

Body Cam Case Could Align FTC-DOJ Merger Procedures

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On Jan. 3, Axon Enterprises Inc. filed a complaint against the Federal Trade Commission in the U.S. District Court for the District of Arizona challenging the constitutionality of the FTC's administrative process. Axon's complaint marks the latest salvo in a decades-long critique of the disparity between the FTC's and U.S. Department of Justice's merger enforcement procedures.

Background

Axon develops law enforcement technology such as the Taser gun and police body cameras. In May 2018, Axon acquired VieVu, a competing Molly Lorenzi provider of police body cameras. The FTC began investigating the acquisition in June 2018. On Jan. 3, Axon sued the FTC in federal court, alleging that the FTC investigation and administrative adjudication process "vest[] the Commission with the powers of prosecutor, judge, and jury in violation of the Due Process and Equal Protection guarantees of the U.S. Constitution."¹

Later that same day, the FTC filed an administrative complaint alleging that Axon's acquisition of VieVu eliminated competition and entrenched Axon's dominant position in the police body camera market.² The administrative complaint on its own merits attention, as the FTC does not routinely challenge consummated transactions.

FTC and DOJ Merger Enforcement Procedures

The Hart-Scott-Rodino Act grants the FTC and the DOJ the ability to review transactions over a certain size and challenge those transactions that substantially lessen competition.³ The FTC and DOJ use a somewhat opaque clearance process to identify which agency will investigate a particular transaction on a case-by-case basis.⁴

The most recent publicly available memorandum documenting the clearance process (released in 2002) allocates specific industries to each agency as the primary method for resolving clearance disputes.⁵ Matters involving industries that are not identified in the memorandum are cleared to the agency with more expertise in the product involved based on prior antitrust investigations.⁶

The FTC and DOJ have similar authority to review mergers, but the process by which each agency conducts enforcement proceedings differs. The DOJ may only challenge an anticompetitive transaction by filing an injunction in federal court.⁷ The FTC may either file an injunction in federal court or initiate an internal enforcement proceeding

before an administrative law judge (which the FTC often accompanies with a complaint for preliminary injunction).⁸

Although the FTC rarely chooses to do so, it may pursue administrative relief even after failing to obtain a preliminary injunction in federal court.⁹

A responding party subject to the FTC administrative process may either enter into a consent agreement or may proceed to an adjudicative hearing before an administrative law judge appointed by the FTC.¹⁰ The FTC Rules of Practice establish a trial-like procedure for conducting administrative hearings that includes motion practice, discovery and evidentiary rules.¹¹ FTC staff serves as complaint counsel, filling the role of prosecutor.¹²

The adjudicative hearing results in an initial decision by the ALJ, which parties may only appeal to the commission itself.¹³ Respondents may ultimately appeal the commission's final decision to a U.S. Court of Appeals.¹⁴

Critique of FTC Merger Enforcement Procedures and the SMARTER Act

Antitrust scholars have long critiqued the disparity between DOJ and FTC merger enforcement procedures — in particular the FTC's ability to pursue administrative litigation that is not available to the DOJ.

In 2002, Congress established the Antitrust Modernization Commission to review the operation and enforcement of U.S. antitrust laws.¹⁵ The AMC issued a report in 2007 determining that the administrative process available exclusively to the FTC “appears unlikely to add significant value beyond that developed in federal court proceedings for injunctive relief in HSR Act merger cases.”¹⁶ The AMC recommended that Congress conform FTC and DOJ merger review practices by prohibiting the FTC from pursuing administrative litigation in HSR merger cases.¹⁷

In 2014, Rep. Blake Farenthold, R-Tex., introduced the Standard Merger and Acquisition Reviews Through Equal Rules, or SMARTER, Act implementing the AMC's recommendation to disallow the FTC's use of administrative adjudication to challenge HSR transactions. Multiple sessions of the House of Representatives have passed the SMARTER Act since 2014, but the act has never cleared the Senate.¹⁸

Former FTC Commissioner Joshua Wright supported the SMARTER Act during his tenure at the FTC, arguing that the proposed legislation would ensure procedural fairness by eliminating “application of different legal standards depending upon which agency is assigned to the merger.”¹⁹

Wright cautioned that abuse of the FTC administrative process is evidenced by:

the fact that over the past two decades, the Commission has almost exclusively ruled in favor of FTC staff. That is, when the ALJ agrees with FTC staff in their role as

Complaint Counsel, the Commission affirms liability essentially without fail; when the administrative law judge dares to disagree with FTC staff, the Commission almost universally reverses and finds liability.²⁰

Axon's complaint echoes Wright's critique:

"The fact that only some companies — namely, those that happen to have their mergers investigated by the FTC and not the DOJ — are subject to those unfair procedures only emphasizes their Constitutional infirmity. There is no rational basis for denying companies faced with a merger challenge brought by the FTC of the basic protections they would (and other companies do) enjoy in a merger challenge brought by the DOJ. That is especially so given that the choice of whether a challenge is brought by the DOJ or the FTC is sorted out by the agencies themselves."²¹

