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# “KILLER ACQUISITIONS” – ANTITRUST AGENCIES’ FOCUS ON ACQUISITIONS OF NASCENT COMPETITORS

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**SECTION 01**

# **INTRODUCTIONS**



# Today's Presenters

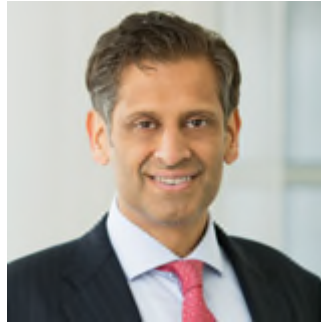


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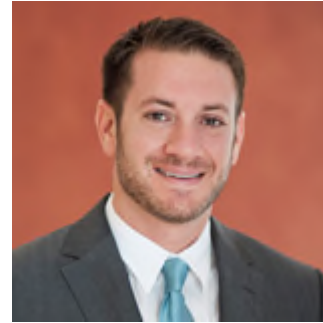


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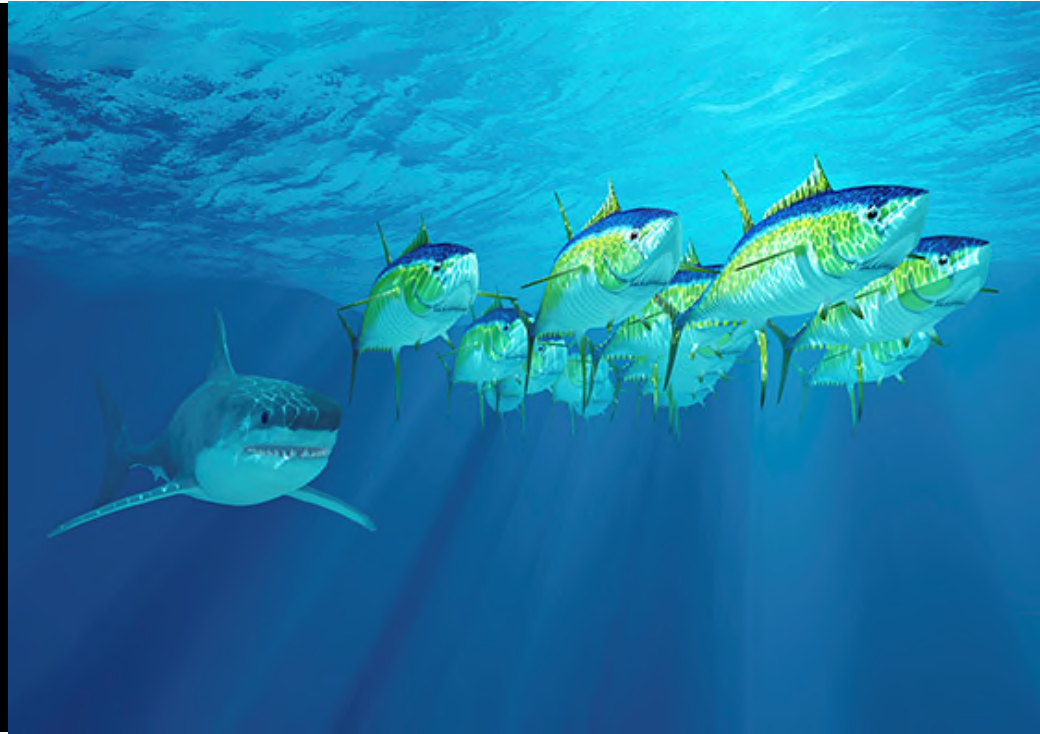
**SECTION 02**

