ABA SECTION OF ANTITRUST LAW

The Threshold

Newsletter of the Mergers & Acquisitions Committee

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CONTENTS

FROM THE CO-CHAIRS

First, best wishes for the Holidays and the New Year from the committee. For our last issue of The Threshold for 2015, we have some tasty morsels. We begin with a timely Q&A with the Premerger Notification Office of the FTC. We all may think that we know a good deal about the PNO, but this piece is enlightening. Next, we move to an interview with Jamillia Ferris of Wilson Sonsini who until recently served in the Office of the General Counsel of the Federal Communications Commission. Jamillia sheds important light on the FCC's role in mergers and its consideration of competition issues. Following that, there is a very interesting summary of the Fall Forum panel on mergers that included three federal judges who have recently tried merger cases. They provide some fascinating insights. We then move to a detailed discussion of the FTC's challenge to the combination of two hospitals in West Virginia despite clearance of the deal by the West Virginia Attorney General. Finally, we conclude the issue with our International Roundup.

Again, best wishes from all at the M&A Committee. We hope that we can count on your support and help in the coming year. Thanks to all of you.

Norman A. Armstrong, Jr.
Ronan P. Harty
Committee Co-Chairs

A Discussion with the FTC's Premerger Notification Office

1. Could you tell us a bit about the PNO Staff?

The PNO staff is comprised of two Program Support Specialists (Theresa and Lanea), seven Attorneys (Bob, Diana, Evan, Karen, Kate, Nora, and Susan) and one Compliance Specialist (Janice). Managing the shop are Assistant Director Bob Jones and Deputy Assistant Director Kate Walsh. Because we're such a small group, most everyone in the office has specific policy areas they oversee. For instance, Karen Berg handles everything related to federal/state relations and Janice Johnson is the point person for HSR Act violations. Beyond that, we are a highly collaborative team that works together to process filings, apply the HSR rules and procedures, and answer HSR-related questions. Our contact information is available on the Premerger Office's website.[1]

2. The PNO often represents what is good about interacting with a government agency – particularly through the informal interpretation process. Does the PNO expect any significant changes to this model? What would the PNO like to change about the process?

We do not expect any significant changes to the informal interpretation process; we think it's worked pretty well for quite a long time! To keep the informal interpretation process up to date and valuable, we have discovered over the years that the best way to contact us, and, incidentally, the way to get your question answered the most quickly, is to send an email. Even better is to send an email to multiple PNO staff members, just in case some are out of the office. It doesn't matter who you contact because we all coordinate regularly to ensure you get the same answer no matter who you email.

[1] https://www.ftc.gov/enforcement/premerger-notification-program/contact-information

3. What can the private Bar do to improve their interactions with the PNO?

First of all, be familiar with the Premerger Office's website,[2] which includes up to the minute alerts about new guidance, policy changes or reminders, and a ton of information on the rules and procedures. Also, follow our blog[3] and the informal interpretations[4] for more in-depth coverage of specific issues. Check these sites often

As far as the filing process, what we hope for more than anything is an HSR form that is complete on its face and anticipates the questions we might have. Remember, we don't know anything about your transaction; everything you can do to help us understand the deal and give us clear, complete information helps us to process your filing faster and more accurately. For example, a long description in Item 3(a) that is either full of corporate-speak or references the agreement does us very little good; give us the press release version of what's going on. At the very least, your description should give us real detail as to what specific asset(s) and/or business(es) are being acquired. Ideally, your Item 3(a) description of the transaction should be no longer than a paragraph or two.

In addition, if an exemption could apply, but doesn't – tell us that. For instance, if you've filed for an acquisition of less than 10% of the voting securities, tell us why §802.9 doesn't apply. If your filing contains foreign assets or a foreign issuer, tell us why a foreign exemption doesn't apply. We also appreciate knowing when part of your transaction is exempt (and why), whether your filing relates to another that's been made, and/or whether you've spoken to someone at the PNO about your facts. Giving us this information up-front in Item 3(a) helps us avoid delaying our review because we need to have follow-up conversations with you (however enjoyable).

