

February 12, 2020

# Edgewell/Harry's Merger – A Cautionary Tale

---

## Abandoned Merger Signals Active Agency Scrutiny of Disruptive Competitors

---

### SUMMARY

On February 10, 2020, Edgewell Personal Care Co. ("*Edgewell*") announced that it would abandon its \$1.37 billion acquisition of Harry's Inc. ("*Harry's*"), after the Federal Trade Commission ("*FTC*") sued to block the deal. Both Edgewell and Harry's sell razors. While Edgewell is a longstanding incumbent in the industry through its Schick and Wilkinson Sword brands, Harry's began in 2013 as a direct-to-consumer ("*DTC*") retailer and expanded into retail outlets in 2016. Edgewell also announced that it anticipates litigation with Harry's following Edgewell's decision to terminate the merger agreement.

The FTC challenge demonstrates that it is closely scrutinizing acquisitions that may eliminate successful market disruptors, particularly in concentrated industries. The challenge also illustrates that statements executives make to investors while a deal is pending can significantly influence the merger clearance process. For private equity and venture investors, the case highlights that antitrust risks may limit available exit strategies for those pursuing investments in disruptive start-ups.

Finally, the threat of Harry's filing a lawsuit against Edgewell provides a reminder that litigation between former merger partners does occur. Prospective acquirers should keep the possibility of litigation in mind when negotiating merger agreement provisions, and exhibit particular care towards provisions that govern the parties' obligations in the event of an extended regulatory review or challenge.

## BACKGROUND

On May 9, 2019, Edgewell and Harry's announced that Edgewell had agreed to acquire Harry's for \$1.37 billion. Approximately 79% of the consideration was to be paid in cash, with 21% being paid in Edgewell stock.

Edgewell and Proctor and Gamble ("**P&G**") have long held significant positions in the razor industry, focusing on the sale of razors through brick-and-mortar retail stores at premium prices in what the FTC characterized as "a comfortable duopoly." Harry's, a private equity-backed start-up, entered the market in 2013 through an innovative direct-to-consumer, or DTC, online sales model that sold razors at a value price point. In 2016, Harry's began selling its razors in brick-and-mortar retail stores, in direct competition with Edgewell and P&G.

The proposed transaction was subject to pre-merger filing obligations under the Hart-Scott-Rodino Act. On August 6, 2019, Edgewell announced that the FTC had issued second requests to the companies, thereby initiating a detailed investigation of the transaction. At the same time, Edgewell announced that the timeline for the transaction remained unchanged, and that the parties intended to consummate the merger during the first quarter of 2020.

On February 3, 2020, the FTC unanimously voted to file an administrative complaint and authorize staff to seek a temporary restraining order and preliminary injunction to stop the proposed acquisition. The FTC's complaint alleged that the acquisition would "neutralize one of the most successful challenger brands ever built, eliminating head-to-head competition between Harry's and Edgewell, and removing the independent competitor that disrupted Edgewell and P&G's longstanding and stable duopoly." The complaint emphasized that "Harry's significant entry into brick-and-mortar retail transformed the wet shave razor market from a comfortable duopoly to a competitive battleground," and that consumers "benefitted from the resulting price discounts and the introduction of additional Edgewell branded and private label choices" as a result of the competition. While the FTC defined the relevant market in which to analyze the merger's effects as "no broader than the manufacture and sale of wet shave system razors and disposable razors," it also acknowledged a number of narrower markets. Notably, the FTC treated online razor sales and sales made at brick-and-mortar stores as distinct markets (distinguishing the sale of Dollar Shave Club to Unilever in June 2016).

Citing the uncertainty and costs associated with the FTC litigation, Edgewell terminated the proposed transaction on February 10, 2020. In response, Harry's co-founders said in a statement that they were "disappointed by the decision by Edgewell's board not to see this process to its conclusion." They also expressed their belief that the companies would have "prevailed in litigation" with the FTC. Harry's informed Edgewell that it intends to sue the company over its decision to terminate the merger agreement.

