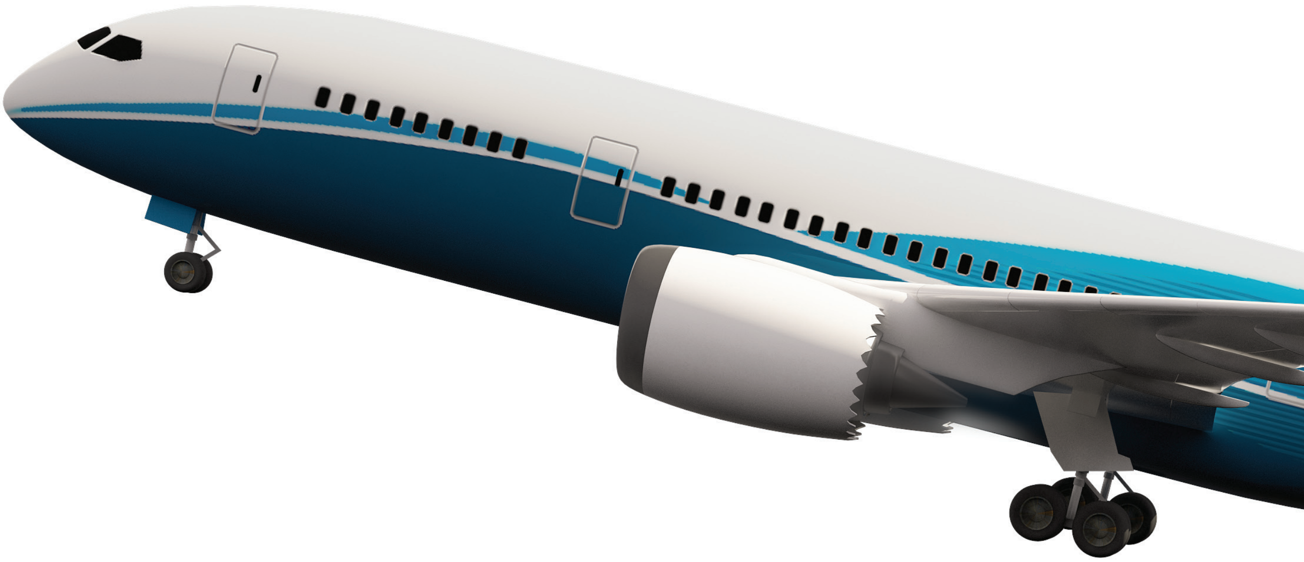


Federal Merger Enforcement Actions

A Look at Recent Trends

A review of federal merger enforcement actions from 2010 through 2013 reveals insights on the antitrust agencies' approach to merger review. **Nancy Hawkins** and **Jessica King-Kafsack** of **Practical Law** examine these enforcement actions and highlight notable trends.

Image by Kim Lee, Worlds Away Productions.

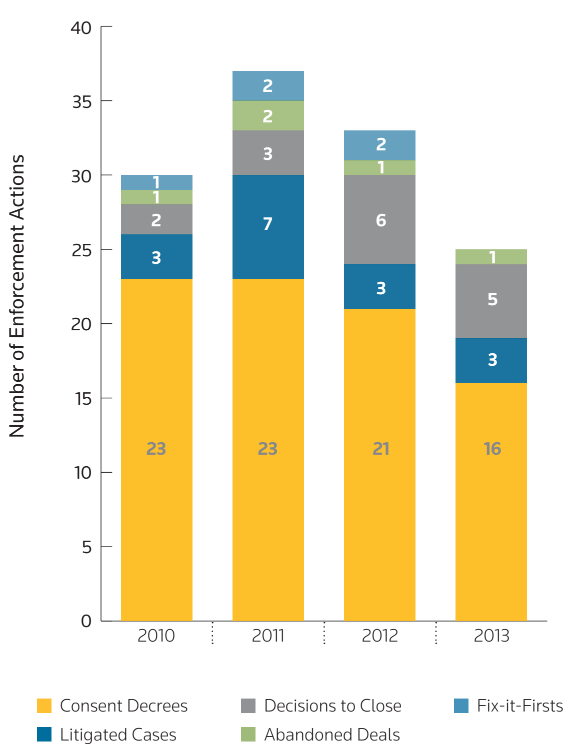
The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) (the antitrust agencies) amended the Horizontal Merger Guidelines in 2010 (2010 Guidelines) to clarify the analytical tools and types of evidence currently used by the antitrust agencies to analyze the potential competitive impact of merger transactions. In part, the amendments:

- De-emphasized the importance of defining a relevant market and calculating market share and market concentration levels (measured by the Herfindahl-Hirschman Index (HHI)).
- Placed greater emphasis on analyzing the competitive effects of a merger and, in particular, the loss of competition between the merging parties (known as a unilateral effects analysis).

A review of FTC and DOJ merger enforcement actions from calendar years 2010 through 2013 reveals several enforcement trends and insights on the antitrust agencies' approach to merger review:

- The antitrust agencies concluded a total of 125 merger enforcement actions, with the majority resulting in consent decrees.
- While the 2010 Guidelines de-emphasized the importance of defining relevant markets and calculating market shares and HHI, generally the antitrust agencies continued to cite to these factors.
- The most common alleged change in market competitors resulting from a merger was three-to-two competitors in the market.
- The majority of deals were analyzed under a unilateral effects analysis, and loss of head-to-head competition was the most common theory of competitive harm used.
- Although the 2010 Guidelines eliminated the two-year threshold to analyze the timeliness of market entry, this threshold remained a part of the FTC's entry analysis.
- The antitrust agencies continued their increased focus on consummated merger enforcement.
- Several 2013 cases show the willingness by the antitrust agencies to factor in market changes in their merger analysis.

