

Merger Control

Fourth Edition

Contributing Editors: Nigel Parr & Catherine Hammon
Published by Global Legal Group

CONTENTS

Preface	Nigel Parr & Catherine Hammon, <i>Ashurst LLP</i>	
Albania	Renata Leka, <i>Boga & Associates</i>	1
Argentina	Julián Peña & Federico Rossi, <i>Allende & Brea</i>	8
Australia	Sharon Henrick, Wayne Leach & Michael Robert-Smith, <i>King & Wood Mallesons</i>	13
Brazil	José C. M. Berardo, Bruno B. Becker & Guilherme Morgulis, <i>BMA – Barbosa, Müssnich, Aragão</i>	24
Canada	Randall J. Hofley, Micah Wood & Kevin H. MacDonald, <i>Blake, Cassels & Graydon LLP</i>	37
Colombia	Alfonso Miranda Londoño, <i>Esguerra Barrera Arriaga S.A.</i>	45
Cyprus	Anastasios A. Antoniou & Aquilina Demetriadi, <i>Anastasios Antoniou LLC</i>	53
Denmark	Olaf Koktvedgaard & Erik Kjær-Hansen, <i>Bruun & Hjejle</i>	60
Finland	Katri Joenpolvi, Leena Lindberg & Jarno Käkälä, <i>Krogerus</i>	67
France	Pierre Zelenko & Daniel Vasbeck, <i>Linklaters LLP</i>	77
Germany	Peter Stauber, <i>Noerr LLP</i>	99
Hungary	Márton Horányi & Andrea Jádi Németh, <i>bpv JÁDI NÉMETH Attorneys at Law</i>	109
India	Farhad Sorabjee & Amitabh Kumar, <i>J. Sagar Associates</i>	119
Indonesia	Yogi Sudrajat Marsono & HMBC Rikrik Rizkiyana, <i>Assegaf Hamzah & Partners</i>	123
Israel	Dr David E. Tadmor & Shai Bakal, <i>Tadmor & Co. Yuval Levy & Co., Attorneys-at-Law</i>	130
Japan	Kentaro Hirayama, <i>Morrison Foerster / Ito & Mitomi</i>	141
Kazakhstan	Aldash Aitghanov, Nikolay Radostovets & Kuanysh Kholtursunov, <i>JSC Center for Development and Protection of Competition Policy</i>	149
Kosovo	Sokol Elmazaj & Delvina Nallbani, <i>Boga & Associates</i>	155
Macedonia	Jasmina I. Jovanovik & Dragan Dameski, <i>Debarliev, Dameski & Kelesoska Attorneys at law</i>	160
Malta	Ron Galea Cavallazzi & Lisa Abela, <i>Camilleri Preziosi</i>	167
Morocco	Amin Hajji & Aïcha Brahma, <i>Hajji & Associés</i>	170
New Zealand	Grant David, Neil Anderson & Melissa Hay, <i>Chapman Tripp</i>	175
Norway	Jan Magne Juuhl-Langseth & Erik Martinus Klevmo, <i>Advokatfirmaet Simonsen Vogt Wiig AS</i>	182
Portugal	António Mendonça Raimundo & Sónia Gemas Donário, <i>Albuquerque & Associados</i>	194
Romania	Silviu Stoica & Mihaela Ion, <i>Popovici Nițu & Asociații</i>	201
Singapore	Kala Anandarajah, Dominique Lombardi & Tanya Tang, <i>Rajah & Tann Singapore LLP</i>	215
Spain	Jaime Folguera Crespo, Raquel Lapresta Bienz & Tomás Arranz Fernández-Bravo, <i>Uriá Menéndez</i>	223
Sweden	Pontus Lindfelt, Mina Gregow & Hanna Wingren, <i>White & Case</i>	232
Switzerland	Franz Hoffet, Marcel Dietrich & Gerald Brei, <i>Homburger AG</i>	242
Turkey	Gönenç Gürkaynak & Öznur İnanılır, <i>ELIG, Attorneys-at-Law</i>	249
Ukraine	Igor Svechkar & Alexey Pustovit, <i>Asters</i>	259
United Kingdom	Nigel Parr & Emily Clark, <i>Ashurst LLP</i>	264
USA	Christopher A. Williams & Paul S. Jin, <i>Wilson Sonsini Goodrich & Rosati</i>	279

USA

Christopher A. Williams & Paul S. Jin
Wilson Sonsini Goodrich & Rosati PC

Overview of merger control activity during the last 12 months

The Antitrust Division of the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) (collectively the Agencies) are responsible for antitrust merger enforcement at the national level. Each agency devotes significant resources to reviewing merger-related activity and challenging those transactions that the Agencies believe will substantially lessen competition. Most merger investigations and challenges result from transactions reported to the Agencies under the U.S. premerger notification program established by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the HSR Act).

