The FTC's Henkel/A-Paint Challenge: A Paradigm Shift for Future FTC Merger Litigation?

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Introduction

In a notable departure from past practice, the Federal Trade Commission (FTC) filed suit in federal district court on December 15, 2025, to *permanently* enjoin Henkel AG & Co. KGaA and its subsidiaries (Henkel) from acquiring A-Paint Topco, Inc. (A-Paint).[1] Historically, the FTC has asked federal courts only to *preliminarily* enjoin challenged transactions pending full adjudication on the merits before the FTC's own administrative tribunal—a process often called "Part 3" litigation. The FTC's decision in Henkel to shift tactics and seek a permanent injunction from a federal court *without* pursuing a parallel administrative action has broad implications for the *Henkel* proceeding and follows statements from FTC Chair (then Commissioner) Andrew Ferguson expressing concern over the constitutionality of litigating private rights in administrative actions generally.[2] Insofar as the FTC's decision in *Henkel* signals a permanent shift in the FTC's litigation tactics, it will profoundly reshape future enforcement. Specifically, it will affect the length of litigation, the scope of the federal court proceeding, the ability of the parties to engage with commissioners while merger litigation is pending and the relevance of ancillary constitutional challenges.

Background

The FTC has historically litigated merger challenges on two tracks, seeking a preliminary injunction in federal court and a permanent injunction in a Part 3 proceeding. This approach follows from the FTC's enabling statute, the FTC Act. By contrast, the US Department of Justice Antitrust Division (DOJ), which has no administrative adjudication function, only litigates merger challenges in federal court. Section 5(b) of the FTC Act[3] empowers the FTC, when it has "reason to believe" there is a current or impending violation of the federal antitrust laws enforced by the FTC, to issue Part 3 administrative complaints.[4] Section 13(b) of the FTC Act authorizes the FTC to seek preliminary injunctions in federal district court to maintain the status quo pending the Part 3 proceeding and permanent injunctions "in proper cases."[5]

Until now, the FTC's federal complaints have asked district courts to maintain the status quo while there is an administrative adjudication on the merits. In practice, however, the preliminary injunction litigation has generally been the final word on a proposed merger's fate. Whichever party loses the

preliminary injunction proceeding typically either gives up or appeals the preliminary injunction decision to a federal appellate court and Part 3 proceedings do not ensue.

The FTC's challenge of the Henkel/A-Paint merger charts a new path by focusing enforcement efforts solely on federal court proceedings.[6] The parties in *Henkel* have yet to consummate their transaction and agreed not to do so until the eighth day after a judgment in favor of the merging parties.[7] The FTC, for its part, has filed its sole suit to block the transaction in federal court seeking only to permanently enjoin the transaction.

Implications for Merging Parties

If *Henkel* signals a new FTC approach for future merger challenges, the effects will be significant. We highlight key implications here:

- **The FTC will now have to meet the same legal standard as the DOJ to prevail.** The FTC can obtain a *preliminary* injunction if, "weighing the equities and considering the FTC's likelihood of ultimate success," the injunction "would be in the public interest."[8] Generally, the FTC can make that showing by raising merits questions "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."[9] To obtain a *permanent* injunction under the Clayton Act, the FTC must succeed on the merits by proving that the effect of the merger "may be substantially to lessen competition, or to tend to create a monopoly."[10] In both cases, a court will evaluate the merits of the merger challenge, including consideration of the relevant market and any anticompetitive effects therein.[11] A departure from preliminary injunctions would resolve a long-standing question about whether FTC merger challenges are subject to a more lenient standard than DOJ challenges since both would now be subject to the same permanent injunction standard in practice.
- **The length of time to trial will increase.** Preliminary injunction litigation has historically happened on an expedited basis, given that the federal court must decide whether to enjoin the transaction pending the outcome of the administrative proceeding. The FTC's in-house trial by default is set five months from the date the administrative complaint is voted out by the commission,[12] and the administrative complaint typically is filed concurrently with the motion for preliminary injunction in federal court.[13] In practice, the parties often have had only a few months to conduct discovery, draft expert reports and depose witnesses before the preliminary injunction hearing commenced. For example, in the FTC's 2023 challenge to IQVIA/Propel Media, fact discovery in the preliminary injunction proceeding lasted less than three months, the evidentiary hearing lasted eight days[14] and the federal court reached its decision roughly five months after the complaint was filed.[15] Moving forward, we are likely to see discovery, trial and decision timelines in FTC challenges of unconsummated mergers that are more aligned with those of DOJ challenges.[16] For example, in the DOJ's 2021 permanent injunction challenge to the merger of Penguin and Simon & Schuster, the parties had an additional month to conduct fact discovery and the court held an evidentiary hearing trial lasting nearly twice as long when compared with

IQVIA.[17] The decision to permanently enjoin Penguin-Simon/Schuster was issued nearly a year after the complaint was filed—over twice as long as is common for a preliminary injunction decision.[18] Merging parties will need to account for the potential for a lengthy district court proceeding when evaluating litigation strategy and drafting key provisions of their agreements.