FIGURE A: FEDERAL MERGER ENFORCEMENT ACTIONS BY TYPE



Note: Any enforcement action that started as a litigated case is counted as such, regardless of how it concluded.

For summaries of recent US federal merger enforcement action outcomes, including consent decrees, decisions to close, litigated cases, fix-it-firsts and abandoned deals, visit the Federal Merger Enforcement Actions database in What's Market at us.practicallaw.com/resources/us-whats-market.

ANTITRUST AGENCY REVIEW

Both the FTC and DOJ review:

- Proposed mergers that may harm consumers by, for example, raising prices or reducing innovation.
- Consummated mergers that have harmed consumers or competitors, generally where there is actual evidence of harm to competition.

If the FTC or DOJ decides to investigate a proposed merger beyond the initial waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), the investigating agency will issue a request for additional information (known as a Second Request) to the parties, which stays the HSR waiting period. The antitrust agencies generally investigate consummated mergers using a compulsory process, meaning through issuance of a civil investigative demand requiring the production of evidence. These investigations (known as merger enforcement actions) typically result in one of the following:

- **Consent decree.** A settlement agreement between the antitrust agency and the merging parties, including a remedy for the merger, such as a divestiture of assets.
- **Litigation.** A lawsuit filed by the FTC or DOJ to prevent or undo the merger.
- **Decision to close.** A statement by the investigating antitrust agency giving its reasons for closing its merger investigation. However, some investigations are closed without any publicly released statement.
- **Fix-it-first.** A situation in which the merging parties amend their purchase agreement to address the antitrust agency's concerns, without the need for a remedy.
- **Abandoned deal.** A decision by the merging parties to abandon their deal in response to a merger investigation or threat of litigation.

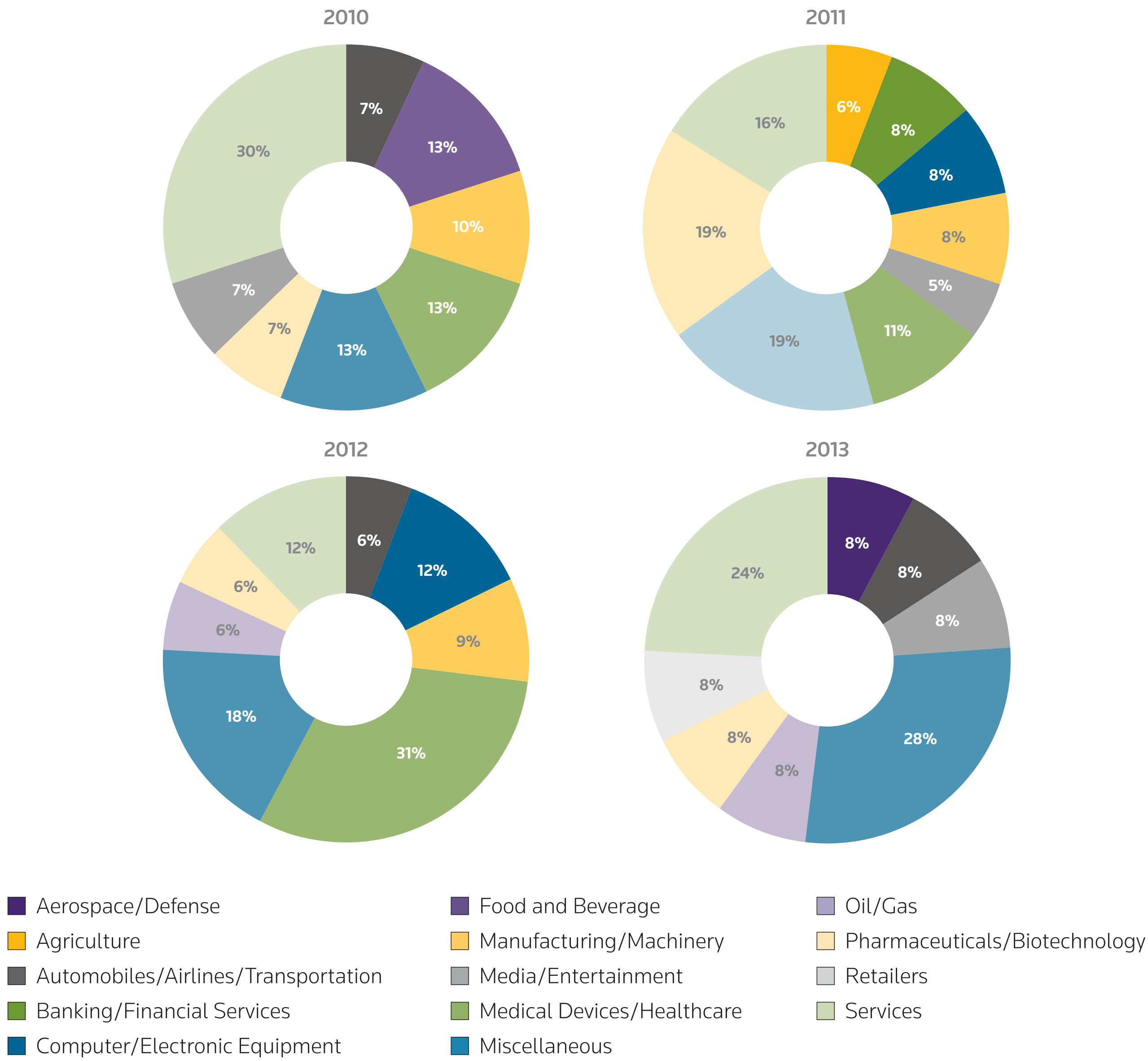
Search Corporate Transactions and Merger Control and How Antitrust Agencies Analyze M&A for more on how the antitrust agencies analyze mergers, acquisitions and joint ventures.