# **WHAT ARE “KILLER ACQUISITIONS”?**



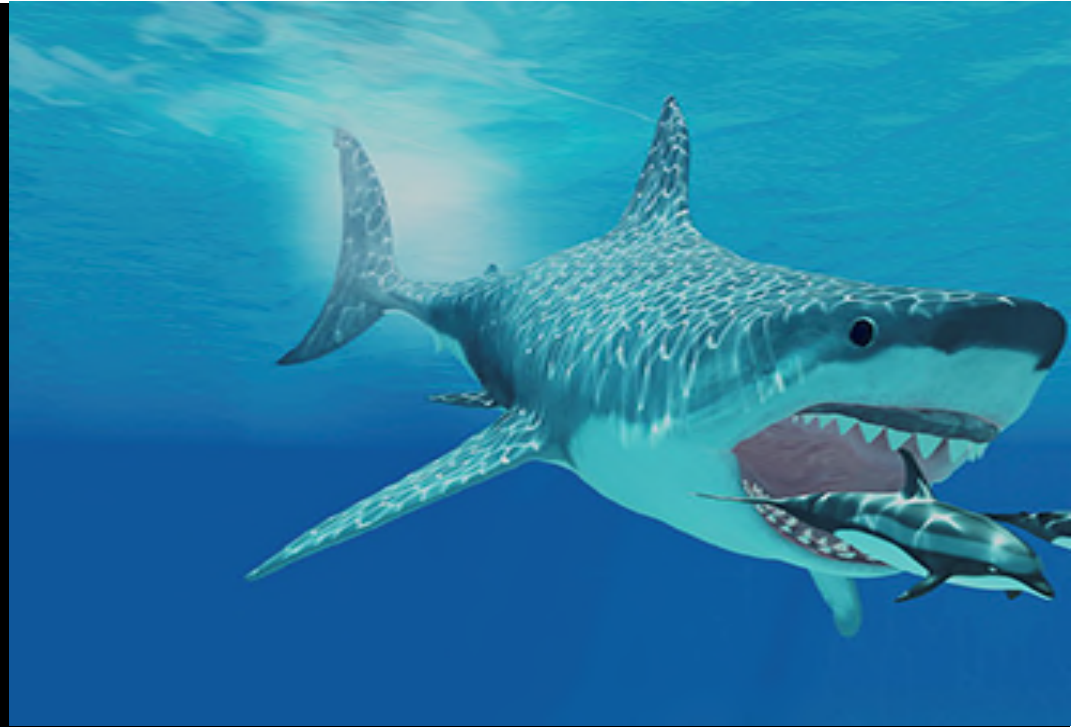
# What is a Killer Acquisition?

- Acquisition of nascent or potential competitor, typically by a big or dominant firm (usually big tech or life sciences industries ... but maybe others?)
- “Killer Acquisition” made prominent in 2019 article by Colleen Cunningham, Florian Ederer, and Song Ma focusing on pharmaceutical industry
- Important antitrust concept on both sides of Atlantic



# ***Potential* Killer Acquisitions Can Take Several Forms**

- Dominant company acquires nascent/potential competitor same product/service
- ***Examples of possible Killer Acquisitions:***
  - Pharma company with blockbuster pill acquires developer of competing pill
  - Big tech company with virtual reality division acquires start-up developing more realistic virtual reality
  - Big tech company with platform acquires start-up platform

