

July 16, 2021

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan:

I am writing concerning the monopolistic behavior of firms in the defense industry. In the two decades starting in 1980, waves of merger activity and consolidation transformed our nation's defense industry from a competitive market with over 50 firms to an oligopoly of only five large rivals.¹ After decades of horizontal consolidation, the remaining giants in this sector have shifted to vertical consolidation, buying up key suppliers and input manufacturers in order to integrate operations up and down their supply chains.² When antitrust agencies have approved these vertical mergers and acquisitions, they have sometimes subjected them to so-called "behavioral" remedies. These remedies seek to protect competition by prohibiting a newly merged firm from using competitively sensitive information to the detriment of its rivals or from disfavoring its rivals that depend on it for supply, distribution, or other inputs.³ Given the questionable effectiveness of these remedies in numerous markets,⁴ I urge the Federal Trade Commission (FTC) to re-evaluate the best method to protect competition when analyzing vertical deals, including not allowing such transactions to proceed in the first place.

In 2018, the FTC concluded that Northrop Grumman's acquisition of Orbital-ATK would cause anticompetitive harm, noting that the vertical transaction "would provide Northrop with the ability and incentive to foreclose missile system prime contractor competitors by denying them access to Northrop's [solid rocket motors] or by making pricing, personnel, schedule,

¹ Commission on the Future of the United States Aerospace Industry, "Final Report," November 2002, p. 134, <https://history.nasa.gov/AeroCommissionFinalReport.pdf>.

² Antitrust Alert, "Aerospace and Defense Series: DOJ and FTC Vertical Merger Guidelines Will Impact Government Contractors," Anthony Ferrera and Jon Dubrow, February 24, 2020, <https://www.antitrustalert.com/2020/02/aerospace-and-defense-series-doj-and-ftc-vertical-merger-guidelines-will-impact-government-contractors/>.

³ Federal Trade Commission, "Fixer Upper: Using the FTC's Remedial Toolbox to Restore Competition," February 8, 2020, https://www.ftc.gov/system/files/documents/public_statements/1565915/conner_gcr_live_conduct_remedies_2-8-20.pdf.

⁴ Id. at 22-31.

investment, design, and other decisions that disadvantage those competitors.”⁵ Nevertheless, the FTC, with input from the Department of Defense (DoD), permitted the transaction subject to a behavioral remedy agreed to by the parties. Among other provisions, this settlement required Northrop to “make its solid rocket motors and related services available on a non-discriminatory basis to all competitors for missile contracts” and to “establish firewalls to keep it from transferring or using any proprietary information that it receives from competing missile prime contractors or [solid rocket motor] suppliers in a manner that harms competition”⁶ in an effort to ensure that Northrop would not use its position to hurt its rivals’ ability to compete.

Reports indicate that the FTC has commenced an investigation into the failure of the behavioral remedy in that deal.⁷ If that investigation is complete, then I urge the FTC to release those findings to the public. If the investigation is ongoing, then I urge the FTC and the DoD to complete that investigation and consider its findings when deciding whether to approve any similar vertical transactions, including Lockheed Martin’s proposed acquisition of Aerojet Rocketdyne.⁸ This vertical transaction, if permitted to proceed, would result in the acquisition of the last remaining independent domestic propulsion supplier by the largest tactical missile prime competitor.⁹ Currently, when the military solicits proposals for missile defense systems from defense firms like Northrup Grumman, Raytheon, Boeing, and Lockheed Martin, it can force these contractors to compete off each other on pricing, timing, and other contractual terms.¹⁰ However, if Lockheed Martin is allowed to integrate with the Aerojet Rocketdyne, the military’s ability to spur this type of competition will be inhibited, and the buyer will have the ability and incentive to raise costs for its rivals, hurting competition and potentially threatening national security.¹¹

Studies have noted that behavioral remedies are “difficult to craft” and “eas[y]...to circumvent,” and they also require “courts to expend resources on monitoring and enforcement,” in large part because behavioral remedies are designed to “require a merged firm to operate in a

⁵ Complaint, In the Matter of Northrop Grumman and Orbital ATK (F.T.C. 2018), https://www.ftc.gov/system/files/documents/cases/1810005_c-4652_northrop_grumman_orbital_complaint_6-5-18.pdf.

⁶ Federal Trade Commission, “FTC Imposes Conditions on Northrop Grumman’s Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.,” June 5, 2018, <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket>.

⁷ Inside Defense, “Northrop says it has received ‘civil investigative demand’ from Federal Trade Commission,” Marjorie Censer, October 24, 2019, <https://insidedefense.com/insider/northrop-says-it-has-received-civil-investigative-demand-federal-trade-commission>.

⁸ Reuters, “U.S. antitrust enforcers seen extending review of Lockheed’s deal for Aerojet,” Mike Stone, February 17, 2021, <https://www.reuters.com/article/us-aerojet-m-a-lockheed/u-s-antitrust-enforcers-seen-extending-review-of-lockheeds-deal-for-aerojet-idUSKBN2AH2XA>.

⁹ Defense One, “Antitrust Regulators Extend Review of Lockheed’s Proposed Purchase of Aerojet Rocketdyne,” Marcus Weisgerber, February 19, 2021, <https://www.defenseone.com/business/2021/02/antitrust-regulators-extend-review-lockheeds-proposed-purchase-aerojet-rocketdyne/172154/>.

¹⁰ KABC, “Proposed Defense Merger Puts National Security at Risk,” 2021, <https://www.kabc.com/news/proposed-defense-merger-puts-national-security-at-risk/>.

