] Competition and Markets Authority, *Proposed acquisition of ARM Limited by NVIDIA Corporation: public interest intervention* (April 19, 2021), https://www.gov.uk/government/publications/proposed-acquisition-of-arm-limited-by-nvidia-corporation-public-interest-intervention.

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[18] MLex Staff, *Nvidia-Arm merger review clock officially begins in China* (Jan. 25, 2022), https://content.mlex.com/#/content/1353624?referrer=content_seehereview.

[19] European Commission Press Corner, *Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina / GRAIL transaction* (Aug. 20, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322.

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