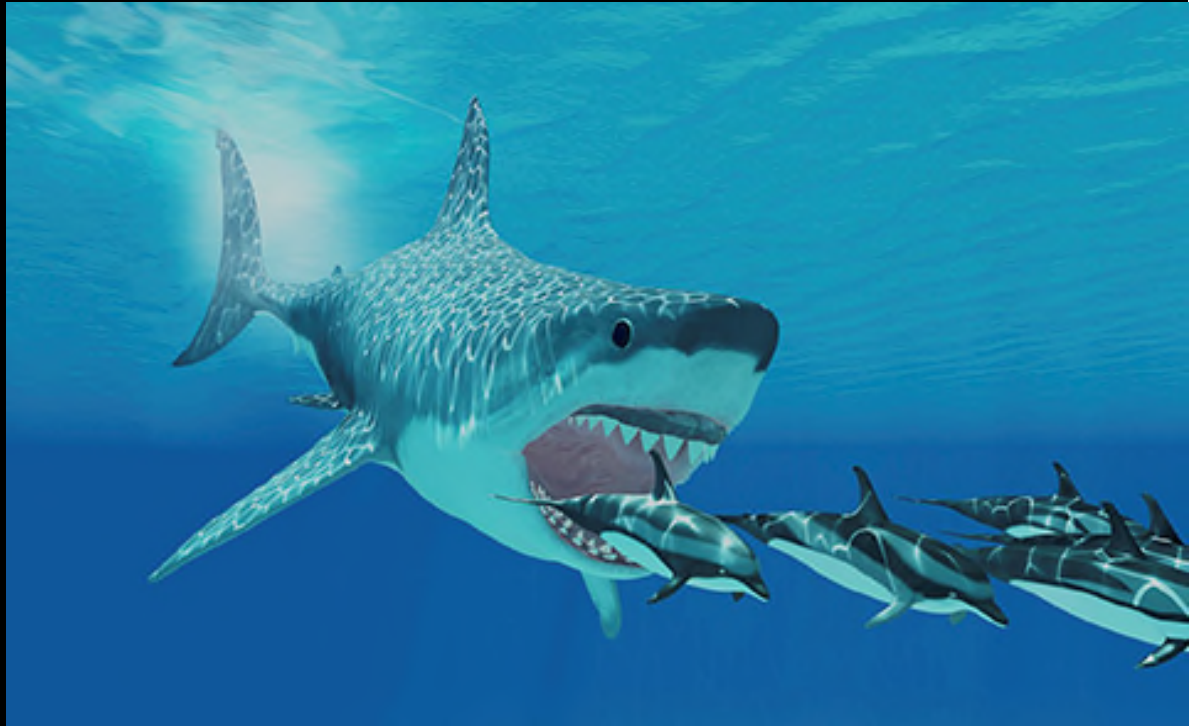




# ***Potential* Killer Acquisitions Can Take Several Forms**

(continued)

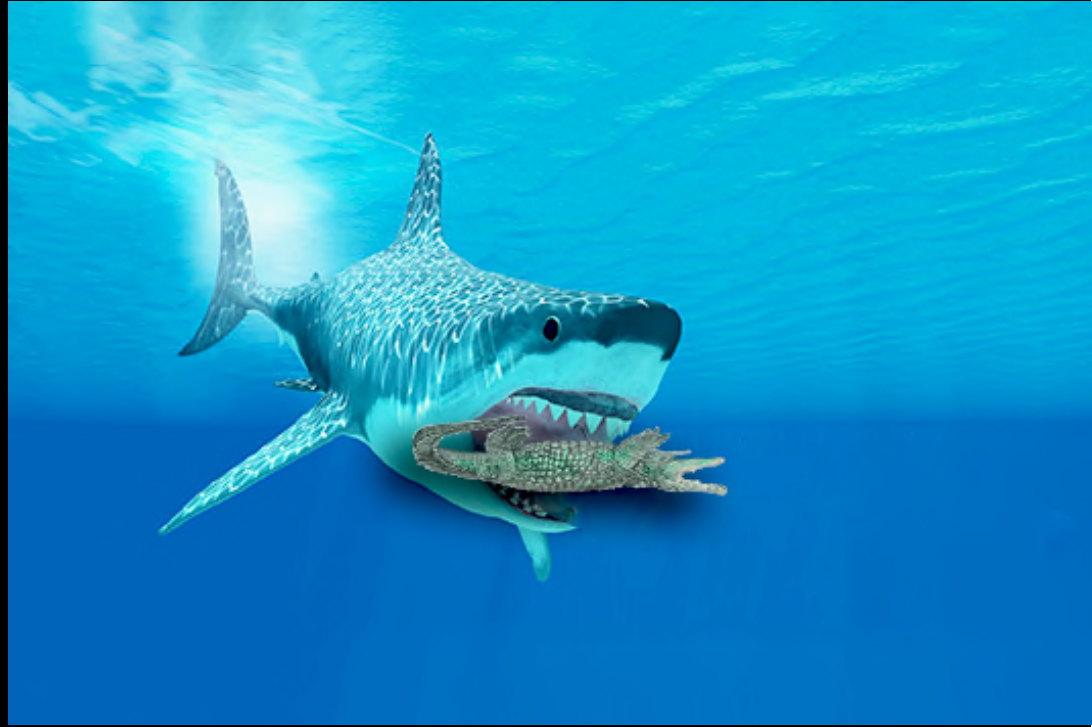
- Dominant company acquires multiple nascent competitors under HSR threshold
- ***Example of possible Killer Acquisition***
  - Tech company acquires six potential rivals over a span of time, each under HSR threshold



# ***Potential* Killer Acquisitions Can Take Several Forms**

(continued)

- Dominant company acquires developer of competing product/service
- ***Examples of possible Killer Acquisitions:***
  - Pharma company with blockbuster pill acquires developer of competing biological that will treat same disease as pill
  - Big tech company with dating platform acquires start-up “virtual blind date” dating platform