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2 https://www.ftc.gov/enforcement/premerger-notification-program

3 https://www.ftc.gov/news-events/blogs/terms/368

4 https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations

With this guidance in mind, here are some additional tips for providing us with a form that will not trigger questions:

In general, there is a difference between a response of N/A and None – you might be surprised how often this comes up. N/A means the item does not apply to your transaction, while None means that the item does apply, but there is no information to report. Item 8 illustrates the difference. If you're filing as the acquiring person and you have overlapping NAICS codes with the acquired person in Item 5, and you have completed Item 7, but there are no prior acquisitions to report in Item 8 – the proper response in Item 8 is None. If, however, you're filing as the acquired person, the proper response to Item 8 is always N/A because this item only applies to the acquiring person.

Items 4(c) and 4(d). We've published a blog post[5] and other guidance on the ins and outs of 4(c) and 4(d) – be sure to consult this guidance when responding to these items so that you provide a complete response. This guidance also lays out the required specifics of a privilege log – remember that your privilege log must cover redacted documents as well as those that are completely withheld, and it must be as robust as what you would submit to a court.

Item 5. All financial information should be expressed in millions of dollars rounded to the nearest one-tenth of a million dollars, which means that dollar revenues in Item 5 should always be expressed in ($MM). All manufacturing codes should be provided at the 10-digit NAICS level while Item 7 requires information at the 6-digit level. Be sure to list Item 5 revenues in ascending NAICS code order - this helps us deal with voluminous Item 5 responses.

[5] https://www.ftc.gov/news-events/blogs/competition-matters/2015/01/how-avoid-common-hsr-filing-mistakes-item-4c-4d

Item 6. There is often confusion about which entities to list in what part of Item 6. Entities in which the filing person owns more than 5% but less than 50% are listed in Item 6(b). Entities controlled by the filing person are listed only in Item 6(a).

Item 7. Item 7(b)(i) is for use in the fund context and is meant to clarify which entity within the fund is the source of the overlap(s). When there is only overlap between an associate and the target, the acquiring person must respond on behalf of the associate in Item 7(d), but the acquired person is not required to provide any geographic information in response to Item 7. Please be sure to double check whether overlapping NAICS codes in your transaction trigger the reporting requirements of Item 7(c)(iv) – if so, your response must be provided alphabetically by state, county, and town with addresses.

Item 8. We often get questions about which prior acquisitions to list in Item 8. You should list all prior acquisitions that meet the criteria of Item 8, and this includes exempt acquisitions. You should also list the acquisition of foreign entities that had sales in the U.S. (sales that would have been reported in Item 5).

4. Are there any recent changes to existing PNO interpretations that you would like to alert practitioners about?

We've recently clarified the meaning of investment rental property[6] under §802.5 and what comprises a warehouse under §802.2(h). See our website,[7] including our blog[8] and informal interpretations,[9] for more information.

5. What is the latest thinking on providing some sort of exemption for executives who acquire shares in their own company?

We have no current plans in this area.

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[6] https://www.ftc.gov/news-events/blogs/competition-matters/2015/07/hsr-rule-8025-investment-rental-property-exemption

[7] https://www.ftc.gov/enforcement/premerger-notification-program

[8] https://www.ftc.gov/news-events/blogs/terms/368

[9] https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations

6. What is the most common mistake that practitioners make?

The most common mistake is not following the form instructions and the numerous tip sheets we've provided over the years. Problems with the form will always result in delays in the processing of your filing and could result in a bounce.

You should always do a thorough quality-control check of the final version of the filing before you submit it. A careful review of the form will, in the vast majority of cases, identify obvious mistakes that we otherwise have to ask you to fix.

In the final assembly of the filing and its attachments, make sure you've followed our guidance on what constitutes attachments versus what should be included in the body of the form. Also, be sure to staple or clip every document, and label each document properly.

Finally, make sure you submit an affidavit that attests to the good faith of the UPE based on an executed agreement. You need to use the words "good faith" and "execute" as specified in the rules and in guidance we've provided on our website.

An Interview with Jamillia Ferris*

1. Generally speaking, how does the FCC review communications mergers?

Pursuant to the Communications Act, the Federal Communications Commission (FCC), in the first instance, assigns telecommunications' "licenses and authorizations" (e.g., licenses for wireless, radio or television services and satellite authorizations). Once granted, and before those licenses can be transferred, companies need FCC approval.

FCC approval is subject to a public interest standard under which the Commission determines whether a proposed transfer would serve the "the public interest, convenience, and necessity." To obtain FCC approval, companies file an application with the Commission in which they identify the licenses to be transferred, describe the expected public interest benefits and potential harms (or explain why there are no harms), and offer any remedies and commitments to address harms or confirm benefits.

