

# Antitrust 2021: New Decade, New Direction?

CLE Seminar for In-House Counsel Webinar Series  
2021

## Introduction and Program Overview

## Merger Control

- **Expect more scrutiny, longer process and more active involvement of State AGs**
  - Suspension of early termination (temporary?)
  - Model Timing Agreement - Agencies are demanding to extend statutory 30 day waiting period to 90-120 days
  - Failing Firm defense - skepticism and stringent standards
  - State AGs departing from federal agencies' analyses - Colorado State AG challenged UnitedHealth/DaVita
    - Six states have proposed legislation requiring healthcare merger notifications (NV, IN, OR, WA, CA, FL)
  - Increased resistance to efficiency claims
- **Increased scrutiny of nascent competition and exclusionary effects**

## Merger Control - Legislative Initiatives

- Big is bad - presumption of illegality for large transactions
- Proposals to entirely block large transactions - "Trust Busting for the Twenty-First Century Act" (Hawley) to ban acquisitions by companies with more than \$100 billion market cap, including vertical mergers
- Consider impact on merger risk provisions
- "Competition and Law Enforcement Reform Act" (Sen. Klobuchar)

## Merger Control (continued)

- **Vertical Merger Guidelines**

- Refreshed in 2020 (after almost 4 decades) - jointly by FTC and DOJ
- Focus on ability and incentive to foreclosure competitors and raise rivals costs
- Concern regarding to access to competitively sensitive information
- Removed initially proposed safe harbor provision (20% combined market share)
- Maintained view that vertical transactions are often pro-competitive - over the objections of 2 FTC Commissioners

## Competitor Collaborations

- **Agreement between actual or potential competitors involving one or more business activities**
- **Enforcers recognize importance of collaborations in modern economy**
  - If no likely effect on competition, usually okay without balancing pro-competitive benefits against anti-competitive effects
  - Some safe harbors (e.g., combined market share under 20%)
  - Narrow exceptions and exemptions may apply (e.g., some co-ops)

## Competitor Collaborations (cont'd)

- Collaboration in the era of COVID-19
  - The Agencies issued a joint statement committing to reviewing pandemic-related collaboration proposals within 7 calendar days -- and they have done it
  - Section 708(c)(1) of the Defense Production Act
- In all collaborations, companies need to stay within the scope of the collaboration
- The risk in cooperative efforts is usually greatest in the exchange of competitively sensitive information

## Anticipated Enforcement Priorities

- **Appointments to the antitrust agencies**
- **DOJ Antitrust, Criminal Section** - currently teed up for 13 trials against 24 individuals and 6 companies
- No poach and other **employee restraint cases going criminal**
- **Deferred Prosecution Agreements**
- **Some industries will remain a focus**
- **State Attorneys General**

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## A Word on International Enforcement

- **International convergence?**
  - Unlikely in the near term, but many are pressing for it
- **UK Competition & Markets Authority (CMA)**
  - Post-Brexit ... one more stand-alone enforcer on global deals
  - Increasingly aggressive
    - Sabre / Farelogix merger inquiry
    - Digital Markets

## Antitrust Compliance

- DOJ policy on the evaluation of compliance programs in criminal antitrust investigations (updated June 2020)
- **Revisit** global compliance policies
  - Ensure that policy ensures, adequately **prevents, detects,** and **remedies** issues
  - **Assess** the Company's **actual risk**
  - **Align** the Company's antitrust policy to that risk
- **Train**
- Periodically **refresh** your risk dashboard

# QUESTIONS?

## Presenters



**Ausra Deluard**  
Co-Chair, U.S. Competition & Antitrust  
San Francisco, CA / Oakland, CA  
D +1 415 267 4131  
ausra.deluard@dentons.com

Ausra is Co-Chair of the U.S. Competition and Antitrust group and a member of Dentons' national Health Care practice group. She advises clients in a range of sectors on contentious and non-contentious antitrust matters, including numerous "second request" merger investigations before the DOJ and FTC. She is an Adjunct Professor at U.C. Hastings School of Law where she teaches antitrust mergers.



**Brian O'Bleness**  
Co-Chair, U.S. Competition & Antitrust  
Kansas City, MO / Washington, DC  
D +1 816 460 2527  
M +1 202 621 3762  
brian.obleness@dentons.com

Brian is Co-Chair of Dentons' U.S. Competition and Antitrust group and a member of Dentons' White Collar and Government Investigations practice. His practice focuses on global internal investigations, antitrust/competition matters and defending clients against government enforcement actions. Brian is dual-qualified as a U.S. lawyer and a solicitor in England and Wales. He is a frequent speaker on global legal risk and remediation.

## Thank you



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