In fiscal year 2014, the Agencies received notification of 1,663 transactions, an increase of over 25% from the previous year and the most since the end of the Great Recession (i.e., the economic recession between December 2007 and June 2009). There was not, however, a corresponding increase in merger challenges – i.e., transactions that are subject to remedies, challenged in court, or abandoned due to antitrust concerns. The total number of challenged transactions has fallen over the past two years, from 44 in fiscal year 2012, to 38 and 37 in fiscal years 2013 and 2014, respectively.

But this modest decrease is far from a sign that the Agencies have scaled back their merger enforcement efforts.

The Antitrust Agencies have been aggressive during the Obama Administration. The 44 challenged mergers in fiscal year 2012 are the most since fiscal year 2001, when the antitrust agencies challenged a total of 55 mergers. Moreover, the 37 challenges in fiscal year 2014 are higher than the prior 10-year average (33.6 challenged transactions), and senior agency officials have reiterated in policy speeches and congressional testimony that preventing anticompetitive mergers has remained a top priority. The Agencies have also successfully blocked or obtained divestitures in several notable transactions through the first eight months of fiscal year 2015.

U.S. Merger Enforcement Data ¹										
Fiscal Year ²	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Transactions Reported	1,675	1,768	2,201	1,726	716	1,116	1,450	1,429	1,326	1,663
Second Requests										
DOJ	25	17	32	20	16	22	31	29	22	-
FTC	25	28	31	21	15	20	24	20	25	-

U.S. Merger Enforcement Data ¹										
Fiscal Year ²	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Total	50	45	63	41	31	42	55	49	47	-
Percentage³	3.1%	2.6%	3.0%	2.5%	4.5%	3.7%	3.9%	3.5%	3.7%	-
Challenges										
DOJ	4	16	12	16	12	19	20	19	15	20
FTC	14	16	22	21	19	22	18	25	23	17
Total	18	32	34	37	31	41	37	44	38	37
Percentage⁴	1.1%	1.8%	1.6%	2.2%	4.5%	3.6%	2.6%	3.1%	3.0%	2.3%

The Agencies also have the authority to challenge non-reportable mergers before or after they are consummated, under Section 7 of the Clayton Act. Two recent challenges to non-reportable transactions include the DOJ's federal court victory against Bazaarvoice's acquisition of PowerReviews, and the FTC's appellate victory against the proposed merger of St. Luke's Health Systems and Saltzer Medical Group.

Department of Justice, Antitrust Division

The DOJ challenged 20 mergers during fiscal year 2014 and announced at least nine challenges during the first eight months of fiscal year 2015. Over the past 12 months, the DOJ announced the following settlements that required divestitures:

- *Martin Marietta/Texas Industries*: The DOJ alleged that Martin Marietta Materials' \$2.7bn acquisition of Texas Industries would have combined two of the only three suppliers of aggregate (crushed stone) approved for use by the Texas Department of Transportation (TDOT). Martin Marietta Materials agreed to divest an Oklahoma quarry and two Texas rail yards to resolve the DOJ's concerns that the merger would harm customers handling TDOT projects in the Dallas metropolitan area.
- *Sinclair/Perpetual*: The DOJ alleged that Sinclair Broadcast Group's \$963m acquisition of Perpetual Corp. would likely result in increased prices for broadcast television spot advertising in parts of central Pennsylvania because the combined company would control three of the six broadcast TV stations in the Harrisburg-Lancaster-Lebanon-York designated market area (DMA). In order to settle the challenge, the parties agreed to divest their assets in WHTM-TV, an ABC affiliate in Harrisburg, Pennsylvania, to Media General.
- *Landmark Aviation/Ross*: Landmark Aviation agreed to divest fixed base operator (FBO) assets used to provide flight support services to general aviation customers at Scottsdale Municipal Airport to Signature Flight Support Corp. in order to resolve the DOJ's challenge to Landmark's \$330m acquisition of Ross Aviation. Absent the divestiture, Landmark would have possessed a monopoly over the provision of FBO services at the Scottsdale Municipal Airport.
- *Tyson Foods/Hillshire Brands*: In order to gain approval for its \$8.5bn acquisition of Hillshire Brands, Tyson Foods agreed to divest its sow purchasing business. The DOJ alleged that the merger would enhance monopsony or buying power because the combined companies would have accounted for more than a third of sow purchases from U.S. farmers and constituted the two best alternatives for many farmers.
- *Media General/LIN Media*: The DOJ alleged that Media General's \$1.5bn acquisition of LIN Media would likely increase the prices for broadcast spot advertising in Birmingham, Alabama; Savannah, Georgia; the Mobile, Alabama/Pensacola, Florida