Generally, there are two aspects to the FCC's analysis. First, the FCC considers whether the proposed transaction would violate any statute or rule. For example, the Commission determines whether the companies are technically qualified to hold the license under the Communications Act—that is, do they have the requisite citizenship, character, financial, and technical qualifications to hold the licenses. While these are important issues to be resolved, the major FCC reviews that the antitrust bar is familiar with generally hinge on the second part of the analysis in which the FCC balances potential public interest harms and benefits and considers any conditions.

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* Jamillia Ferris is a partner in the Washington, D.C. office of Wilson Sonsini Goodrich & Rosati, where she is a member of the antitrust practice. Prior to joining the firm, Jamillia served in the Office of General Counsel at the Federal Communications Commission. At the FCC, she led the review of AT&T's proposed $49 billion acquisition of DIRECTV and served on the steering committee overseeing the FCC's review of Comcast's proposed $45 billion acquisition of Time Warner Cable

At the end of the day, the FCC can approve an application with or without conditions or, if the Commission cannot find that the transaction is in the public interest or if the public record presents a substantial and material question of fact, it designates the transaction for an administrative proceeding.

2. The FCC utilizes a "public interest" standard in its analysis. How does this compare to the Clayton Act Section 7 standard used by the FTC and Antitrust Division?

The public interest standard, like the Clayton Act, includes an analysis of a transaction's effect on competition. That analysis is grounded on the same competition principles that are used by the antitrust agencies, including, for example, the *2010 Horizontal Merger Guidelines*.

But the public interest standard is broader that the Clayton Act. While the antitrust agencies consider whether a transaction will substantially lessen competition, the FCC analyzes whether a transaction will *enhance* competition. This may result in a more expansive view of a transaction's effect on potential and future competition. The Commission also weighs more than strictly economic factors. For example, the FCC considers a transaction's effect on diversity of views, localism, deployment of advanced telecommunications services, the management of spectrum—issues that while broader than a Clayton Act review, fall within the scope of the Communications Act.

The public interest standard is not boundless and the balancing is focused on transaction-specific harms and benefits that are fact and economic-based.

3. In terms of process, how does the FCC's review compare to that of the federal antitrust agencies (FTC and DOJ's Antitrust Division)?

In some respects it is quite similar—the FCC attorneys, economists, and engineers engage in a rigorous review of facts and economic evidence to determine whether a transaction will advance the public interest. The FCC issues information requests for documents and data to the parties of a transaction—not unlike a Second Request, but again broader in scope to reflect the broader public interest standard. The FCC also hears from third parties.

A big distinction is the public nature of the FCC's review and record. In major transactions such as NBCU/Comcast, Comcast/Time Warner, and AT&T/DIRECTV, the public record can be substantial. It will include the applicants' responses to the FCC's information requests, third-party petitions to deny or comments, and descriptions of *ex parte* meetings held with Commission staff or leadership. The materials are subject to a protective order, but as a general matter, unlike at the antitrust agencies, the public can get a fulsome sense of the issues being raised at the FCC and know who is raising them. Indeed, antitrust lawyers who want to better understand the nature of the FCC merger review proceedings can follow a transaction from beginning to end on the FCC website.

Also, because the FCC has to issue a public order that responds to all of the arguments raised during the course of its merger review—even an order approving a transaction can be very informative. For example, in AT&T/DIRECTV the companies submitted a merger simulation that was integral to the FCC's conclusions. The merger simulation and the FCC's analysis are extensively explained in the FCC Order and Technical Appendix published on the FCC website. Given the nature of the antitrust agencies' process, that type of detail is not typically to available to outside parties in an antitrust agency's merger review.

4. How do the reviewing agencies coordinate?

The agencies coordinate at all levels. With waivers from the relevant parties, staff attorneys and economists from both agencies closely collaborate and share relevant expertise throughout the investigatory stage of a merger investigation. The efficiencies that result benefit parties and the agencies. And, the agencies' leadership have made clear that they value this coordination.