The clearance process has itself received recent Congressional attention in response to perceived conflict between the FTC and DOJ regarding division of jurisdiction over investigations of the so-called big four tech companies. Although the agencies reached an agreement in June 2019 to allocate the four investigations, the FTC reportedly sent the DOJ a letter shortly thereafter complaining about the agreement's implementation.²²

In response to questioning by the Senate Judiciary Committee about the FTC's and DOJ's use of negotiated clearance agreements, FTC Chairman Joseph Simons acknowledged that "the clearance process has not worked well with respect to a small number of potential investigations involving conduct by technology companies."²³

Conclusion

Lack of conformity between FTC and DOJ procedures currently enables each agency to apply substantially different enforcement processes to investigations of similar conduct. The procedures available to a given responding party are based solely on the outcome of a clearance process that is itself subject to criticism.

Axon's complaint against the FTC brings criticism of this process and of FTC administrative adjudication before a judicial forum. A judgment in favor of Axon declaring the FTC's structure and administrative procedures unconstitutional could effectively result in some of the same changes contemplated by the SMARTER Act, marking a shift in the FTC's role in challenging HSR transactions and perhaps conforming procedures between the agencies.

Any such changes are likely a long way off, as it is probable the FTC would vigorously oppose any rulings undermining its authority and appeal any lower court decisions to that effect. Competition attorneys and parties to HSR transactions should nonetheless pay careful attention to the outcome of Axon's lawsuit to inform their antitrust strategies.

¹ Axon v. FTC, et al., Case No. 2:20-cv-00014-DMF, Dkt. No. 1 at ¶ 2 (D. Ariz. Jan. 3, 2020) (Axon Complaint). Axon's complaint is not the first direct constitutional challenge to the FTC's administrative

process. In 2008, Whole Foods sued the FTC alleging that administrative adjudication of its proposed merger with Wild Oats violated the Due Process Clause. See *Whole Foods Market, Inc. v. FTC*, Case No. 1:08-cv-02121-PLF, Dkt. No. 1 (D.D.C. Dec. 8, 2008). Whole Foods entered into a consent agreement with the FTC shortly thereafter, and dismissed its case.

² In the Matter of Axon Enterprise, Inc. and Safariland, LLC, Dkt. No. D9389 (F.T.C. 2020)

³ 15 U.S.C. § 18a.

⁴ Premerger Notification and the Merger Review Process, Federal Trade Commission, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrustlaws/mergers/premerger-notification-merger-review> (last accessed Jan. 10, 2020) (How Mergers Are Reviewed).

⁵ Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations at ¶ 17, App. A, Department of Justice (Mar. 5, 2002), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/17/10170.pdf>.

⁶ *Id.* at ¶ 18.

⁷ 15 U.S.C. § 25.

⁸ 15 U.S.C. §§ 45(b), 53(b).

⁹ Deborah A. Garza et al., Antitrust Modernization Commission: Report and Recommendations at 139 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (AMC Report).

¹⁰ 16 C.F.R. § 3.11 (commencement of administrative proceedings); 5 U.S.C. § 3105 (appointment of ALJ).

¹¹ *Id.* at §§ 3.1 – 3.83.

¹² A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority, Federal Trade Commission (Oct. 2019), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

¹³ *Id.*

¹⁴ 15 U.S.C. § 45(c).

¹⁵ Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, 11051-60, 116 Stat. 1856.

¹⁶ AMC Report, *supra* n. 9 at 141.

¹⁷ *Id.* at 140.

¹⁸ SMARTER Act of 2018, H.R. 5645, 115th Cong. (2018).

¹⁹ Joshua Wright, Commissioner, Federal Trade Commission, Remarks at the Global Antitrust Institute Invitational Moot Court Competition (Feb. 21, 2015).

²⁰*Id.*; see also, e.g., Richard A. Posner, The Federal Trade Commission, 37 U. Chi. L. Rev. 47 (1969); Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons From Administrative Law, 61 Stan. L. Rev. 869 (2009); Terry Calvani & Angela M. Diveley, The FTC At 100: A Modest Proposal for Change, 21 Geo. Mason L. Rev. 1169 (2014).

²¹ Axon Complaint, supra n. 1 at ¶ 35.

²² See Brent Kendall and John D. McKinnon, Congress, Enforcement Agencies Target Tech, Wall Street Journal (June 3, 2019), <https://www.wsj.com/articles/ftc-to-examinehow-facebook-s-practices-affect-digital-competition-11559576731>; John D. McKinnon and Brent Kendall, U.S. Antitrust Enforcers Signal Discord Over Probes of Big Tech, Wall Street Journal (Sept. 16, 2019), <https://www.wsj.com/articles/u-s-antitrust-enforcers-signaldiscord-over-probes-of-big-tech-11568663356>.

²³ Oversight of the Enforcement of the Antitrust Laws Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights, 116th Cong. (2019) (statement of Joseph Simons, Chairman, FTC).