DMA; and the Providence, Rhode Island/New Bedford, Massachusetts DMA. To resolve the DOJ's concerns Media General agreed to divest interests in TV stations in these relevant geographic markets.

- *Nexstar/Communications Corp.*: The DOJ alleged that Nexstar Broadcast Group's \$270m acquisition of Communications Corporation of America would result in Nexstar controlling three of the four major broadcast network TV stations in Evansville, Indiana. Nexstar agreed to divest its interests in WEVV-TV, a CBS and FOX affiliate, in order to settle the DOJ's challenge.
- *Continental AG/Veyance Technologies*: Continental AG agreed to divest Veyance Technologies' North American commercial air springs vehicle business to resolve allegations that its \$1.8bn acquisition of Veyance would substantially lessen competition in the North American aftermarket for commercial vehicle air springs. The DOJ coordinated with competition authorities from Brazil, Canada, and Mexico during its investigation.
- *Verso/NewPage*: Verso agreed to divest NewPage mills in Maine and Wisconsin to resolve allegations that the \$1.4bn merger would have significantly increased concentration and likely resulted in higher prices in the U.S. and Canada for coated paper products used for labels, magazines, and catalogues.
- *Waste Management/Deffenbaugh*: Waste Management agreed to divest small container commercial waste service routes in Springdale, Arkansas; Van Buren/Fort Smith, Arkansas; and Topeka, Kansas in order to proceed with its \$405m acquisition of Deffenbaugh Disposal.

Five mergers over the past year were abandoned after the DOJ expressed concerns that the transactions raised serious antitrust issues.

- *Flakeboard/SierraPine*: On October 1, 2014, the DOJ announced that Flakeboard America had abandoned its proposed \$107m acquisition of one medium-density fiberboard (MDF) and two particleboard mills from SierraPine after the DOJ expressed concerns about the transaction. According to the DOJ, the proposed acquisition would have given Flakeboard a 58% market share for the thicker and denser grades of MDF that each party sells in California, Oregon, and Washington.
- *Embarcadero/CA Inc.*: On November 5, 2014, the DOJ announced that Embarcadero Technologies had abandoned its proposed acquisition of CA's ERwin data modelling solution after the DOJ expressed concern that the acquisition would eliminate "a vigorous competitor that has competed to provide expanded functionality and more affordable pricing in recent years".
- *National CineMedia/Screenvision*: In November 2014, the DOJ filed a complaint in federal district court to block National CineMedia's (NCM) proposed \$375m acquisition of Screenvision. According to the complaint, NCM and Screenvision are the only two significant advertising networks in the U.S., serving approximately 88% of all movie screens. The complaint alleged that the merger would likely result in anticompetitive effects in the markets for preshow services sold to exhibitors (through reduction of quality of preshow services and lower revenue shares for exhibitors) and cinema advertising sold to advertisers (through increased prices). In March 2015, shortly before trial, the parties abandoned the transaction.
- *Comcast/Time Warner Cable*: On April 24, 2015, the DOJ announced that Comcast decided to abandon its \$45.2bn acquisition of Time Warner. According to Assistant Attorney General (AAG) Baer, the merger "would have created a market where one company provided almost 60% of high speed internet access" and risked making

“Comcast an unavoidable gatekeeper for internet-based services that rely on a broadband connection to reach consumers”.

- *Applied Materials/Tokyo Electron*: On April 27, 2015, the DOJ announced the abandonment of the \$10bn merger between Applied Materials and Tokyo Electron, the two largest providers of non-lithography semiconductor manufacturing equipment. The parties proposed a divestiture package that the DOJ ultimately found to be insufficient to replace “the competition eliminated by the merger, particularly with respect to the development of equipment for next-generation semiconductors”, according to Deputy AAG Hesse.