FEDERAL MERGER ENFORCEMENT ACTIONS BY THE NUMBERS

From 2010 through 2013, the FTC concluded 73 merger enforcement actions and the DOJ concluded 52. These numbers do not include three outstanding 2013 antitrust agency lawsuits, two of which concluded in early 2014 (both in favor of the respective antitrust agency). The majority of the enforcement actions resulted in consent decrees (see *Figure A*).

Additionally, most of the merger enforcement actions from 2010 through 2013 were between competitors, known as horizontal mergers. Only 13 were vertical deals (deals between parties at

FIGURE B: PERCENTAGE OF ENFORCEMENT ACTIONS BY INDUSTRY SECTOR



Note: The Miscellaneous category is comprised of industries in which only one federal merger enforcement action occurred that year.

different levels of the supply chain), or were horizontal mergers that included some vertical aspects.

LITIGATED CASES

From 2010 through 2013, the FTC and DOJ exhibited aggressiveness in merger enforcement and demonstrated a willingness to devote substantial resources to litigation by bringing a total of 19 litigated cases to stop or unwind mergers. With respect to the concluded litigation matters, the antitrust agencies had a high rate of success in resolving competitive concerns. Except for one case in which the court denied the FTC a preliminary injunction (for a summary of this action, search FTC v. Laboratory Corporation of America and Laboratory Corporation of America Holdings in What's Market), all of the litigations ended in either:

- Grants of preliminary or permanent injunctive relief.
- Consent decrees.
- Abandoned deals.

INDUSTRY SECTORS

The FTC and DOJ brought a majority of the merger enforcement actions in the services industry (see *Figure B*). Other significant markets were:

FIGURE C: THEORIES OF COMPETITIVE HARM

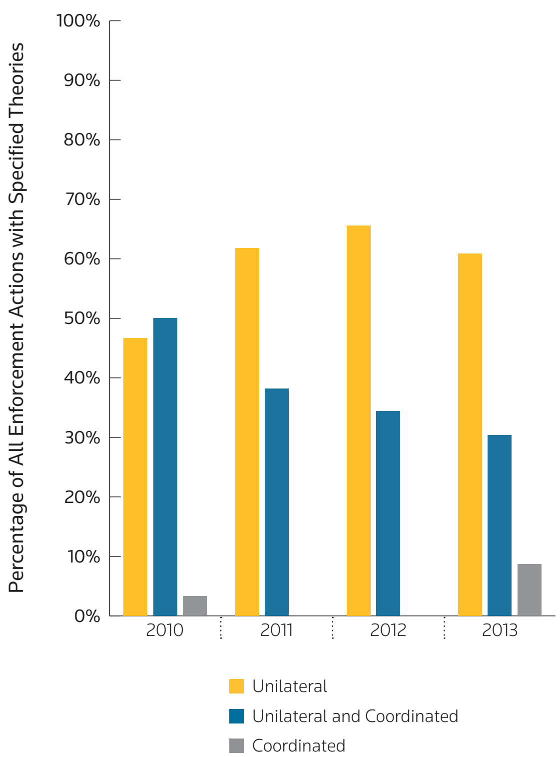
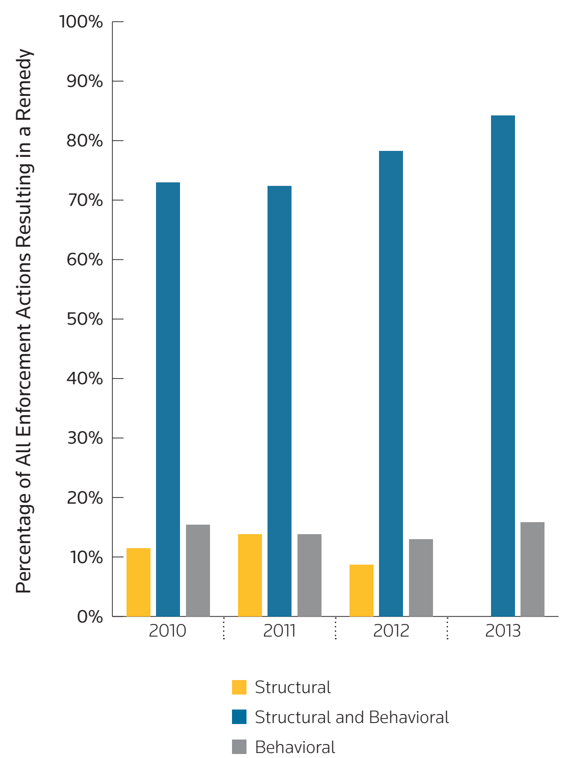


FIGURE D: TYPE OF REMEDY



- Healthcare.
- Pharmaceuticals.
- Food and beverage.
- Telecommunications.
- Manufacturing.
- Airlines.

THEORIES OF COMPETITIVE EFFECTS

Over the last four years, the FTC and DOJ analyzed most mergers under a unilateral effects theory of competitive harm, looking at the loss of competition between the merging parties (see *Figure C*). From 2010 through 2013, the antitrust agencies analyzed only three transactions under a purely coordinated effects theory of competitive harm, which looks at the loss of competition caused by high levels of concentration that enable and encourage post-merger coordinated interaction among the firms left in the relevant market.

REMEDY TYPE

For federal merger enforcement actions from 2010 through 2013 that resulted in a remedy, a combination of a structural remedy (divestiture) and behavioral remedies was by far the most common (see *Figure D*). Less frequently, the antitrust agencies imposed a remedy that was purely structural or behavioral. Only nine remedies were purely structural and only 14 remedies were purely behavioral.