# ***Potential* Killer Acquisitions Can Take Several Forms**

(continued)

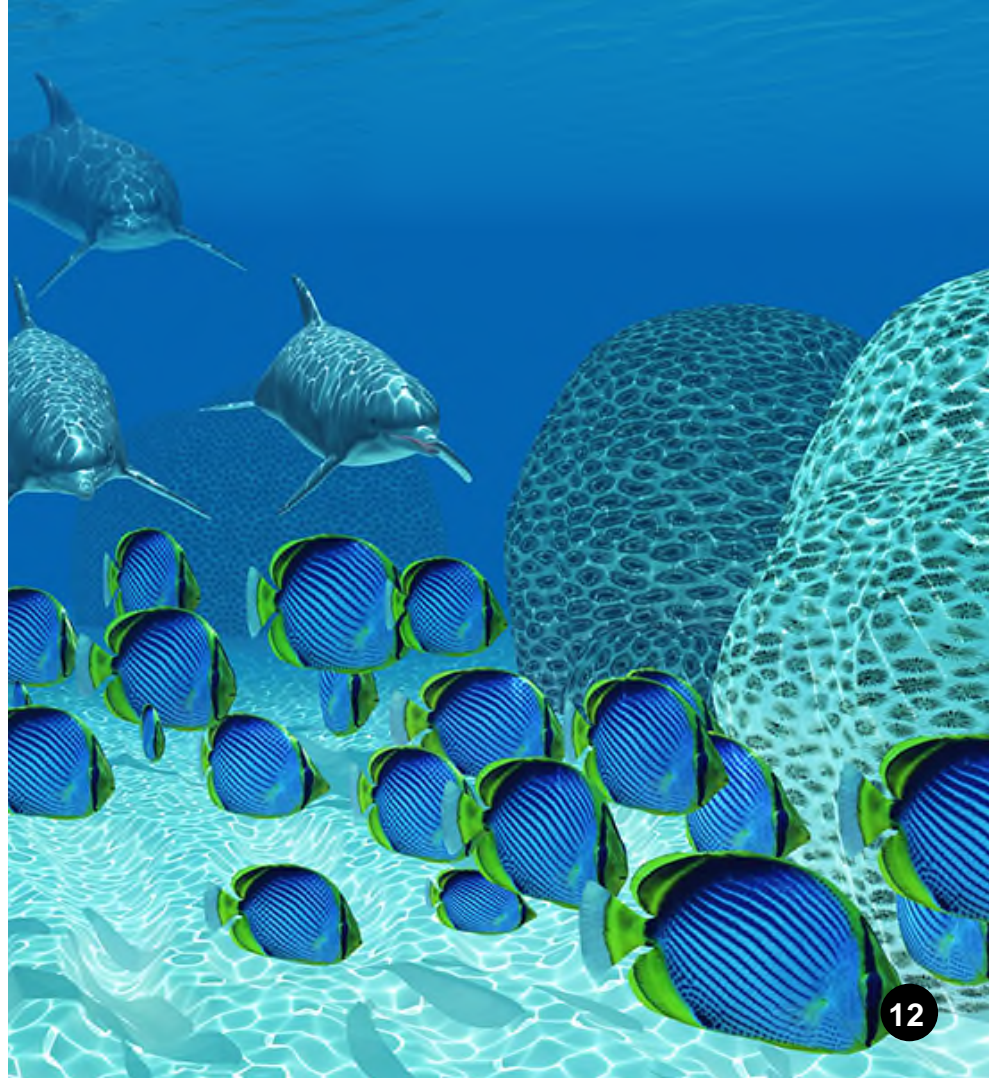
- Dominant company acquires nascent upstream or downstream company or data
- ***Examples of possible Killer Acquisitions:***
  - Big tech company acquires other tech company with unique and rich data set
  - Big tech company acquires platform-agnostic digital tool





# Most Acquisitions of Nascent/Potential Competitors are Not “Killer Acquisitions”!

- Pro-competitive purpose
- Start-up has its own rivals
- Start-up’s chances of success uncertain
- Competing product/service’s chances of success uncertain
- Start-up will not compete
- Other “big” rivals can compete in-house