There are also several major transactions under review with antitrust implications. The DOJ is currently investigating Halliburton’s proposed \$34.6bn acquisition of Baker Hughes as well as AT&T’s proposed \$48.5bn acquisition of DirecTV. Charter Communications’ recently proposed acquisitions of Time Warner Cable and Bright House Communications are also likely to be investigated by the DOJ. However, the Charter acquisitions appear to present less competitive risk than the Comcast/Time Warner combination. Comcast/Time Warner would have consolidated nearly 60% of the high-speed internet market into the hands of one party, while the Charter acquisitions would only give Charter control of less than 30% of the market and make it the second-largest player, behind Comcast. Another complication with the Comcast/Time Warner combination was Comcast’s ownership of a large media and entertainment company NBCUniversal, which could incentivise Comcast to steer content in its favour.

Federal Trade Commission

During fiscal year 2014, the FTC initiated 17 merger enforcement actions: 13 resulted in consent orders requiring divestitures; three transactions were abandoned after the FTC raised concerns during its investigations; and one merger was abandoned after the FTC authorised an administrative complaint and initiated proceedings to obtain a preliminary injunction in federal district court.

The FTC has been even more active in fiscal year 2015. In the first half alone, the Commission has initiated 11 enforcement actions, with several more expected before the end of the fiscal year. In three of these actions, the FTC authorised an administrative complaint and related preliminary injunction to block the mergers, one of which was eventually abandoned.

The FTC agreed to settle the following challenges initiated over the past 12 months in exchange for a divestiture remedy:

- *Eight Pharmaceutical Mergers*: The FTC required product divestitures in seven pharma transactions over the past year. Five involved generic product overlaps: Akorn’s \$324m acquisition of VersaPharma (generic rifampin injection); Sun’s \$4bn acquisition of Ranbaxy (generic minocycline); Impax’s \$700m acquisition of CorePharma (generic pilocarpine and ursodiol); Actavis’ \$25bn acquisition of Forest (generic diltiazem, ursodiol, and propranolol); and Valeant’s \$500m acquisition of Precision Dermatology (generic Retin-A). *Actavis/Forest* and *Valeant/Precision* also involved brand generic competition. Two mergers involved over-the-counter (OTC) product overlaps: Prestige’s \$750m acquisition of Insight (motion sickness) and the GSK/Novartis consumer healthcare joint venture (nicotine replacement therapy transdermal patches). There was one merger involving branded competition: Novartis’s \$16bn acquisition of GSK’s marketed oncology products (BRAF and MEK inhibitors).
- *Three Other Healthcare-related Mergers*: The FTC also required divestitures in three other healthcare-related markets: Eli Lilly’s \$5.4bn acquisition of Novartis Animal

Health (canine heartworm parasiticides); Medtronic's \$42.9bn acquisition of Covidien (drug-coated balloon catheters); and H.I.G.'s acquisition of Symbion (outpatient surgical services to commercial health plans and commercially insured patients).

- *Albertsons/Safeway*: The FTC ordered the largest divestiture ever in a supermarket merger, requiring Albertsons and Safeway to sell over 168 supermarkets in 130 local markets across eight states in order to resolve its concerns that the \$9.2bn merger would likely to be anticompetitive.
- *Par Petroleum/Mid Pac Petroleum*: The FTC alleged that Par Petroleum's acquisition of Mid Pac Petroleum would be likely to substantially lessen competition in the Hawaii-grade gasoline blendstock (HIBOB) market in the state of Hawaii. Par and Chevron own the only two refineries in Hawaii that provide bulk supply of HIBOB. Aloha owns the only terminal in Hawaii that can economically import bulk supply of HIBOB that is not otherwise owned by Par or Chevron. The FTC alleged that acquiring Mid Pac's storage rights to Aloha's terminal would give Par the ability and incentive to reduce the size of an import cargo that Aloha could receive at the terminal. To settle the charges, Par agreed to terminate its storage and throughput rights at Aloha's terminal. Commissioner Wright dissented from the decision, arguing that there was insufficient evidence to support the theory that such an exclusionary strategy would be profitable.
- *Holcim/Lafarge*: To settle the FTC's allegations that Holcim's \$25bn acquisition of Lafarge would have harmed competition in the manufacture and sale of Portland and slag cement in 12 local markets, the parties agreed to divest certain assets in these relevant geographic markets. Commissioner Wright concurred with respect to some of the geographic markets but dissented with respect to others due to lack of sufficient evidence.
- *ZF Friedrichshafen/TRW Automotive Holdings*: The FTC, with Commissioner Wright dissenting, voted to issue a complaint and accept a proposed consent order requiring the divestiture of TRW's North American and European linkage and suspension business for heavy and light vehicles, which includes heavy vehicle tie rods, in order to alleviate concerns that ZF's \$12.4bn acquisition would be likely to harm competition in the North American market for heavy vehicle tie rods.
- *Reynolds America/Lorillard*: Reynolds and Lorillard, the second- and third-largest U.S. cigarette makers, agreed to divest four cigarette brands to Imperial Tobacco Group in order to settle charges that the \$27.4bn merger would be likely to harm competition in the U.S. market for traditional combustible cigarettes.