Of the 14 transactions in which only behavioral remedies were ordered:

- Six were vertical mergers, where a divestiture typically does not remedy the competitive problems.
- Four were post-consummation mergers, where divestitures are more difficult to craft because the parties' assets are already integrated.
- Two were fix-it-firsts, where the FTC wanted to ensure that the parties upheld their amended agreement and did not reacquire the assets at issue.
- Two were unique situations, including one where relevant state law prohibited a divestiture (for a summary of this action, search In the Matter of Phoebe Putney Health System, Inc. and Palmyra Park Hospital, Inc. in What's Market).

To retrieve summaries of enforcement actions by industry sector, geographic market, remedy type and more, visit the Federal Merger Enforcement Actions database in What's Market at us.practicallaw.com/resources/us-whats-market.

MARKET SHARES AND HHI LEVELS

While the 2010 Guidelines de-emphasized the importance of defining relevant markets and calculating market shares and HHI, the FTC and DOJ continued to explicitly cite to these factors in both consent decrees and complaints filed in litigated cases throughout 2010, 2011 and 2012. However, in both 2012 and 2013, while the DOJ specified HHI and market share levels in each of its litigated cases and consent decrees, the FTC decreased its use of those factors (see *Figure E* and *Figure F*).

In enforcement actions from 2010 through 2013 where the FTC and DOJ specified the post-merger HHI, a large majority of those calculations were in excess of 2,500 (defined as a highly concentrated market under the 2010 Guidelines). Only nine transactions had post-merger HHI calculations between 1,500 and 2,500 (defined as a moderately concentrated market).

CHANGE IN COMPETITORS

In the enforcement actions from 2010 through 2013, the alleged change in market competitors resulting from the transaction has been divided. However, the most commonly alleged change is three-to-two competitors in the market (see *Figure G*).

TWO-TO-ONE COMPETITORS

From 2010 through 2013, 35 federal merger enforcement actions had one or more markets with a change in competitors from two to one. A merger to monopoly is extremely likely to draw the scrutiny of the antitrust agencies and will almost always result in a remedy or a decision to block the deal because the merged firm would be able to exert unilateral market power and increase prices or reduce services or other non-price benefits, without facing competition from others in the market.

However, there was one striking exception to this general rule in 2013 in the FTC's investigation of GenCorp Inc. and United Technologies Corp. The FTC closed its investigation of the merger, deferring to the Department of Defense's recommendation that the FTC not block or remedy the two-to-one merger for national security reasons (for a summary of this action, search GenCorp. Inc. and United Technologies Corp. in What's Market).

There was a drop in two-to-one merger investigations in 2013, during which there were only four merger enforcement actions with at least one market resulting in a two-to-one reduction in competitors. The industries involved in those mergers were funeral services, aerospace and defense, manufacturing and pharmaceuticals.

THREE-TO-TWO COMPETITORS

From 2010 through 2013, 42 federal merger enforcement actions had one or more markets with a change in competitors from three to two. Mergers that would result in only two remaining competitors in the market face serious inquiry from the antitrust agencies because the merged firm could exert unilateral market power, particularly if it will be the dominant competitor post-merger. Additionally, a three-to-two merger can result in coordination between the remaining competitors if they have less incentive to compete with each other.

Included in three-to-two mergers are those where, premerger, the market consists of three significant competitors, two of which intend to combine, and certain fringe players who do not have a constraining effect on the three big firms. For example, in the Honeywell International Inc. and Intermec, Inc. merger, the FTC

FIGURE E: PERCENTAGE OF ACTIONS WITH SPECIFIED MARKET SHARES

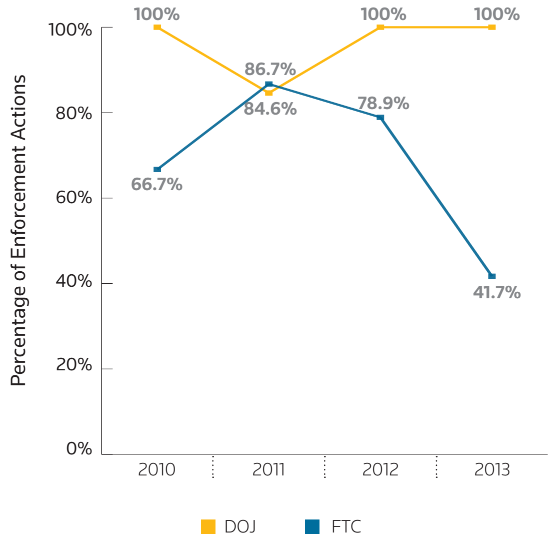
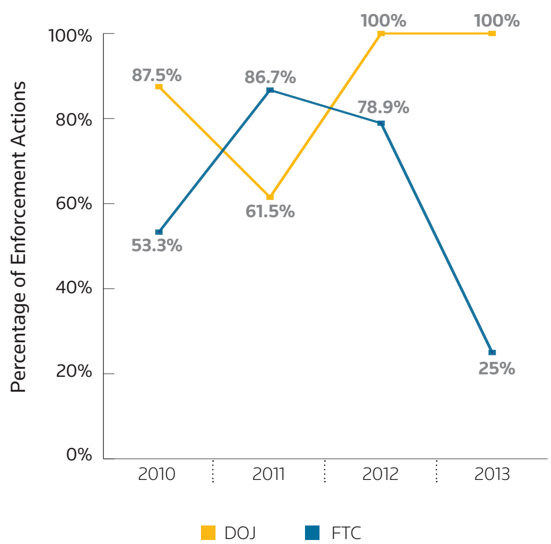


FIGURE F: PERCENTAGE OF ACTIONS WITH SPECIFIED HHI



Note: These charts only include consent decrees and litigated cases. Decisions to close, abandoned deals and fix-it-firsts rarely include market shares or HHI.

alleged that there were three major competitors (including the merging parties) that controlled 80% of the relevant 2D scan engine market. The remaining market share was divided among a number of fringe players who did not possess relevant intellectual property (IP) rights. Without owning or licensing necessary IP rights, the fringe competitors did not significantly constrain the big three market players. Therefore, the FTC determined that, due to the highly concentrated market, the two remaining significant competitors would have less incentive to compete aggressively post-merger (for a summary of this action, search In the Matter of Honeywell International Inc. in What's Market).