- **The scope of evidentiary proceedings will change.** The FTC's decision to seek a permanent injunction in *Henkel* from a federal court may have a meaningful impact on the evidence the parties introduce at trial. The Part 3 rules have permissible evidentiary standards, including a presumption that hearsay is admissible so long as it is relevant, material and reliable.[19] In the past, the FTC often would successfully argue to federal courts that in deciding whether the FTC was likely to prevail on the merits in the Part 3 proceeding, it should consider the evidence that would be admissible in that proceeding, thereby incorporating the lax Part 3 rules governing admissibility into the federal court proceeding. In practice, this meant the parties often admitted full deposition and investigational hearing transcripts (rather than deposition designations), along with party and third-party ordinary course documents without the need for sponsoring witnesses. In permanent injunction proceedings, however, the Federal Rules of Evidence apply, and hearsay is typically inadmissible unless a specific exception is met. The distinction is significant and may curtail some of the evidence the FTC otherwise could introduce in a preliminary injunction proceeding, including much of the evidence the agency typically obtains during its investigation.
- **Constitutional challenges to the FTC likely will ebb.** Should the FTC continue to seek permanent injunctions in federal court, the agency likely will sidestep at least some constitutional challenges that merging parties may have otherwise pursued. In 2020, Axon Enterprise, Inc. challenged as unconstitutional various aspects of the FTC and its adjudicative process.[20] Since *Axon*, parties facing Part 3 actions have raised constitutional challenges to the FTC's structure and processes, and the agency has at times been forced to litigate these issues alongside the substantive antitrust claims.[21] If the FTC abandons its Part 3 process, it will avoid many of those collateral issues in merger cases.
- **It may be easier for merging parties to negotiate settlements.** Under the historic two-track approach, an administrative law judge would recommend a decision on the proposed merger's legality, and the FTC would make a final decision.[22] Because the commissioners stood as the final decision-makers on the merger, they were walled off from the FTC attorneys trying the case and did not participate in settlement talks to resolve concerns with the challenged merger. To communicate with the commissioners on a proposed settlement, parties would have to first withdraw the administrative matter from adjudication.[23] By contrast, under the new one-track approach, the FTC serves only as a litigant and has no adjudicative role at any point in the process. Therefore, the commission can engage in settlement discussions throughout the process without needing to jump through any procedural hoops. That simplification will enable parties to directly engage with the final decision-maker when attempting to settle a case.

While the FTC's new approach carries some risk of a higher evidentiary and legal standard, it comports with the broader Trump Administration's view that use of administrative proceedings should be minimized.[24] Separately, it allows the commissioners to engage more directly in agency litigations, allows the FTC more flexibility to advocate for longer discovery timelines and prevents staff from having to litigate cases on three fronts (the Part 3 hearing, the federal preliminary injunction proceeding and any constitutional challenge).

Conclusion

The FTC's change in tactics will affect merging parties' strategies from how the deal is structured to the first engagement with the FTC and throughout litigation and trial. The WilmerHale antitrust team has a deep bench of former FTC litigators who are standing by to assist you with assessing litigation strategy and other regulatory considerations.

Associate Kevin Decker provided invaluable assistance to this alert.

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1. Compl. for Permanent Inj., *FTC v. Henkel AG & Co. KGaA*, No. 1:25-cv-10371 (S.D.N.Y. Dec. 15, 2025). According to the complaint, the proposed merger would combine the two biggest brands of construction adhesives sold domestically at retailers like The Home Depot, Lowe's, Menards and Ace Hardware. *Id.* at ¶ 1.

2. *A Conversation with FTC Commissioner Andrew Ferguson Hosted by Alden Abbott*, Mercatus Ctr. (June 13, 2024), https://www.mercatus.org/economic-insights/event-videos/conversation-ftc-commissioner-andrew-ferguson-hosted-alden-abbott ("My own view is I have constitutional and due process concerns about administrative adjudications generally. I haven't made up my mind about any of this, obviously, nor could I lawfully since I sit as a judge in the Part III, or basically as an appellate judge in the Part III process. I think Justice Thomas' concurrence on the lawfulness of agency adjudications involving private rights is pretty persuasive.").

3. 15 U.S.C. § 45(b).

4. *See* 16 C.F.R. pt. 3.

5. 15 U.S.C. § 53(b).