The Commission has issued an administrative complaint and authorised staff to seek a preliminary injunction in federal district court with respect to three transactions over the past 12 months. In December, Verisk Analytics abandoned its proposed \$650m acquisition of EagleView Technology after the FTC issued an administrative complaint alleging that the proposed acquisition would "result in a virtual monopoly in the U.S. market for rooftop aerial measurement products used by the insurance industry to assess property claims".

The FTC has also sought to block Steris' proposed \$1.9bn acquisition of Synergy Health and Sysco's proposed \$8.2bn acquisition of US foods. Steris and Sysco have each announced that they will contest the FTC's challenge. In *Steris/Synergy Health*, the FTC alleges that the merger would significantly reduce future competition in regional markets for sterilisation of products using radiation. In *Sysco/US Foods*, the FTC charges that the merger is likely to harm competition for national and local customers who rely on broadline foodservice distribution. According to the complaint, Sysco post-merger would control 75% of the national market and hold high shares in numerous local markets.

The FTC is also investigating several significant transactions, including Dollar Tree's proposed \$8.7bn acquisition of Family Dollar and Staples' proposed \$6.3bn acquisition of Office Depot. In 2014, Family Dollar was the subject of a takeover battle between Dollar General and Dollar Tree. Although the largest player, Dollar General, outbid Dollar Tree at \$9.1bn, Family Dollar's shareholders approved the acquisition by Dollar Tree given the greater risk of combining the two largest dollar retail stores than the second and third. According to Dollar Tree's public filings, Dollar Tree has entered into an agreement to divest 330 Family Dollar stores, representing about \$45.5m in operating income, to private equity firm Sycamore Partners in order to address the FTC's concerns with the transaction.

The FTC issued a second-request investigation concerning Staples' proposed acquisition of Office Depot. In 2013, Office Depot acquired Office Max, leaving only two national bricks and mortar office supply stores. Staples' acquisition will bring the number to one. However, Staples and Office Depot face competition from other players outside the traditional market, including Wal-Mart and Amazon.com. But this type of competition is only in the consumer market so the FTC may look closer at competition for the supply of office products to large corporations and government. Nevertheless, Staples has indicated that it expects the merger to close by the end of the calendar year.

Developments in jurisdictional procedure and enforcement of pre-merger notification rules

HSR rules and thresholds

Acquisitions of voting securities, controlling non-corporate interests, or assets in excess of the HSR Act's size-of-transaction threshold and, if applicable, size-of-person threshold require notification to the DOJ and FTC, unless an exemption applies. The HSR Act's jurisdictional thresholds are adjusted annually to reflect changes in gross national product. The current thresholds are set forth in the following table.

HSR Jurisdictional Thresholds (effective as of February 20, 2015)	
Size of Transaction Value	Notification Requires
At or less than \$76.3m	No.
In excess of \$76.3m but not in excess of \$305.1m	Yes, if size of person threshold is met and no exemption applies: <ul style="list-style-type: none"> if the acquiring person has assets or annual net sales of \$152.5m and the acquired person has \$15.3m in (i) total assets or annual net sales from manufacturing, or (ii) total assets if not engaged in manufacturing; or the acquiring person has \$15.3m in total assets or annual net sales and the acquired person has \$152.5m in total assets or annual net sales.
In excess of \$305.1m	Yes, unless an exemption applies.