**SECTION 03**

# **ANTITRUST AGENCIES' POLICIES**



# Reasons for Combinations

- **Why acquire** small firms?
  - Access to top talent
  - Use greater resources to improve technology and innovation
  - Outsourcing early-stage R&D
    - Rather than develop a magic wand themselves, big firms can allow start-ups to compete for magic wand development and acquire the best
- Why do small firms **want to be acquired**?
  - Ultimate exit strategy: successful IPOs are rare
  - Resources to flourish/further innovation
  - Easier to finance risky drugs/technologies



# CONCERNS of the Agencies

1

## Stifling innovation

- Buyer may kill development of services and products that compete with Buyer's products

2

## Hampering future competition

- Buyer might sell at higher price or stifle future non-price competition/innovation

3

## Making it harder for competitors to compete

- Acquiring upstream, downstream or even complementary firm-agnostic assets and making them exclusive

4

## Misuse or monopolize personal data

# Enforcers' Focus

**What is deal rationale?**

**What will happen  
post-acquisition?**

**What innovations  
were in the pipeline  
and will they still  
exist?**

**Other competing  
innovators?**

# Difficulty of Enforcement

## Antitrust Enforcers' Toolbox to Prove Anti-Competitive Harm

Traditional Mergers	"Killer Acquisitions"
<ul style="list-style-type: none"><li>✓ Data<ul style="list-style-type: none"><li>✓ Win/loss data</li><li>✓ Switching data</li><li>✓ Sales data</li><li>✓ Market shares</li></ul></li><li>✓ Relevant product market</li><li>✓ Documents</li><li>✓ Customer reaction</li></ul>	<ul style="list-style-type: none"><li>X Data<ul style="list-style-type: none"><li>X Win/loss data</li><li>X Switching data</li><li>X Sales data</li><li>X Market shares</li></ul></li><li>✓ Relevant product market (limited)</li><li>✓ Documents (limited)</li><li>✓ Customer reaction (limited)</li></ul>



# The Law in the United States

- **Section 7** of the **Clayton Act** prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."
- **Preliminary Injunction in Federal Court:** questions that are so "serious, substantial, difficult and doubtful that they are fair ground for thorough investigation, study, deliberation and determination by the FTC [in its administrative proceeding against the merger]." (FTC Act)
- **Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act)**
  - \$94 million size of transaction threshold; increases to \$376 million if size-of-person test not met

# The Law in the EU/UK

- **EU Council Regulation (EC) No 139/2004 (“EU Merger Regulation”)**



- Establishes EU Commission jurisdiction on the basis of worldwide, EU-wide and national revenue thresholds – this is a “one stop shop” that includes the UK until December 31 2020
- Prohibits mergers and acquisitions where they will “significantly impede effective competition in the common market”

- **UK Enterprise Act 2002**



- Establishes UK jurisdiction on the basis of a revenue test or a “share of supply” test - parties together supply 25% or more of “goods or services of any description” in the UK
- Prohibits mergers that have resulted (or may be expected to result) in a “substantial lessening of competition in any market in the UK”
- Although filings are voluntary, CMA may investigate ex officio and freeze integration during review
- Flexibility in interpretation of share of supply test means that the CMA has reviewed “killer acquisitions” more frequently than the EU Commission

# Federal Trade Commission Actions

- Opened Investigation into Facebook acquisitions of Instagram and WhatsApp
- Tech Workshop
- FTC Technology Enforcement Division
- Subpoenaed info from 5 large tech firms about prior acquisitions not reported to the antitrust agencies under the HSR Act

FTC to “deepen its understanding of large technology firms’ acquisition activity, including how these firms report their transactions to the federal antitrust agencies, and whether large tech companies are making potentially anticompetitive acquisitions of nascent or potential competitors that fall below HSR filing thresholds and therefore do not need to be reported to the antitrust agencies.”



# What DOJ Has Said

- “It is not possible to describe here each way that a[n] [acquisition of a nascent competitor] may harm competition in a digital market, but I will note the potential for mischief if the purpose and effect of an acquisition is to block potential competitors, protect a monopoly, or otherwise harm competition by reducing consumer choice, increasing prices, diminishing or slowing innovation, or reducing quality.”
  - Assistant Attorney General (AAG) Makan Delrahim (June 2019)