6. Compl. for Permanent Inj., *FTC v. Henkel AG & Co. KGaA*, No. 1:25-cv-10371 (S.D.N.Y. Dec. 15, 2025). In recent years, the FTC has sought permanent injunctions in federal merger challenges only in four instances, and in each the merger was already consummated and there was no premerger status quo to maintain. *See* Compl. for Permanent Inj., *FTC v. Ovation Pharms., Inc.*, No. 0:08-cv-06379 (D. Minn. Dec. 16, 2008); Compl. for Permanent Inj., *FTC v. St. Luke's Health System, LTD*, No. 1:12-cv-00560 (D. Idaho Mar. 26, 2013); Compl. for Injunctive and Other Relief, *FTC v. U.S. Anesthesia Partners, Inc.*, No. 4:23-cv-03560 (S.D. Tex. Sept. 21, 2023); *see also* Compl., *In re Evanston Nw. Healthcare Corp.*, No. 9315 (F.T.C. Feb. 10, 2004) (seeking divestiture of Highland Park hospital and associated assets by Evanston Northwestern Healthcare via Part 3 proceeding).

7. Compl. for Permanent Inj., *FTC v. Henkel AG & Co. KGaA*, No. 1:25-cv-10371 (S.D.N.Y. Dec. 15, 2025) ¶ 14.

8. 15 U.S.C. § 53(b). That is a lower standard than the typical party seeking a preliminary injunction must meet since it is dictated by the FTC Act. *See FTC v. Microsoft Corp.*, 136 F.4th 954, 964 (9th Cir. 2025) ("§ 13(b) 'places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard' in as much as 'the Commission need not show irreparable harm to obtain a preliminary injunction.' The inquiry under § 13(b) thus focuses on (1) 'the likelihood that the Commission will ultimately succeed on the merits'; and (2) the 'balance [of] the equities.'" (quoting *FTC v. Warner Commc'ns*

Inc., 742 F.2d 1156, 1159–60 (9th Cir. 1984))); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) ("The Congress determined that the traditional standard was not appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief."(citing H.R. Rep. No. 93–624, at 31 (1971)). Usually, an ordinary litigant must show "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

9. *FTC v. Microsoft Corp.*, 136 F.4th 954, 965 (9th Cir. 2025) (quoting *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984)).

10. 15 U.S.C. § 18.

11. *See, e.g.*, *Hackensack Meridian*, 30 F.4th at 166.

12. 16 C.F.R. § 3.11.

13. 15 U.S.C. § 53(b).

14. *See* Scheduling Order, *FTC v. IQVIA Holdings Inc.*, No. 1:23-cv-06188-ER (S.D.N.Y. 2023); *FTC v. IQVIA Holdings Inc.*, 710 F. Supp. 3d 329, 341 (S.D.N.Y. 2023).

15. *IQVIA Holdings Inc.*, 710 F. Supp. 3d at 341.

16. As with any discovery schedule, however, the parties will be able to argue for a shorter schedule. For example, in *FTC v. Henkel AG*, the parties filed a joint letter asking for a trial beginning on May 26, 2026, and continuing through the week of June 1, 2026, in order to "close their transaction by the agreed termination date should the Court not enjoin it." ECF No. 63.

17. *See* Scheduling Order, *United States v. Bertelsmann SE & Co., et al.*, No. 21-2886 (D.D.C. 2022); *Justice Department Obtains Permanent Injunction Blocking Penguin Random House's Proposed Acquisition of Simon & Schuster* (Oct. 31, 2022), https://www.justice.gov/archives/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed#:~:text=The court's decision follows a thirteen-day trial in August 2022.

18. *United States v. Bertelsmann SE & Co.*, 646 F. Supp. 3d 1 (Oct. 31, 2022).

19. 16 C.F.R. § 3.43(b).

20. Compl., *Axon Enter. v. FTC*, No. 2:20-cv-00014-DMF (D. Ariz. Jan. 2, 2020).

21. *See, e.g.*, Compl., *Kroger v. FTC*, 1:24-cv-00438 (S.D. Ohio Aug. 19, 2024).

22. *See* 16 C.F.R. § 3.51 (recommended decision); *id.* § 3.54 (FTC decision).

23. 16 C.F.R. § 3.25.

24. *See, e.g.*, *A Conversation with FTC Commissioner Andrew Ferguson Hosted by Alden Abbott*, Mercatus Ctr. (June 13, 2024),

https://www.mercatus.org/events/2024/06/conversation-ftc-commissioner-andrew-ferguson-hosted-alden-abbott (then-Commissioner Ferguson: "My own view is I have constitutional and due process concerns about administrative adjudications generally. I haven't made up my mind about any of this, obviously, nor could I lawfully since I sit as a judge in the Part III, or basically as an appellate judge in the Part III process. I think Justice Thomas' concurrence on the lawfulness of agency adjudications involving private rights is pretty persuasive."); *see also Axon*, 598 U.S. at 196 (2023) (Thomas, J., concurring) ("I have grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end.").