## COMMENT

### Increased Scrutiny Where “Uniquely Disruptive Competitors” Are Acquired

The FTC’s complaint illustrates that companies should expect heightened agency scrutiny when acquiring a disruptive competitor. This is particularly true in a concentrated industry in which government regulators perceive significant barriers to entry. In its complaint, the FTC emphasized that Harry’s was a “uniquely disruptive competitor” that had managed to interrupt Edgewell and P&G’s duopoly in a way that would be difficult for another firm to replicate. The FTC noted that Edgewell and P&G had “dominated the wet shave razor market for decades,” and that Harry’s made the “first – and, to date, the only – successful jump from an online DTC platform into brick-and-mortar retail.” In its complaint, the FTC alleged that barriers to market entry were high, and that aspiring entrants now face steeper challenges than Harry’s did. New entrants would now “lack Harry’s early-mover advantage in the now-mature DTC space and on the now-crowded shelves of brick-and-mortar retailers,” and therefore find it much more difficult to succeed. As a result, the FTC asserted that any anticompetitive effects from the transaction would be hard to offset.

The FTC’s approach to market definition raises an intriguing question about whether Edgewell might have achieved a strategic acquisition of Harry’s during the company’s incipency, when it sold razors exclusively in the DTC channel and did not yet compete in the brick-and-mortar channel.

### Implications For Executives And Investors

The FTC’s complaint illustrates how statements to investors can complicate the merger clearance process. The FTC’s complaint cited Edgewell’s CEO’s statements on a quarterly earnings call on November 12, 2019, that Edgewell was “not interested” in escalating price competition once the proposed acquisition was completed or in “leading a new round ... of value destruction.” The FTC used these statements to support its theory that the acquisition was intended to arrest the price competition Harry’s had introduced into the market and thereby harm consumers. Executives and counsel should be mindful of the possibility that statements made to investors concerning proposed transactions will likely be reviewed by antitrust authorities and could be used against them during an investigation or litigation.

The FTC’s scrutiny of acquisitions of disruptive competitors also raises important concerns for investors looking to invest in disruptive start-ups. At the outset, investors should be mindful that antitrust risks will be an important factor for potential exit options, since an acquisition by an established competitor may not be a viable exit strategy if the start-up has been effective in disrupting a concentrated industry.

### Litigation Between Former Merger Partners

Finally, while abandoning the transaction put an end to Edgewell’s contest with the FTC, the company faces potential ongoing fallout related to the failed merger. Harry’s alleged intention to pursue litigation against Edgewell over the deal’s termination serves as a reminder that litigation between former merger partners is likely in the event that one party seeks to terminate a transaction that the other party wishes to complete.

## SULLIVAN & CROMWELL LLP

The prospect of litigation between former merger partners must be addressed when drafting merger agreements, and the Edgewell/Harry's case highlights the critical importance of drafting clear and comprehensive provisions detailing the parties' obligations in the event of a regulatory challenge.

\* \* \*

# SULLIVAN & CROMWELL LLP

## ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

## CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to [SCPublications@sullcrom.com](mailto:SCPublications@sullcrom.com).