¹¹ *Id.*

manner inconsistent with its own profit-maximizing incentives.”¹² Such requirements include “lower[ing] entry barriers, erect[ing] a firewall to protect competitively sensitive information, or commit[ting] not to discriminate against competitors in the market that rely on the merged firm for supply, distribution, or other inputs.”¹³ For example, in two recent and significant vertical transactions in the entertainment and media sectors—the Ticketmaster-Live Nation and Comcast-NBCU deals, respectively—the Department of Justice (DoJ) mandated that the merged firms not retaliate against customers who also conducted business with rival firms.¹⁴ However, Ticketmaster still went on to condition providing Live Nation’s entertainment events on “whether the purchaser had also used Ticketmaster’s ticketing services,”¹⁵ hurting competition and directly contravening the purpose of the behavioral remedy. In another deal involving flight search tools, the DoJ required Google and ITA to establish a firewall to protect against potential anticompetitive exchanges of sensitive information related to online travel intermediaries.¹⁶ However, such coordination between divisions of a business are natural in order to optimize profits, and firms may discover alternate ways to accomplish the ends that the firewall sought to thwart.¹⁷ In other instances, companies brazenly have skirted their pre-merger commitments altogether. For instance, Google promised the European Commission it would keep data in two separate pots before it acquired DoubleClick in 2007, but in 2016 Google “literally cross[ed] out [those] lines in its privacy policy” and “substituted new language that says browsing habits ‘may be’ combined with what the company learns from the use of Gmail and other tools.”¹⁸

These examples illustrate only some of the challenges that a monitor—who does not “sit at the meetings where such decisions are made”¹⁹—may face when policing behavioral remedies, particularly when dealing with powerful, dominant firms. Absent a favorable finding from the FTC’s investigation of Northrop Grumman, and a clear understanding of whether any kind of behavioral remedy can sufficiently address competition concerns for the complex systems in our missile defense industry, the FTC and the DoD should be particularly careful before imposing

¹² American Antitrust Institute, “Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement,” John Kwoka and Diana Moss, 2011, https://www.antitrustinstitute.org/wp-content/uploads/2011/11/AAI_wp_behavioral-remedies_final.pdf.

¹³ Jones Day, “Federal Antitrust Enforcers Taking More Regulatory, but More Flexible, Approach to Merger Remedies,” Phillip Proger and J. Bruce McDonald, June 2010, <https://www.jonesday.com/en/insights/2010/06/federal-antitrust-enforcers-taking-more-regulatory-but-more-flexible-approach-to-merger-remedies>.

¹⁴ *United States v. Ticketmaster Entertainment, Inc.*, 75 Fed. Reg. 6,715, 6,717 (DOJ Feb. 10, 2010) (proposed final judgment); *United States v. Comcast Corp.*, 76 Fed. Reg. 5,459, 5,461-64 (§§ IV-VI) (DOJ Jan. 31, 2011) (proposed final judgment).

¹⁵ “Scrambled Eggs and Paralyzed Policy: Breaking Up Consummated Mergers and Dominant Firms,” John Kwoka and Tommaso Valletti, December 14, 2020, at 9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736613.

¹⁶ *United States v. Google, Inc.*, 76 Fed. Reg. 21,026, 21,028-29 (DOJ April 14, 2011) (proposed final judgment).

¹⁷ Behavioral Merger Remedies, *supra* note 12, at 26-27.

¹⁸ ProPublica, “Google Has Quietly Dropped Ban on Personally Identifiable Web Tracking,” Julia Angwin, October 21, 2016, <https://www.propublica.org/article/google-has-quietly-dropped-ban-on-personally-identifiable-web-tracking>.

¹⁹ Behavioral Merger Remedies, *supra* note 12, at 24.

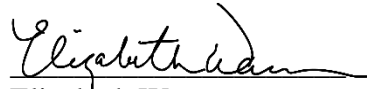
yet another behavioral remedy in the defense industry in response to vertical mergers and acquisitions.

To better understand the ways in which the FTC decides that behavioral remedies can adequately address potential anticompetitive concerns related to a prospective vertical transaction and monitors the effectiveness of those remedies once such a transaction has been consummated, I request answers to the following questions by Friday, July 30, 2021:

1. What is the DoD's role, if any, when the FTC assesses transactions in the defense industry? Is the DoD's approval necessary for such transactions?
2. How many transactions in the defense industry have been subjected to behavioral remedies by the FTC since 2000?
3. On average, how long do the requirements of these behavioral remedies last?
4. How often has the FTC completed retrospective reviews of vertical transactions in the defense industry?
5. What rules, mechanisms, or standards does the FTC abide by or employ to select compliance officers or monitors to ensure parties meet the requirements of a behavioral remedy?
6. What rules, mechanisms, or standards does the FTC abide by or employ to determine that a behavioral remedy would protect competition once a vertical transaction has been consummated? Please include any considerations of relevant market shares, Herfindahl-Hirschman Index calculations, and revenues of the parties.
7. What rules, mechanisms, or standards does the FTC abide by or employ to determine whether a behavioral remedy has been violated or has been ineffective?
8. What actions does the FTC take if it determines that a behavioral remedy has been violated or has been ineffective? Please include discussion of further imposed remedies, such as fines and orders to disgorge ill-gotten profits or unwind consummated transactions.

Thank you for your attention to this matter.

Sincerely,


Elizabeth Warren
United States Senator

cc:
The Honorable Kathleen Hicks, Deputy Secretary of Defense