5. Do you have any advice for practitioners appearing before the FCC?

Practitioners should support their advocacy efforts with factual and economic support for their arguments. Obviously, the public nature of the FCC's review introduces a different dynamic, but arguments carry the most weight when they are backed by substantive analysis. This is true for applicants seeking a license transfer and third parties commenting on a transaction. For example, parties to a transaction should be prepared to provide a measurable basis for any claimed benefits if they want the Commission to factor them into their balancing of the public interest harms and benefits. This is particularly important where a transaction presents the risk of significant public interest harm. They also should expect a close examination of any public-interest commitments. Third parties filing petitions to deny also need to provide factual or economic support for their arguments.

Views From the Bench on Merger Cases: Summary of ABA Antitrust Fall Forum Panel Discussion

Arjun Chandran

On November 12, 2015, the ABA Section of Antitrust Law hosted its annual Fall Forum at the National Press Club in Washington, D.C. The first panel of the day, moderated by Karen Silverman, managing partner of Latham & Watkins' San Francisco Office, and Gary Zanfagna, Chief Antitrust Counsel for Honeywell International Inc., invited three federal judges to provide their perspectives on merger enforcement cases. The panelists included John Bates, U.S. District Court for the District of Columbia, Amit Mehta, U.S. District Court for the District of Columbia, and B. Lynn Winmill, U.S. District Court for the District of Idaho.

Each of these judges has presided over a noteworthy merger challenge – Arch Coal/Triton Coal (Judge Bates), Sysco/US Foods (Judge Mehta), and St Luke's/Saltzer Medical Group (Judge Winmill). The three judges provided insight into their experiences adjudicating these cases, and offered advice for practitioners handling merger enforcement cases in federal court. In particular, the judges stressed the importance of managing the volume and length of submissions, using expert testimony wisely, and orienting your arguments to a non-expert audience.

Judge Bates

In 2004, in *FTC v. Arch Coal, Inc.*,[1] the FTC sought a preliminary injunction to prevent Arch Coal's acquisition of the Triton Coal Company, on the grounds that it would increase market concentration and tend to create a monopoly in the market for coal mined from Wyoming's Southern Powder River Basin (SPRB), where one third of American-mined coal is produced. Judge Bates denied the request for a preliminary injunction, concluding that the FTC had not

[1] 329 F. Supp. 2d 109 (D.D.C. 2004).

met its burden under Section 7 of the Clayton Act and Section 13(b) of the FTC Act that the transaction would substantially lessen competition.

In his panel discussion, Judge Bates shed light on some of the factors that were important to him in reaching his decision to deny the FTC's request for injunctive relief. First, as an overarching matter, he emphasized to the audience that coal is a highly regional product, so the market is very specific. However, he did not find convincing the testimony by the FTC's expert that the product market was more narrow than SPRB coal.

The first factor that Judge Bates pointed to as important in his decision was the fact that there was no post-merger reduction in the number of competitors in this case. There were five significant producers of SPRB coal, and that number would remain unchanged after the merger, since another producer, Kiewit, would enter the market by taking over one of Triton's mines.

Judge Bates conceded that the market was concentrated, but characterized the post-merger HHI increase of 49-224 as "modest". It should be noted however, that in the opinion, Judge Bates did note that the HHI increase suggested that "at a minimum the proposed transactions raise significant competitive concerns."[2] That Judge Bates did not reiterate this point during the panel discussion may indicate that he did not believe that an HHI increase of 49 in "the single best available measure of market concentration – reserves" was particularly problematic, and that he did not consider Loadout Capacity (with an HHI increase of 224) a particularly good barometer of market concentration. Indeed the FTC argued in *Arch Coal* that loadout capacity was the best measure of future competitiveness and thus market concentration. However, Judge Bates did not find this argument availing – especially because the defense introduced evidence that the FTC had

[2] *Id.*at 129.

previously argued for the importance of reserves as the proper measure of determining concentration levels in the coal industry.[3]

Second, Judge Bates pointed to the FTC's novel theory of likely future tacit coordination on price as unconvincing. In *Arch Coal*, the FTC argued that "the mechanism of tacit coordination . . . is a form of output restriction in which the major coal producers in the SPRB market would constrain their production so that increases in supply would lag behind increases in demand, thereby creating an upward pressure on price."[4] Though he did not delve into the reasons in great detail in his panel discussion, Judge Bates did not seem to be persuaded that this non-price theory of coordinated effects was compelling. In his opinion, he examined the "structure and dynamics of the SPRB market" and concluded that it was "not conducive to an increased likelihood of tacit coordination as a result of the proposed transaction."[5]

In evaluating the case as a whole, Judge Bates explained that the most important factors to him were expert testimony and industry documents. On the other hand, he felt that "subjective customer evidence was very weak."