FIGURE G: CHANGE IN COMPETITORS

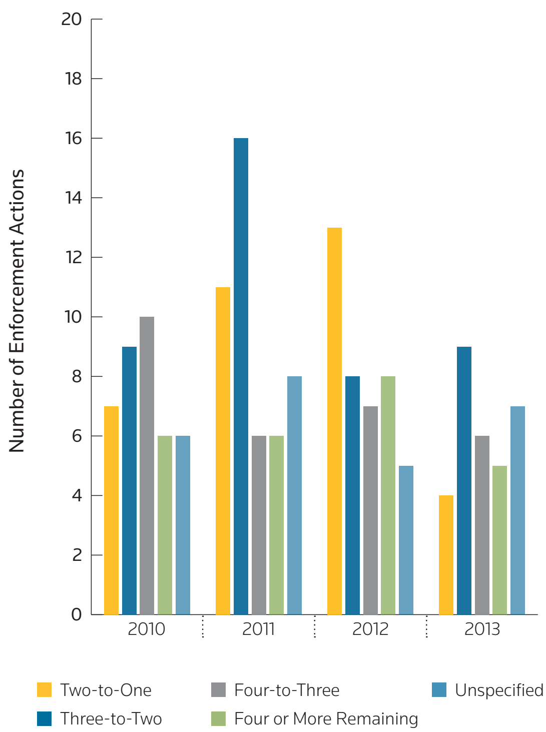
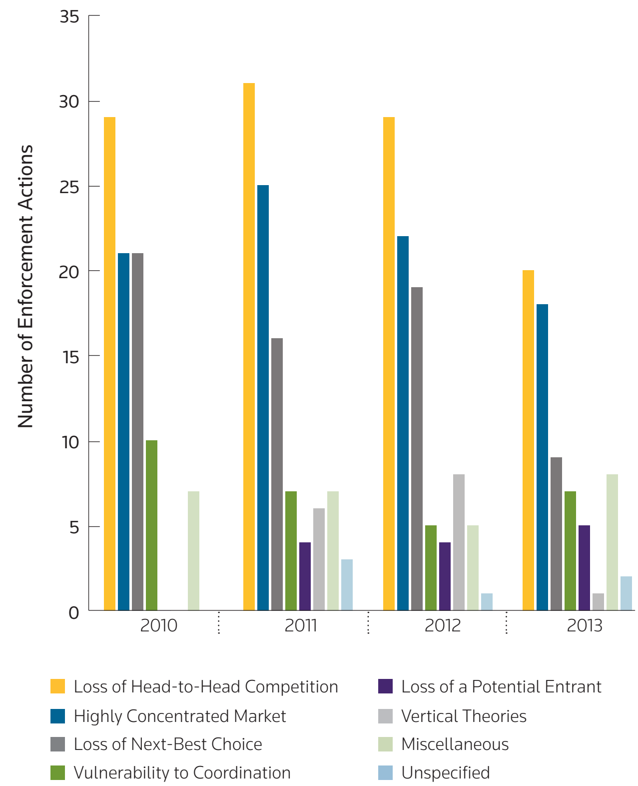


FIGURE H: THEORIES OF COMPETITIVE HARM



FOUR-TO-THREE AND FOUR OR MORE REMAINING COMPETITORS

From 2010 through 2013, 29 federal merger enforcement actions had one or more markets with a change in competitors from four to three. Additionally, 25 merger enforcement actions had one or more markets with at least four remaining competitors. In the deals where the change in competitors would have resulted in three or more competitors remaining in the relevant markets, the antitrust agencies analyzed the deals under the theories of loss of next-best choice, vulnerability to coordination and loss of a potential entrant (in addition to loss of head-to-head competition and highly concentrated markets).

THEORIES OF COMPETITIVE HARM

Given that the majority of deals were analyzed under a unilateral effects analysis, it is not surprising that the antitrust agencies analyzed loss of head-to-head competition as a theory of competitive harm in 109 out of the 125 merger enforcement actions issued from 2010 through 2013 (see *Figure H*). The existence of a highly concentrated market was also a common theory of competitive harm.

Other common theories of competitive harm include:

- Loss of next-best choice.
- Vulnerability to coordination.
- Loss of a potential entrant.
- Foreclosure and raising rivals' costs (for vertical mergers).

For summaries of enforcement actions by theory of competitive harm, visit the Federal Merger Enforcement Actions database in What's Market at us.practicallaw.com/resources/us-whats-market.

LOSS OF NEXT-BEST CHOICE

Loss of next-best choice is most frequently a theory of competitive harm in mergers to monopoly, when, by definition, the only two competitors are a customer's next-best choice. However, even where a merger is not a merger to monopoly, the merging parties can often be closer competitors for a number of customers than any other competitors in the market. This is frequently seen in mergers where the remaining competitors do not pose much of a threat to the merged entity.