## CONTACTS

### New York

---

Werner F. Ahlers	+1-212-558-1623	<a href="mailto:ahlersw@sullcrom.com">ahlersw@sullcrom.com</a>
Francis J. Aquila	+1-212-558-4048	<a href="mailto:aquilaf@sullcrom.com">aquilaf@sullcrom.com</a>
Audra D. Cohen	+1-212-558-3275	<a href="mailto:cohenad@sullcrom.com">cohenad@sullcrom.com</a>
H. Rodgin Cohen	+1-212-558-3534	<a href="mailto:cohenhr@sullcrom.com">cohenhr@sullcrom.com</a>
Scott B. Crofton	+1-212-558-4682	<a href="mailto:croftons@sullcrom.com">croftons@sullcrom.com</a>
Mitchell S. Eitel	+1-212-558-4960	<a href="mailto:eiteml@sullcrom.com">eiteml@sullcrom.com</a>
John Evangelakos	+1-212-558-4260	<a href="mailto:evangelakosj@sullcrom.com">evangelakosj@sullcrom.com</a>
Sergio J. Galvis	+1-212-558-4740	<a href="mailto:galviss@sullcrom.com">galviss@sullcrom.com</a>
C. Andrew Gerlach	+1-212-558-4789	<a href="mailto:gerlacha@sullcrom.com">gerlacha@sullcrom.com</a>
Matthew B. Goodman	+1-212-558-4995	<a href="mailto:goodmanm@sullcrom.com">goodmanm@sullcrom.com</a>
Dustin F. Guzior	+1-212-558-4482	<a href="mailto:guziord@sullcrom.com">guziord@sullcrom.com</a>
Brian E. Hamilton	+1-212-558-4801	<a href="mailto:hamiltonb@sullcrom.com">hamiltonb@sullcrom.com</a>
Steven L. Holley	+1-212-558-4737	<a href="mailto:holleys@sullcrom.com">holleys@sullcrom.com</a>
Matthew G. Hurd	+1-212-558-3122	<a href="mailto:hurdm@sullcrom.com">hurdm@sullcrom.com</a>
Stephen M. Kotran	+1-212-558-4963	<a href="mailto:kotrans@sullcrom.com">kotrans@sullcrom.com</a>
Mark J. Menting	+1-212-558-4859	<a href="mailto:mentingm@sullcrom.com">mentingm@sullcrom.com</a>
Scott D. Miller	+1-212-558-3109	<a href="mailto:milleresc@sullcrom.com">milleresc@sullcrom.com</a>
Keith A. Pagnani	+1-212-558-4397	<a href="mailto:pagnanik@sullcrom.com">pagnanik@sullcrom.com</a>
Richard C. Pepperman II	+1-212-558-3493	<a href="mailto:peppermanr@sullcrom.com">peppermanr@sullcrom.com</a>
Richard A. Pollack	+1-212-558-3497	<a href="mailto:pollackr@sullcrom.com">pollackr@sullcrom.com</a>
George J. Sampas	+1-212-558-4945	<a href="mailto:sampasg@sullcrom.com">sampasg@sullcrom.com</a>

## SULLIVAN & CROMWELL LLP

Melissa Sawyer	+1-212-558-4243	<a href="mailto:sawyer@sullcrom.com">sawyer@sullcrom.com</a>
Alan J. Sinsheimer	+1-212-558-3738	<a href="mailto:sinsheimera@sullcrom.com">sinsheimera@sullcrom.com</a>
Benjamin R. Walker	+1-212-558-7393	<a href="mailto:walkerb@sullcrom.com">walkerb@sullcrom.com</a>
Krishna Veeraraghavan	+1-212-558-7931	<a href="mailto:veeraraghavank@sullcrom.com">veeraraghavank@sullcrom.com</a>

---

### Washington, D.C.

Renata B. Hesse	+1-202-956-7575	<a href="mailto:hesser@sullcrom.com">hesser@sullcrom.com</a>
Joseph J. Matelisi	+1-202-956-7610	<a href="mailto:matelisi@sullcrom.com">matelisi@sullcrom.com</a>
Robert S. Risoleo	+1-202-956-7510	<a href="mailto:risoleor@sullcrom.com">risoleor@sullcrom.com</a>