If a notification is required, the parties may not consummate the transaction until the HSR waiting period has expired or been early terminated. The HSR waiting period is 30 days for most transactions and 15 days for a cash tender offer or bankruptcy sale. Before the end of the initial 30-day waiting period, the agency responsible for reviewing the transaction may issue a request for additional documentary material (Second Request). A Second Request extends the waiting period by 30 days (10 days for a cash tender offer or

bankruptcy sale) after all parties have substantially complied with the Second Request (or, in the case of a cash tender offer, bankruptcy sale, or certain other types of transactions, after the acquiring party complies).

There have been no significant changes to the HSR Rules since 2013 when the FTC promulgated two amendments. First, the agency formalised the withdraw and refile procedure, which is primarily used to give the investigating agency additional time to review a transaction and avoid a costly and lengthy Second Request investigation. Second, the FTC amended the HSR Rules to include in the definition of an asset acquisition the transfer of “all commercially significant rights” to a patent or part of a patent in the pharmaceutical industry. The rule change largely codified the FTC’s informal guidance that certain exclusive licenses to pharmaceutical patents should be treated as an asset. But it also expanded the scope of pharmaceutical licensing transactions that constitute potentially reportable asset acquisitions by concluding that “all commercially significant rights” could be transferred even if the patent holder retains limited manufacturing rights or co-rights.

A few days before the new rule became effective, the Pharmaceutical Research and Manufacturers of America (PhRMA) – an industry group representing biopharmaceutical researchers and biotechnology companies – filed a complaint in federal court arguing that the new rule violated the APA and should be set aside. In denying PhRMA’s motion for summary judgment and granting summary judgment for the FTC, the district court agreed with the agency that it was entitled to deference in its interpretation of the HSR Act’s grant of authority to promulgate industry-specific rules. PhRMA appealed to the U.S. Court of Appeals for the District of Columbia, which affirmed the district court’s decision.

Amendment to FTC’s Rules of Practice

In March 2015, the Commission approved revisions to its Rules of Practice, including a change affecting the procedure of administrative proceedings. The FTC has the authority to challenge mergers in an administrative trial on the merits. But the Commission does not have the authority to enjoin a merger, so it must file for a preliminary injunction in federal court in order to prevent the parties from consummating a transaction after the HSR waiting period has expired. The FTC amendments return to the approach of a 1995 rule that automatically suspends administrative litigation if the parties to the merger request a dismissal after the preliminary injunction has been denied by a federal court. The FTC, however, retains the authority to continue a stayed administrative proceeding, and thus lift the stay, if it determines that doing so would serve the public interest.

HSR enforcement actions

The Antitrust Agencies may seek civil penalties against companies and individuals for violations of the HSR Act’s premerger notification and waiting requirements. The maximum civil penalty for an HSR Act violation is \$16,000 per day for the duration of the violation. During the past year, the Agencies brought two enforcement actions under the HSR Act.

In August 2014, Berkshire Hathaway agreed to pay \$896,000 in civil penalties to settle charges that it violated the HSR Act by changing convertible notes that it owned into voting securities in USG Corporation in excess of the relevant reporting threshold. Under the HSR Act, the conversion of convertible notes, options, warrants, and other securities with no present right into voting securities is reportable if the reporting thresholds are met and no exemption applies. Six months prior to converting the convertible notes, Berkshire Hathaway made a corrective filing in connection with an acquisition of Symetra

voting securities by exercising warrants. While the Agencies generally do not take action against inadvertent, first-time violations, they will seek civil penalties when the same party makes a subsequent violation, particularly after making promises of instituting an effective program to monitor compliance with the HSR Act.

In November 2014, the DOJ announced a settlement with Flakeboard America and SierraPine to resolve allegations of illegal premerger coordination. The DOJ alleged that the parties' conduct prior to the expiration of the HSR waiting period – i.e., working together to shut down one of SierraPine's mills and move its customers to Flakeboard – constituted a premature transfer of “beneficial ownership” in violation of HSR rules and a *per se* unlawful agreement between competitors in violation of Section 1 of the Sherman Act. As discussed earlier in this chapter, the parties never consummated the transaction due to antitrust concerns, but SierraPine's mill was nevertheless shut down pursuant to the terms of the acquisition agreement. The settlement required each party to pay \$1.9m in civil penalties, and Flakeboard was required to disgorge \$1.15m in profits. This was the first gun-jumping enforcement action in five years.