The merger between Unilever, N.V. and Alberto-Culver Co. shows how the next-best choice theory can be used in markets other than a merger to monopoly. In the Unilever and Alberto-Culver merger, the DOJ defined the relevant markets as:

- Value shampoos.
- Value conditioners.
- Hair spray sold in retail stores.

The DOJ found that a significant fraction of customers purchasing Unilever's and Alberto-Culver's value shampoos and conditioners view each company as their next-best choice, as shown by:

- The companies' documents.
- Diversion rates caused by past price changes, where customers of one of the merging parties' products would switch to the other merging party's products in response to a price increase.

As a result, a significant fraction of the post-merger sales lost due to price increases on Unilever's products would be diverted to products of Alberto-Culver, and vice versa. The premerger margins on the parties' relevant products were high enough that the amount of recaptured lost sales would make price increases profitable, even if they would have been unprofitable before the merger. This was the case even if less than a majority of the customers viewed the merging parties' brands as their next-best choice premerger (for a summary of this action, search U.S. v. Unilever, N.V. and Alberto-Culver Co. in What's Market).

Search Economic Tools for Evaluating Competitive Harm in Horizontal Mergers for more on diversion ratios.

The FTC and DOJ use a similar analysis when looking at auction markets, where the merging parties' bidding behavior is often constrained by the possibility of losing sales to each other. For example, in the Regal Beloit Corporation and A.O. Smith Corporation merger, many customers deemed the merging parties to be the two best sources for spa pump motors. The third competitor in the market would be unlikely to constrain any exercise of unilateral market power by Regal Beloit post-merger (such as an increase in bid price) because Regal Beloit was aware that many customers strongly prefer it as a supplier (for a summary of this action, search U.S. v. Regal Beloit Corporation and A.O. Smith Corporation in What's Market).

VULNERABILITY TO COORDINATION

The antitrust agencies continue to challenge mergers in markets that are particularly susceptible to coordination, where the merger would increase the incentives of the remaining competitors to collude.

A market that is vulnerable to coordination can include:

- Transparent pricing.
- Homogenous products.
- Readily available market information on customers and transactions.

In the majority of cases in which this theory is used, the antitrust agencies set out the factors that make a relevant market more vulnerable to coordination and how the acquisition at issue will increase incentives to coordinate. One notable exception involved the FTC's consent decree in Fidelity National Financial, Inc. and Lender Processing Services, Inc., in which the complaint, Analysis to Aid Public Comment and the FTC's statement discussed coordination broadly, but did not analyze the vulnerability of the markets to coordination within their four corners (for a summary of this action, search In the Matter of Fidelity National Financial, Inc. and Lender Processing Services, Inc. in What's Market). Commissioner Wright filed a dissenting statement in that case noting that there was not enough evidence to support the FTC's assertion that incentives to coordinate would likely increase post-merger.

LOSS OF A POTENTIAL ENTRANT

The loss of a potential entrant theory is commonly used in pharmaceuticals mergers where the merger would eliminate either:

- An imminent competitor in a generic market (with an approved Abbreviated New Drug Application (ANDA)).
- A potential future competitor, where the merging party or parties will likely supply the generic product in the near future.

Search Hatch-Waxman Act for more on the ANDA process.

The FTC has also used the loss of a potential entrant theory to analyze a future market. In the Mylan Inc. and Agila matter, the FTC alleged that the acquisition would reduce potential competition in a future generic market that did not yet exist. The FTC argued that entry by either or both Mylan and Agila into that future market would likely increase price competition for the generic drug. That competition, however, would be lost post-acquisition because Mylan would be able to delay the launch of an additional generic product (for a summary of this action, search In the Matter of Mylan Inc., Agila Specialties Global Pte. Limited, Agila Specialties Private Limited and Strides Arcolab Ltd. in What's Market).

More controversial was the FTC's decision in the Nielsen Holdings N.V. and Arbitron Inc. matter, in which the FTC alleged that the acquisition would eliminate Arbitron as a potential competitor in the future market for national syndicated cross-platform audience measurement services. While there was no such market existing at the time of the FTC's consent decree, it argued that:

- Demand for this service by advertisers and media companies was increasing.
- Nielsen and Arbitron were the best-positioned firms to develop (or partner with others to develop) a national syndicated cross-platform audience measurement service because of their:
  - existing audience measurement panels; and
  - proven audience measurement technology assets.

Notably, Commissioner Wright dissented, objecting to the loss of competition in a future market as the theory of competitive harm. Specifically, Commissioner Wright remarked that a future market analysis presents unique challenges, including difficulty in:

- Defining the relevant product market.
- Identifying likely buyers and sellers.
- Estimating cross-elasticities of demand.
- Understanding potential product substitutability.

(For a summary of this action, search In the Matter of Nielsen Holdings N.V. and Arbitron Inc. in What's Market.)

LOSS OF A MAVERICK

The antitrust agencies set out the loss of a maverick theory in the 2010 Guidelines. They explained that an acquisition of a competitor who has consistently constrained price increases

An Expert's View

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Laura is an antitrust partner in the firm's Washington, DC office and focuses her practice on mergers and acquisitions. She has successfully obtained merger clearance from the FTC and DOJ for clients in a variety of industries, serving as lead antitrust counsel for numerous multi-billion dollar transactions.

Laura explores issues the antitrust agencies focus on when reviewing merger transactions:

Following the 2010 amendments to the Horizontal Merger Guidelines, has your analysis of mergers and the arguments you set forth to the government changed?