Judge Mehta

Very shortly into Judge Mehta's tenure as a Federal Judge, he presided over *FTC v. Sysco Corp.*.[6] That case involved an FTC suit to enjoin an $8.2 billion merger between the two largest broadline food distributors in the United States – Sysco and U.S. Foods (USF). Broadline distributors – in contrast to specialist, systems, or "cash and carry" food sellers – provide a wide range of foods and food service products directly to customers at their place of business. The FTC alleged that a combination of the two largest broadline foodservice

[3] *Id.* at 126.

[4] *Id.* at 131.

[5] *Id.* at 146.

[6] No. 1:15-cv-00256, 2015 WL 3958568 (D.D.C., Jun. 23, 2015).

distributors would substantially increase industry concentration and impact consumers across the country. Judge Mehta concurred with the FTC, granting their request for a preliminary injunction.

The factor that Judge Mehta seemed to emphasize the most in his panel discussion was his determination that there was a distinct product market for foodservice distribution sold to national customers. Indeed, as he noted in his opinion, "market definition has been the parties' primary battlefield in this case."[7] Sysco and U.S. Foods argued that (1) the relevant product market was the entire foodservice distribution industry, including broadline distributors, systems distributors, specialty distributors, and cash-and-carry stores, and (2) that there was no product market for "national customers". After a thorough examination of expert testimony and industry documents, Judge Mehta concluded that there was in fact a distinct market for broadline foodservice distribution to national customers. At the panel discussion, Judge Mehta remarked that of particular importance to him was a plaintiff's exhibit showing that a McKinsey & Co. report prepared for defendants referred to the existence of national customers. He noted that where a defendant's own internal documents corroborate the agency's market definition, then a defendant's attempt to define the market more broadly will likely not be availing.

In addition, Judge Mehta stressed to the audience the importance of the fact that in this case, the "divestitures proposed by the defendants were insufficient." Divesting 11 USF distribution centers to PFG would not have replaced the competitive intensity present in the market as the result of USF's direct competition with Sysco. Under the divestiture plan, PFG would have only had half the broadline sales that USF enjoyed pre-merger. Accordingly, Judge Mehta concluded that consumers would be "better off in a marketplace that has two strong competitors capable of nationwide broadline distribution than in a marketplace in which there is a single undisputed heavyweight of broadline

[7] *Id.* at *10.

distribution whose only competitive constraints is a transitioning . . . collection of regional players."[8]

Judge Winmill

In *Saint Alphonsus Medical Center – Nampa, Inc. v. St. Luke's Health System, Ltd.*,[9] Judge Winmill ordered St. Luke's to unwind its acquisition of Saltzer Medical Group. The FTC and a group of health care providers petitioned the court to unwind the transaction that left St. Luke's the dominant player in the Adult primary care market in Nampa, Idaho.

The case presented, as Judge Winmill explained at the Fall Forum, "very clear anticompetitive effects." In particular, he emphasized that the most merger HHI exceeded 6,200, and the net increase exceeded 1,600 – which as he described in the opinion – "are well above the thresholds for a presumptively anticompetitive merger (more than double and seven times their respective thresholds, respectively).[10]

Judge Winmill also noted that an important consideration was that patients were not willing to travel very far for primary care services – thus, the geographic market was necessarily limited, and so there was very little possibility that St. Luke's dominant market position would not have led to anticompetitive effects.

5 Lessons for Practitioners

During the question and answer session, the three judges shared some suggestions for practitioners litigating merger cases in federal court.

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[8] *Id.* at *55.

[9] 2014 WL 407446 (D. Idaho, Jan. 24, 2014).

[10] *Id.* at *8.

1. Avoid Unnecessarily Voluminous Evidence

All three judges stressed the difficulty of navigating voluminous evidence in complex merger cases. Of course, it is not possible to litigate merger cases without generating thousands of pages of documents in evidence and expert testimony, but to the extent possible, the judges urged lawyers to be mindful about the volume of evidence and length of party submissions. Judge Mehta in particular questioned the efficacy of party filings in excess of several hundred pages. Where it is not possible to limit the amount of paperwork that judges and clerks must sift through, one thing lawyers can do to ease the burden is to hyperlink all of the cross-references they make within the record or the docket.

