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# FTC V. IQVIA AND THE RETURN OF PHILADELPHIA NATIONAL BANK TO MERGER REVIEW

Earlier this month, the Federal Trade Commission ("FTC") withdrew its complaint challenging the IQVIA and Propel Media merger after the parties announced their intent to abandon the deal. The decision comes after the FTC successfully secured a preliminary injunction in the District Court for the Southern District of New York ("the Court") in January. The preliminary injunction prevented the parties from closing the proposed transaction based on the allegation that the merger would substantially harm the competition for "programmatic advertising" targeting physicians and other health care practitioners. The Court's opinion was notable for the low evidentiary threshold the FTC needed to reach to convince the Court the transaction posed "serious questions" regarding the merits of the transaction, and follows the trend of the FTC's aggressive challenges of mergers generally in the health care space.

## BACKGROUND

In July 2023, the FTC sued to prevent IQVIA's proposed acquisition of DeepIntent, a health care-based marketing specialist owned by Propel Media, based on the FTC's position that the proposed acquisition would substantially lessen competition for programmatic advertising. Programmatic advertising is "an automated process for digital advertising that facilitates an auction process in microseconds across many digital advertising spaces." IQVIA had recently entered programmatic advertising through its acquisition of Lasso and subsequently sought to acquire DeepIntent, which the FTC characterized as one of Lasso's most significant competitors.

At the preliminary injunction hearing, the FTC and the parties presented conflicting evidence on the relevant market to evaluate the transaction and the market shares of the parties within those potential markets. Additionally, the FTC submitted evidence that it claimed showed the anticompetitive impacts of the transaction on health care provider advertising, which the parties attempted to refute. The Court ultimately found that the FTC had carried its burden of showing there were "serious questions" regarding the impact of the merger and granted the preliminary injunction.

## THE COURT'S RELIANCE ON PHILADELPHIA NATIONAL BANK AND THE 30 PERCENT THRESHOLD

The IQVIA decision is particularly notable because the FTC argued that the Court should accept that a post-merger market share threshold of 30 percent was sufficient to presume anticompetitive impact from the transaction. The 30 percent threshold was first discussed in *U.S. v. Philadelphia National Bank* (hereinafter, "*Philly Bank*"), which was a relatively early interpretation of Section 7 of the Clayton Act, and stated that, "[w]ithout attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."

Over the last 30 years, however, most antitrust practitioners and economists have largely ignored *Philly Bank's* 30 percent threshold. Cases such as *U.S. v. Baker Hughes* and *U.S. v. General Dynamics Corp.* have generally curbed its use, and economists have developed more advanced tools to measure competitive effects, such as the Herfindahl-Hirschman Index, the Willingness-to-Pay metric and the Gross Upward Pricing Pressure Index. As these metrics became more widespread and economic learnings advanced, the 30 percent threshold carried less weight, though *Philly Bank* was never directly overruled.

However, at the FTC's urging, the Court embraced *Philly Bank's* 30 percent threshold test as sufficient to "establish a presumption of anticompetitive effects." Although the Court acknowledges in a footnote that "market shares alone are not dispositive," the Court's ruling seemingly takes the opposite position. When faced with dueling market shares presented by experts of the FTC (46%) and IQVIA (30.6%), the Court did not attempt to resolve the differences, but rather stated that the "FTC has established a presumption of anticompetitive effects if either expert's figure is accurate." Further, by establishing a presumption of anticompetitive effects, the Court found that the FTC established a likelihood of success on the merits. Evidence of the impact of the remaining competitive forces and volatility in the marketplace was insufficient to overcome this presumption.

## FTC HAS A LOWER THRESHOLD TO ACHIEVE A PRELIMINARY INJUNCTION TO BLOCK MERGER

Additionally, the Court's decision is notable for its acceptance of the lower standard the FTC must achieve to obtain a preliminary injunction. Specifically, instead of showing a likelihood of success on the merits, one of the four traditional elements of a preliminary junction, the Court

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articulated that the FTC must show the equities favor an injunction and "raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."

The "serious questions" standard is not new. However, there has been considerable debate in recent years regarding what bar the FTC must achieve to meet its burden. The Court, relying on *FTC v. Lancaster Colony Corp.*, found a "fair and tenable chance of ultimate success on the merits." But, prior courts have distinguished this characterization of the FTC's burden and required a higher standard. Most notably, the *FTC v. Staples* matter found that the "fair and tenable" standard was not the appropriate measure of the "serious questions" standard. However, that case was not precedential on the IQVIA Court.

Regardless of whether the Court adopted a lower "serious questions" standard than previously espoused, it is evident that the FTC's standard for achieving a preliminary injunction in district court is lower than the Department of Justice's ("DOJ") standard to achieve the same effect. The DOJ must meet the standard four-part preliminary injunction test, where the harm to the movant, the likelihood of success and the private and public equities are all weighed in determining if the court should grant a preliminary injunction. As a result, it is likely that health care systems and providers, as well as other industries typically investigated by the FTC, must consider a different calculus than payers and other industries typically investigated by the DOJ, when considering merger litigation prospects.

**PRACTICAL TAKEAWAYS**

- The IQVIA case, a substantial victory for antitrust enforcers particularly given that it is no longer subject to appeal, will likely reinforce the FTC's and DOJ's aggressive stance towards mergers. Reinvigorating *Philly Bank* is another arrow in the antitrust agencies' quivers when taking aim at mergers, and one that will be particularly employed against multi-market and larger mergers.
- The FTC's argument, and the Court's acceptance, of *Philly Bank's* 30 percent threshold may have a disproportionate impact on hospital and health system mergers where market definition is often focused only on overlapping areas and excludes widely accepted metrics such as diversion measures and willingness to pay metrics. The result could be a more difficult path to convincing the FTC of a lack of anticompetitive effects.
- Coupled with the FTC's "serious questions" standard (as opposed to the traditional "likelihood of success on the merits"), the FTC is uniquely positioned to challenge mergers with preliminary injunctions with minimal actual evidence of the economic impact of the proposed transaction once the 30 percent market share threshold is met.

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