Key industry sectors reviewed

The U.S. Antitrust Agencies investigate and pursue enforcement actions against mergers in all areas of the economy. The DOJ and FTC have generally divided responsibility over mergers by industry based on prior agency experience, although there are instances where both Agencies will claim responsibility over the same merger. Such procedural “clearance battles” during the initial waiting period can delay the substantive investigation of a transaction.

During the past year, the DOJ has investigated mergers involving construction materials, flight support services, forestry products, commercial vehicle parts, media and communications, waste services, oilfield services and equipment, software, and semiconductor manufacturing equipment. Five of the DOJ's challenges over the past year involved the media and communications sector, including three broadcast television spot advertising mergers, one cinema advertising merger, and one cable and internet provider merger.

Over half of the FTC's merger challenges during the past year involved healthcare products and services, including eight pharmaceutical mergers, one animal health products merger, one medical device merger, and one outpatient services merger. The FTC also investigated or challenged mergers involving supermarkets, food distribution, retail discount stores, office supplies, automobile parts, cigarettes, cement, gasoline, measurement services, and real estate web portals, among others.

Key economic appraisal techniques applied

Quantifiable economic evidence tends to be the most persuasive in determining the competitive effects of a merger. However, sometimes data on prices or output is not available or even reasonably quantifiable. This is often an issue in cases involving innovation or potential competition. Deputy AAG Gelfand noted earlier this year that the DOJ will not “fold its tent merely because it might be difficult to quantify a price or output effect with precision and certainty”. The Agencies analyse all sources of evidence to determine whether a transaction is likely to substantially harm competition, including “industry structure, history of competition, history of innovation, testimony from knowledgeable witnesses, company documents, and the like”.

The FTC's investigation of Zillow's acquisition of Trulia and the DOJ's challenge to National CineMedia's attempted acquisition of Screenvision are two recent examples of the varying degree of importance given to quantifiable and non-quantifiable evidence. In Zillow/Trulia, the documentary evidence tended to show that "Zillow and Trulia compete closely with one another for consumer traffic and for real estate agent advertising dollars," which would favour a narrow market definition. However, other evidence suggested that real estate agents used numerous methods to attract customers in addition to Zillow and Trulia. There was also insufficient economic evidence that real estate agents would in fact produce higher prices or that the combined company would have a reduced incentive to innovate. Accordingly, the FTC closed the investigation.

The DOJ's complaint in National CineMedia/Screenvision relied heavily on internal documents to support a relevant product market definition of preshow services sold to exhibitors and cinema advertising sold to advertisers. In each relevant market, the merger would result in a near-monopoly. The merging parties contested the DOJ's alleged relevant market, "arguing that cinema ads compete in a broader market that includes television and online video ads". Under the merging parties market definition, each company's market shares would have been relatively small.

The different weight given to documents in Zillow/Trulia and National CineMedia/Screenvision provides some uncertainty as to the outcome of a merger investigation where the parties have documents otherwise suggesting close competition. The difference, however, between the two mergers is that Zillow and Trulia appeared to have other evidence tending to suggest a broader market definition while National CineMedia and Screenvision did not.

Approach to remedies

In January 2015, the FTC announced plans to conduct a study to update and expand upon the divestiture study it issued in 1999 to assess the effectiveness of remedies imposed by the FTC in prior mergers. As a result of the 1999 study, the Commission implemented several changes to its divestiture process, including shortening the divestiture period, requiring up-front buyers in cases where the divestiture comprised less than an on-going business, and more frequently requiring monitors, particularly in technology and pharmaceutical mergers.

The FTC proposes to study all 92 orders issued from 2006 through 2012. For 53 of the orders, its staff plan to interview buyers of the divested assets (if a divestiture was ordered), significant competitors in each market, including the merged company, and customers. For the 15 orders involving supermarkets, drug stores, funeral homes, hospitals, and other clinics, the FTC plans to send questionnaires to the buyer of the divested assets that focus on specific issues that have arisen in those industries. For the 24 orders involving pharmaceutical mergers, the FTC plans to synthesize the information it has from compliance reports, monitors, and publicly available information.

During a speech in February 2015, AAG Baer – who was Director of the FTC's Bureau of Competition while the 1999 study was prepared and issued – applauded the FTC's proposal to assess the effectiveness of its prior remedies. The AAG stressed that "[s]ound antitrust enforcement requires careful attention to remedies", and the importance of each agency learning from its prior experiences when crafting future remedies. Baer also touted the DOJ's efforts in obtaining meaningful remedies, noting that the structural remedy required in the Anheuser-Busch InBev/Grupo Modelo merger has resulted in new product offerings, and the divested slots in the American/US Airways merger is showing promising results in traffic growth and increased competition.