# What the CMA Has Said

- “[The share of supply test] is a flexible test which, in practice, has meant that **the CMA has consistently been able to exert jurisdiction over transactions in digital markets**, for example where the turnover of the target was limited, but the value of the deal was high.”
- “[...] if the price paid by the acquirer seems hard to explain based on current or likely future earnings, we should scrutinise the rationale for the acquisition with particular rigour and consider, in particular, **whether the purchase price could reflect the benefit of killing off emerging competition.**”
- “In several recent cases [including *PayPal/iZettle*] we have considered the need to use a **dynamic counterfactual**, considering not only what would have happened absent the merger occurring based on the current state of competition, but also **based on how the market is likely to evolve.**” (emphasis added)

— Andrea Coscelli, CMA Chief Executive, 3 June 2019

**SECTION 04**

# **RECENT ENFORCEMENT**



# Roche/Spark (2019)

- **Federal Trade Commission**

- A key question in the investigation was whether Roche would have the incentive to delay or discontinue Spark's developmental gene therapy for hemophilia A
- FTC concluded that other companies developing gene therapy treatments, so that Roche would have incentive to accelerate, rather than decelerate, Spark's therapy
- "The Commission will continue to closely scrutinize acquisitions by incumbents of emerging competitors and will not hesitate to bring enforcement actions against them where the facts support such action."

- **CMA**

- Found jurisdiction on the basis of (i) the number of UK-based employees engaged in "activities" relating to the treatment of Hem A; and/or (ii) the number of UK patents procured from an administrative patent authority in relation to the treatment of Hem A.
- CMA reviewed whether Roche's internal documents relating to its valuation of Spark were consistent with the pro-competitive rationale for transaction



# ILLUMINA/PACIFIC BIOSCIENCES (2020)

- **Federal Trade Commission**

- FTC alleged that Illumina acquiring PacBio as a nascent competitive threat
  - Illumina world's leading supplier of DNA sequencing employing "short-read" sequencing technology
  - Pacific Biosciences up-and-coming developer of "long-read" sequencing technology
- FTC alleged acquisition would reduce firm's incentive to innovate and develop new products

- **CMA**

- CMA applied the share of supply test to review Illumina/PacBio. The CMA concluded that the parties' combined share of supply of next generation sequencing (which would include both short and long-read sequencing technology) exceeded 25% in the UK.
- The CMA provisionally found that Illumina/PacBio would result in a significant loss of competition and in a reduction in innovation (with few remaining providers of DNA sequencing systems). The CMA did not consider the parties' proposed remedies to be adequate and provisionally proposed to block the merger. The parties abandoned the transaction on 3 January 2020.

# Steris-Synergy (2015)

- **Federal Trade Commission**

- FTC alleged that prior to the merger, Synergy planned to enter the U.S. market with an emerging x-ray sterilization technology that would disrupt the current duopoly
- Case turned on a factual determination of whether, absent the merger, Synergy would have entered the U.S. market
- Court cited extensive evidence that “business reasons” caused Synergy not to enter the U.S. market and sided with Steris/Synergy

# Other Recent Enforcement

- **CDK / Auto/Mate (2018, FTC)**

*“The evidence indicated that Auto/Mate was also a threat to other incumbent DMS [dealership management system] providers, and, importantly, was poised to become an even more effective competitor in the near future. The Commission’s action shows that it will block a proposed merger if a large, established firm seeks to eliminate competition from a small but significant and developing competitor that is delivering substantial competitive benefits in innovation, price, and quality.”*

**SECTION 05**

# **WHAT LIES AHEAD...**





# What to Expect: More Scrutiny, Same Enforcement

- **Heightened Scrutiny of Big Firm Acquisitions**

- “Big Tech”, Life Sciences and Health Care acquisitions of nascent competitors, start-ups, and potential competitors more likely to get “second look”
  - Greater focus on deal rationale, use of Target’s data, vertical/conglomerate effects
  - HSR review for such deals could be slower
- More reviews (including CIDs) of non-HSR reportable deals / consummated deals

- **But More Scrutiny Does Not Necessarily Mean More Enforcement**

- Difficult to identify harm to competition absent 20/20 hindsight
  - Who knows which start-ups will actually constrain Buyer in future?
- Difficult to prove harm to competition even with 20/20 hindsight
- Current approach to antitrust laws already prevents most aggressive “killer acquisitions”