As government officials stated when the guidelines were issued, the 2010 Horizontal Merger Guidelines (2010 Guidelines) largely reflect practices that the agencies already were implementing and antitrust attorneys were well-aware. However, the 2010 Guidelines include some significant changes from earlier versions, and therefore provide clearer guidance to the business community and the public. For example, the 2010 Guidelines focus more on the competitive effects of a merger, and de-emphasize the importance of market definition to the agencies' analysis. The 2010 Guidelines also more fully describe the sources of evidence and analytical tools that the agencies will use to predict a merger's competitive effects.

In the last few years, the emphasis of arguments that I set forth to the government has evolved to mirror the agencies' focus on competitive effects. However, the actual analysis of mergers has not changed significantly. The agencies' competitive effects-centric analysis places more emphasis on the merging companies' documents, customers' views, industry data and economic analysis. In fact, the 2010 Guidelines stress the use of economic models to examine a merger's potential competitive effects. As a result, when data is available, effective arguments incorporate econometric analysis, including the upward pricing pressure (UPP) methodology and diversion ratios, critical loss analysis, natural experiments and merger simulation models.

Do you find that the antitrust agencies are less interested in market shares and HHI levels? If so, what is the agencies' main focus when beginning a merger investigation?

Market shares and concentration levels (as measured by the HHIs) still are important to the merger analysis. The 2010 Guidelines increased the HHI thresholds that the agencies use to assess whether a rebuttable presumption regarding market power applies. However, in many industries, these higher thresholds probably already were being used by the agencies' staff.

Although the HHI thresholds have increased, the revised treatment of market definition principles sometimes can result in narrower markets, and therefore higher market concentration. HHIs and concentration often are used primarily as an initial screen. That is, where the post-merger HHI is fairly low, it helps the government determine that further scrutiny may not be required. The 2010 Guidelines' focus on competitive effects means that where the post-merger HHI thresholds appear to be exceeded in an initial screen, agency staff then can shift to more sophisticated analysis of other factors to assess whether the transaction is likely to lead to adverse competitive effects.

I have found that the agencies' main focus when beginning a merger investigation are the number of significant competitors, the closeness of competition between the merging companies and the companies' documents (the documents supplied under Item 4 of the HSR notification as well as strategic plans, customer lists and other

or collusion in the market by, for example, pricing below competitors or introducing innovative offerings, may:

- Enhance the market power of the acquiring firm post-acquisition.
- Facilitate collusion among the remaining competitors post-acquisition.

The theory gained popularity in 2011, as the DOJ used it in two successful, high-profile merger cases (for summaries of these actions, search U.S. v. H&R Block, Inc. and 2SS Holdings, Inc. and U.S. v. AT&T Inc. and T-Mobile USA, Inc. in What's Market).

In addition to those cases, the antitrust agencies discussed the theory six other times from 2010 through 2013, including in:

- Three litigated cases (for summaries of these actions, search U.S. v. US Airways Group, Inc. and AMR Corporation, U.S. v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V., and F.T.C. v. Laboratory Corporation of America and Laboratory Corporation of America Holdings in What's Market).
- Two consent decrees (for summaries of these actions, search In the Matter of Charlotte Pipe and Foundry Company and Randolph Holding Company, L.L.C. and In the Matter of

documents routinely requested by agency staff during the initial waiting period). These documents typically provide agency staff with insight into the acquirer's rationale for the transaction, and how the merging companies view the marketplace and competitive dynamics.

Further, the government's initial interviews of customers and competitors also provide agency staff with an early assessment of whether the transaction could raise competitive concerns. In fact, documents that point to possible anticompetitive effects have figured prominently in most of the recent transactions that the agencies have challenged in court or entered into settlements with the merging companies.

What theories of competitive harm do you consider when reviewing a four-to-three merger or one with four or more remaining competitors in the market? Do you think these types of mergers raise red flags with the antitrust agencies?

It is very difficult to generalize because each transaction is unique. Clearly, a merger is unlikely to raise antitrust concerns if there are lots of viable competitors in the market. On the other hand, where there are only a few significant competitors, a transaction that combines two of them has the potential to raise concerns about market power and unilateral effects.

Generally, once there are four or more significant competitors in the market, the government would have to advance a coordinated interaction theory of harm. The 2010 Guidelines indicate that there are numerous forms of coordination that could raise concerns. More important, however, the 2010 Guidelines also outline various factors that would make an industry less susceptible to coordination. Key factors regarding whether a transaction will raise red flags are the companies' documents and the views of customers regarding the transaction.

There is no bright line between a four-to-three merger versus a five-to-four merger because there are so many factors to consider, including:

- The combined company's market share.
- Whether one of the merging parties was a maverick or innovator.
- Whether the merging parties are each other's closest competitors.
- Whether the market is vulnerable to coordination.
- Whether there are entry barriers.
- Whether there are powerful buyers.

Advocating for clearance of a transaction involves providing the government with a comprehensive analysis of the industry and the competitive dynamics, highlighting the reasons why the market is not vulnerable to coordinated conduct and the transaction would not change these market characteristics. To be credible, the analysis has to be supported with references to ordinary course documents, industry information and statistics, as well as economic data or analyses.

In addition, customer support (or at least not opposition) also is critical, and therefore sometimes it is useful to take steps to garner customer support. However, when the government and the merging parties each have customer statements, courts sometimes discount this category of evidence. Finally, since significant merger-specific efficiencies are weighed against potential adverse competitive effects, synergies and efficiencies can be important where the evidence of potential anticompetitive effects is not strong.

The bottom line is, because the 2010 Guidelines focus on whether adverse competitive effects are likely, effective advocacy in support of a transaction similarly focuses on the big picture and illustrates to the government why competitive effects are unlikely. The importance of companies' documents to the agencies' initial review (and ultimate analysis) of a merger underscores that it is critical to involve antitrust attorneys early in a transaction so that they can fully analyze the market, review the companies' documents, assess the likely views of customers and develop arguments in support of the transaction that are consistent with this evidence. This enables the antitrust attorneys to quickly educate the reviewing agency staff about the competitive dynamics in the market, address any potential concerns and join issue on the areas that require additional advocacy.