Baer also noted that structural relief can help to restore competition “even when the eggs have been scrambled”, citing the negotiated remedy following the DOJ’s successful litigation of Bazaarvoice’s consummated acquisition of PowerReviews. The remedy required Bazaarvoice to “restore the *status quo ante*” by selling some of its assets related to PowerReviews, and “give up more than it had originally acquired, through other contractual provisions designed to compensate for the deterioration of PowerReviews’ competitive position”.

The proposed FTC study and Baer statements indicate an increased willingness by each Agency to consider additional and potentially more stringent remedy requirements. For example, in recent years, the Agencies have expanded the use of conduct remedies to support a structural divestiture. Supply, transitional services, and technology licensing agreements are common to support divestitures in the pharmaceutical industry, but they are also becoming more common to resolve competition concerns in mergers involving other industries.

* * *

Endnotes

1. Hart-Scott-Rodino Annual Reports for fiscal years ended 2013, 2012, 2011, 2010, 2009, 2008, 2007, 2006, and 2005, *available at* www.ftc.gov/bc/anncompreports.shtml; FTC Competition Enforcement Database, *available at* <https://www.ftc.gov/competition-enforcement-database>; Commissioner Ramirez, Prepared Statement on “Oversight of the Enforcement of the Antitrust Laws,” May 15, 2015, *available at* https://www.ftc.gov/system/files/documents/public_statements/642691/150515antitrustoversight.pdf; DOJ Antitrust Division Civil Program Update, Spring 2015, *available at* <http://www.justice.gov/atr/division-update/2015/civil-program-update>.
2. The US government fiscal year runs from October 1 to September 30 of the following calendar year.
3. Percentages are based on adjusted transactions because they exclude transactions that are not subject to the merger review procedures of the HSR Act.
4. The percentage of challenged transactions may be overstated or understated in certain years because not all challenged mergers required notification to the Antitrust Agencies and some challenges were recorded in a fiscal year subsequent to notification.

Acknowledgment

The authors acknowledge the assistance of Ryan Maddock in preparing this chapter.

**Christopher A. Williams****Tel: +1 202 973 8895 / Email: cwilliams@wsgr.com****URL: <https://www.wsgr.com/WSGR/DBIndex.aspx?SectionName=attorneys/BIOS/12330.htm>**

Chris Williams is an associate in the Washington, D.C. office of Wilson Sonsini Goodrich & Rosati, where he is a member of the firm's antitrust and national security practices. His antitrust experience includes merger notification and clearance, civil and criminal litigation, government investigations, and business counselling. He has represented clients in a wide range of industries, including information technology, electronics and computer hardware, semiconductors, telecommunications, healthcare, life sciences, pharmaceuticals, and energy and utilities.

**Paul S. Jin****Tel: +1 202 973 8858 / Email: pjin@wsgr.com****URL: <https://www.wsgr.com/WSGR/DBIndex.aspx?SectionName=attorneys/BIOS/8860.htm>**

Paul Jin is a partner in the firm's antitrust practice. He advises clients on all antitrust aspects of merger matters, including negotiating terms of merger agreements, determining the applicability of merger clearance filing requirements in both U.S. and foreign jurisdictions, and advocating on behalf of clients before the Federal Trade Commission and the Department of Justice in connection with informal merger inquiries, Second Requests, third-party subpoenas, and conduct investigations. He has assisted with hundreds of Hart-Scott-Rodino notification forms for mergers, minority and asset acquisitions, and corrective filings, and is considered a leading HSR practitioner. Paul's practice also includes antitrust counselling on issues such as diligence and pre-closing conduct procedures, internal compliance programs, and collaboration guidelines.

Wilson Sonsini Goodrich & Rosati PC

1700 K Street, N.W., Fifth Floor, Washington, D.C. 20006-3817, USA
Tel: +1 202 973 8800 / Fax: +1 202 973 8899 / URL: <http://www.wsgr.com/>

Other titles in the *Global Legal Insights* series include:

- Banking Regulation
- Bribery & Corruption
- Cartels
- Corporate Real Estate
- Corporate Tax
- Employment & Labour Law
- Energy
- International Arbitration
- Litigation & Dispute Resolution
- Mergers & Acquisitions

Strategic partners:



www.globallegalinsights.com