# Key Takeaways When Considering M&A

- Assess both merging parties' entry or expansion plans, even if a party currently has a small or no market share
- Consider potential harm from non-price competition or a loss of innovation
- Conduct the antitrust analysis using narrow market definitions (ex. the smaller competitor only targets a unique set of customers) and broad market definitions (ex. bringing in competition from a wider range of customers, including the merging parties)
- Be thoughtful and precise in creating documents
  - Document the procompetitive rationale for the deal and ensure that it is consistent with valuation model
  - Be careful with hyperbole and overstating the degree of current or future competition with the merging party

**SECTION 06**

# **COVID-19 UPDATE**



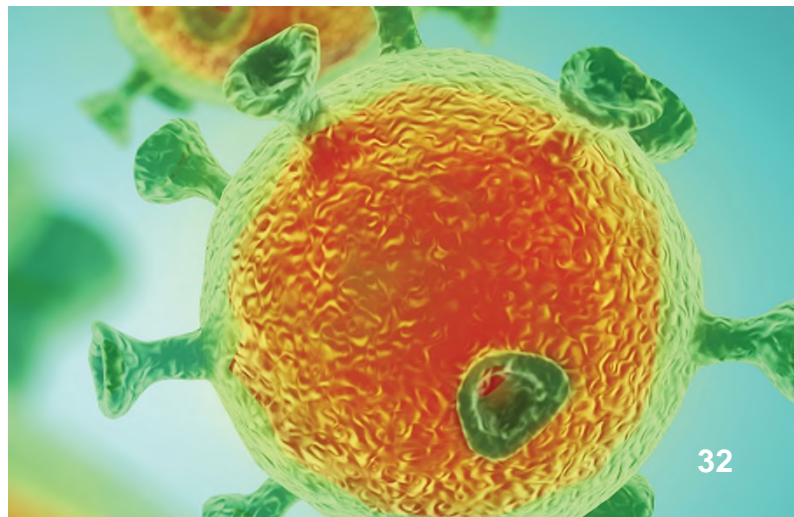
# COVID-19 US Antitrust Update

- **FTC and DOJ Joint Statement on non-M&A Deals**

- Flexibility in evaluating collaborations focused on COVID-related solutions
- Agencies will “account for exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath”
- Limited flexibility for “joint efforts that are limited in duration,” thereby excluding M&A transactions

- **HSR Review Continues**

- Parties can submit HSR filings electronically
- Early termination grants are back
- Slower investigations





# COVID-19 US Antitrust Update

- **HSR Tips for Funding Distressed Companies**

- Many types of equity funding not HSR reportable
  - Financial instruments that are not voting securities (e.g., loans, warrants, etc.) and non-corporate interests that don't give buyer economic "control" over non-corporate entity
  - "Springing" conversions
  - Investment only exemption
  - Conversion of debt into voting securities in some circumstances
- Minority interest considerations
  - Section 8
  - Information exchanges
  - Substance



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# COVID UK/EU UPDATE

## **The UK CMA**

- The CMA said it continues to "progress cases, make decisions and meet deadlines," and that it will review its practices and protocols as the situation develops
- Some aspects of investigations, in particular, the pre-notification process, may be subject to some delay and parties that have not yet closed or notified transactions are asked to consider holding off formally filing
- Oral hearings and meetings are being conducted remotely. There are no plans to stop the clock on ongoing reviews.

## **The European Commission**

- Companies are encouraged to delay merger notifications originally planned until further notice, where possible
- The European Commission notes that it faces difficulties in some cases in collecting information from the notifying parties and third parties, such as their customers, competitors and suppliers, given the disturbances caused by coronavirus outbreak
- The European Commission therefore continues to encourage parties to discuss the timing of notifications of transactions with the relevant case team

# Morgan Lewis Coronavirus/COVID-19 Resources

We have formed a multidisciplinary Coronavirus COVID-19 Task Force to help guide clients through the broad scope of legal issues brought on by this public health challenge.

Find resources on how to cope with the post-pandemic reality on our [NOW. NORMAL. NEXT. page](#) and our [COVID-19 page](#) to help keep you on top of developments as they unfold.

If you would like to receive a daily digest of all new updates to the page, please visit either resource page to [subscribe](#), and download our biweekly [COVID-19 Legal Issue Compendium](#).