---

### Los Angeles

Eric M. Krautheimer	+1-310-712-6678	<a href="mailto:krautheimere@sullcrom.com">krautheimere@sullcrom.com</a>
Rita-Anne O'Neill	+1-310-712-6698	<a href="mailto:oneillr@sullcrom.com">oneillr@sullcrom.com</a>
Adam S. Paris	+1-310-712-6663	<a href="mailto:parisa@sullcrom.com">parisa@sullcrom.com</a>
Alison S. Ressler	+1-310-712-6630	<a href="mailto:resslera@sullcrom.com">resslera@sullcrom.com</a>
Robert A. Sacks	+1-310-712-6640	<a href="mailto:sacksr@sullcrom.com">sacksr@sullcrom.com</a>

---

### Palo Alto

Brendan P. Cullen	+1-650-461-5650	<a href="mailto:cullenb@sullcrom.com">cullenb@sullcrom.com</a>
Scott D. Miller	+1-650-461-5620	<a href="mailto:miller-sc@sullcrom.com">miller-sc@sullcrom.com</a>
Sarah P. Payne	+1-650-461-5669	<a href="mailto:paynesa@sullcrom.com">paynesa@sullcrom.com</a>

---

### London

John Horsfield-Bradbury	+44-20-7959-8491	<a href="mailto:horsfieldbradbury@sullcrom.com">horsfieldbradbury@sullcrom.com</a>
Jeremy B. Kutner	+44-20-7959-8484	<a href="mailto:kutnerj@sullcrom.com">kutnerj@sullcrom.com</a>
Ben Perry	+44-20-7959-8477	<a href="mailto:perryb@sullcrom.com">perryb@sullcrom.com</a>
Richard A. Pollack	+44-20-7959-8404	<a href="mailto:pollackr@sullcrom.com">pollackr@sullcrom.com</a>
Juan Rodriguez	+44-20-7959-8499	<a href="mailto:rodriguezja@sullcrom.com">rodriguezja@sullcrom.com</a>
Evan S. Simpson	+44-20-7959-8426	<a href="mailto:simpsones@sullcrom.com">simpsones@sullcrom.com</a>

---

### Paris

Olivier de Vilmorin	+33-1-7304-5895	<a href="mailto:devilmorino@sullcrom.com">devilmorino@sullcrom.com</a>
---------------------	-----------------	--

---

### Frankfurt

Carsten Berrar	+49-69-4272-5506	<a href="mailto:berrarc@sullcrom.com">berrarc@sullcrom.com</a>
Krystian Czerniecki	+49-69-4272-5525	<a href="mailto:czernieckik@sullcrom.com">czernieckik@sullcrom.com</a>
York Schnorbus	+49-69-4272-5517	<a href="mailto:schnorbusy@sullcrom.com">schnorbusy@sullcrom.com</a>

---

### Brussels

Michael Rosenthal	+32-2896-8001	<a href="mailto:rosenthalm@sullcrom.com">rosenthalm@sullcrom.com</a>
-------------------	---------------	--

---

### Melbourne

Waldo D. Jones Jr.	+61-3-9535-1508	<a href="mailto:jonesw@sullcrom.com">jonesw@sullcrom.com</a>
--------------------	-----------------	--

---

### Sydney

Waldo D. Jones Jr.	+61-2-8227-6702	<a href="mailto:jonesw@sullcrom.com">jonesw@sullcrom.com</a>
--------------------	-----------------	--

---

## SULLIVAN & CROMWELL LLP

---

### Tokyo

Keiji Hatano	+81-3-3213-6171	<a href="mailto:hatanok@sullcrom.com">hatanok@sullcrom.com</a>
--------------	-----------------	--

---

### Hong Kong

Garth W. Bray	+852-2826-8691	<a href="mailto:brayg@sullcrom.com">brayg@sullcrom.com</a>
---------------	----------------	--

Kay Ian Ng	+852-2826-8601	<a href="mailto:ngki@sullcrom.com">ngki@sullcrom.com</a>
------------	----------------	--

---

### Beijing

Gwen Wong	+86-10-5923-5967	<a href="mailto:wonggw@sullcrom.com">wonggw@sullcrom.com</a>
-----------	------------------	--

---