AmeriGas Propane, L.P. and Energy Transfer Partners, L.P. in What's Market).

- One decision to close (for a summary of this action, search Vivendi, S.A. and EMI Recorded Music in What's Market).

ENTRY ANALYSIS

The 2010 Guidelines eliminated the two-year threshold to analyze the timeliness of market entry. However, the two-year threshold remains part of the FTC's entry analysis. From 2010 through 2013, the FTC noted in 20 consent decrees or complaints filed in litigation that entry into the relevant markets would not be timely because it would take a new entrant longer than two years. The DOJ has also used the two-year threshold analysis from time to time.

CONSUMMATED MERGER ENFORCEMENT

A consummated merger action refers to a deal that is investigated by one of the antitrust agencies after it has closed. Most mergers that are reviewed after they close were exempt from HSR Act premerger filing requirements and, therefore, the parties were able to close without notifying the antitrust agencies about the deal.

Consummated merger enforcement has been on the rise during President Obama's administration. From 2010 through 2013, the antitrust agencies brought 21 consummated merger actions, with the FTC bringing the vast majority (17 actions). Two of the consummated actions were not finalized in 2013, and both ended in litigation wins for the antitrust agencies in early 2014.

Search Antitrust Enforcement of Consummated Mergers and Considerations and Strategies in Non-HSR Reportable Transactions for more on consummated merger enforcement and considerations unique to small but potentially anticompetitive deals.

CHANGES IN MARKET FACTORS

Each merger enforcement action turns on its own set of facts. 2013 merger enforcement activity exemplified that the antitrust agencies are not bound by prior enforcement actions in the same industry if competition within the relevant markets has changed, as discussed in the following cases:

- The FTC's decision to close its investigation of the Office Depot, Inc. and OfficeMax, Inc. merger.
- The FTC's decision to close its investigation of the Tesoro Corp. and BP p.l.c. merger.
- The DOJ's lawsuit to block the US Airways Group, Inc. and AMR Corporation (American Airlines, Inc.) merger.
- The DOJ's decision to close its investigation of the T-Mobile USA, Inc. and MetroPCS Communications, Inc. merger.

OFFICE DEPOT/OFFICEMAX

In its analysis of the competitive effects of the Office Depot and OfficeMax merger, the FTC contrasted this investigation with its 1997 case successfully blocking Staples, Inc.'s acquisition of Office Depot.

In the earlier case, the FTC argued that office supply superstores' prices were set according to the number of competing superstores in a local area. Evidence also showed that the merging parties viewed other office supply superstores as their main competitors and that they grouped their stores into price zones based on the number of nearby superstores. This resulted in higher prices in local markets with fewer office supply superstores, even if non-office supply superstore competitors were present.

In contrast, the 2013 competitive landscape shows that consumers no longer view office supply stores as a destination and prefer to purchase supplies at retailers that offer other products, such as mass merchants and club stores. Consumers also frequently use online retailers like Amazon, which carry a vast array of office supply products and can quickly deliver them anywhere in the world at minimal cost.

With the expansion of competitive players in the retail office supply market, the FTC decided to close its investigation of Office Depot and OfficeMax (for a summary of this action, search Office Depot, Inc. and OfficeMax, Inc. in What's Market).

TESORO/BP

The FTC determined that Tesoro's acquisition of BP's southern California refining and marketing business would not harm competition in the California-grade (CARB) gasoline market. Although the FTC challenged similar acquisitions in the past, those transactions occurred at a time when west coast refineries operated near capacity. This severely restricted their individual and collective ability to increase CARB gasoline production in response to a strategic reduction in CARB gasoline supply that would have likely increased prices.

However, in the current market, CARB gasoline demand has declined over the last decade and is projected to continue declining due to improving vehicle fuel efficiency and the increasing use of renewable transportation fuels. The decline in gasoline demand has created excess refinery capacity market-wide that will likely constrain Tesoro's ability to raise CARB gasoline prices post-acquisition (for a summary of this action, search In the Matter of Tesoro Corporation and BP p.l.c. in What's Market).

US AIRWAYS/AMERICAN AIRLINES

Although the DOJ had previously permitted several mergers between large airlines, the agency sought to block US Airways' merger with American Airlines. The airline industry views consolidation and capacity reductions as a way to increase prices and ancillary revenues. The DOJ argued that the US Airways and American Airlines merger would harm an already too concentrated industry, in part, by making it easier for the few remaining competitors to coordinate.

The litigation ended when the parties entered into a proposed settlement, requiring the largest ever divestitures in an airline merger (for a summary of this action, search U.S. v. US Airways Group, Inc. and AMR Corporation in What's Market).

T-MOBILE/METROPCS

In contrast to when AT&T failed to obtain antitrust approval to acquire T-Mobile in 2011, the DOJ allowed the merger between T-Mobile and MetroPCS in 2013.

MetroPCS is not a national player and the DOJ found that the merger was unlikely to harm consumers in the local markets for mobile wireless services, where MetroPCS:

- Does not provide a unique and competitively significant differentiated offering.
- Each relevant local market is also served by all four national carriers.

The merger also did not lower T-Mobile's maverick status, and competition could improve by increasing T-Mobile's scale and spectrum position, particularly because MetroPCS's spectrum holdings are compatible with T-Mobile's existing network (for a summary of this action, search T-Mobile USA, Inc. and MetroPCS Communications, Inc. in What's Market).

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