# Biography



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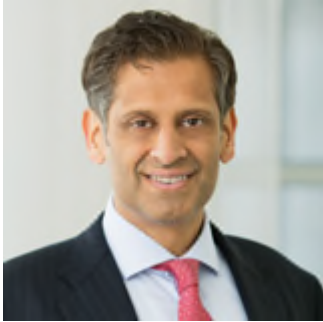
Ryan Kantor's practice focuses on federal and state government antitrust investigations, antitrust litigation, and counseling on antitrust and competition issues. He represents clients before the US Federal Trade Commission, US Department of Justice (DOJ), state attorneys general offices, and in federal and state courts. Ryan previously served as assistant chief of the Healthcare and Consumer Products section in the DOJ's Antitrust Division.

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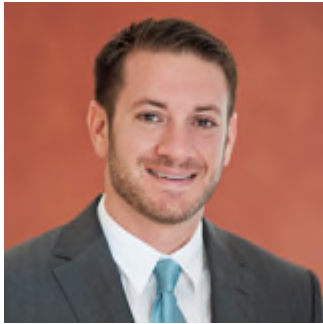
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Omar Shah represents clients in merger control procedures and on antitrust matters, particularly those involving the intersection of competition law with media/communications regulation. His practice involves representing clients before UK, EU, and other competition authorities, courts, and tribunals and in commercial and regulatory litigation proceedings, including judicial reviews.

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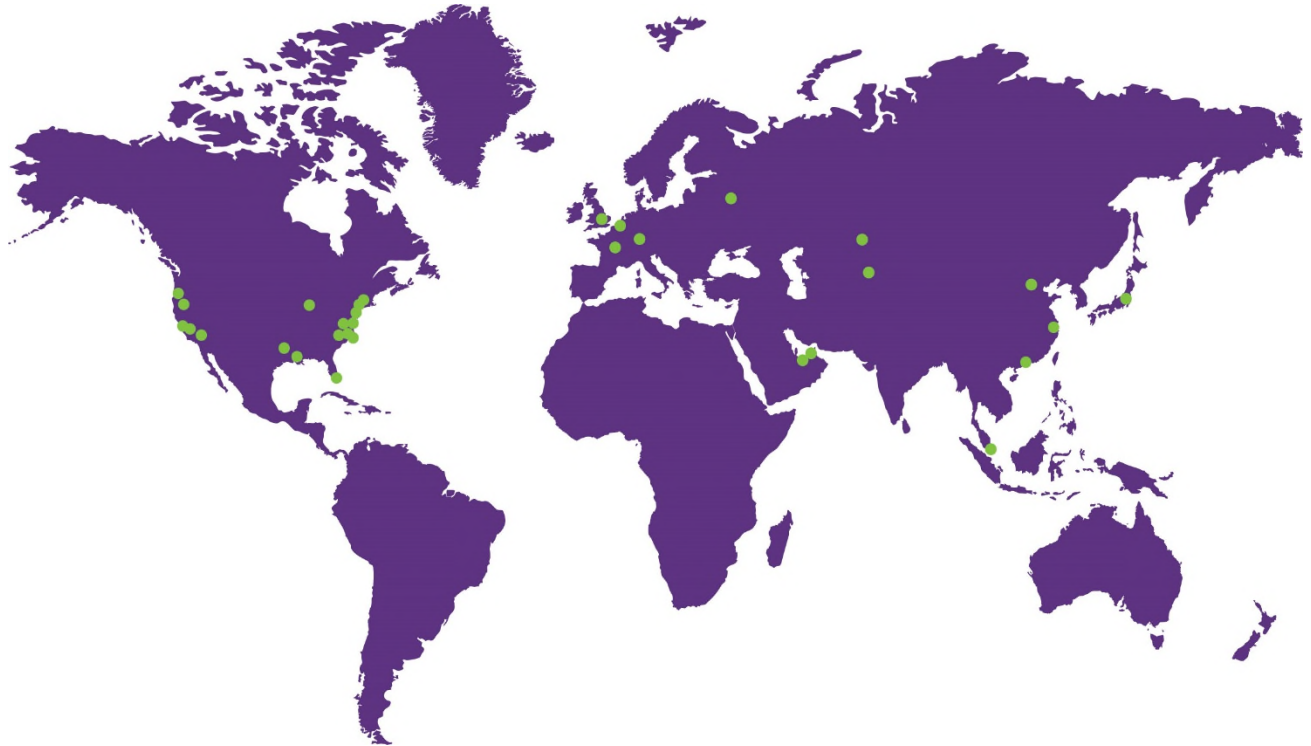
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