2. Present Experts Wisely

In addition to the overwhelming volume of expert testimony, the judges also cautioned attorneys that judges may be more likely to find the expert convincing who *seems* persuasive or credible upon examination, not necessarily the one with the most impressive résumé. Attorneys should select and prepare expert witnesses with this consideration in mind.

3. Know Your Audience

The refrain echoed by all three judges was that "judges are not experts in antitrust law." Counsel should be aware of this fact and make an effort to present evidence and arguments in a manner such that an intelligent but non-expert fact-finder can evaluate them. The takeaway from this is *not* to shy away from complex economic theory. All three judges shared the impression that practitioners should not be reticent to present novel or complex economic theory. Rather, when they do forward such theories, they should be mindful of their audience, and provide such materials as are necessary to digest the information in a reasonably short amount of time.

4. Merger Guidelines Inform Judges' Decisions

Although all three judges reassured the audience that the DOJ and FTC were not accorded additional deference in merger enforcement cases on account of representing the United States, they did maintain that the Merger Guidelines were highly persuasive. Judge Mehta noted the peculiarity of using guidelines prepared by a party before the court in litigation, but nonetheless echoed the sentiments of the other two judges that the Merger Guidelines are one of the primary mechanisms judges will use in figuring out how to evaluate a proposed transaction. Practitioners may thus wish to frame their arguments relating to the competitive effects of a proposed transaction in a manner that tracks the language of the Merger Guidelines.

5. Efficiency Arguments Are Rarely Going to Prevail

A final piece of advice offered by the panel of judges was that they were unaware of any instance in which an efficiency argument had successively rebutted anticompetitive harm. Judge Mehta remarked that knowing this fact informed the high standard he held defendants' efficiency arguments to (he ultimately rejected them as insufficient). The three judges thus advised the audience that barring extreme circumstances, they did not anticipate synergies or other efficiencies to stand in the way of the government winning an injunction where there has been a showing of substantial anticompetitive harm.

FTC Challenges Proposed Combination of Two West Virginia Hospitals Despite Clearance from State of West Virginia Attorney General

Norman Armstrong Jr., Jeffrey S. Spigel, and John D. Carroll[*]

On November 6, 2015, the Federal Trade Commission ("FTC") announced it would seek to block Cabell Huntington Hospital ("Cabell")'s proposed acquisition of St. Mary's Medical Center ("St. Mary's") (the "Proposed Acquisition"), even though the Proposed Acquisition had been cleared by the West Virginia Attorney General pursuant to a settlement agreement that contained a number of "conduct" remedies that included certain price controls on the merging parties.[1] The FTC's challenge was unanimously supported by a bipartisan Commission.

The FTC's administrative complaint alleges that the Proposed Acquisition would create a "near monopoly" over general acute care inpatient hospital services and outpatient surgical services in the adjacent counties of Cabell, Wayne, and Lincoln, West Virginia, and Lawrence County, Ohio and likely would result in higher prices.[2] The FTC also alleged that patients in these areas would suffer from lower quality of care as a result of the Proposed Acquisition. At bottom, the FTC's decision to challenge the Proposed Acquisition emphasizes the FTC's historical skepticism of conduct remedies and a new willingness to challenge hospital mergers even if it has the support of state regulatory officials.

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[*] The authors are in the antitrust practice group of King & Spalding LLP's Washington, D.C. office. Jeff Spigel is a partner and leads the firm's global antitrust group; Norm Armstrong is a partner who recently joined the firm, having served as Deputy Director of the FTC's Bureau of Competition; and John Carroll is a counsel at the firm and former FTC staff lawyer.

[1] The settlement is *available at:* http://www.ago.wv.gov/Documents/CHH,%20SMMC%20Antitrust%20Agreement.PDF.

[2] FTC's Administrative Complaint Pursuant to Section 5(b) of the Federal Trade Commission Act at p. 2, *In the Matter of Cabell Huntington Hospital/St. Mary's Medical Center*, FTC File No. 1410128, ("Cabell Compl."), https://www.ftc.gov/system/files/documents/cases/151106cabellpart3cmpt.pdf.

Background

Cabell, a 303 bed, not-for-profit hospital, and St. Mary's, a 393 bed Catholic hospital, are located three miles apart from each other in Huntington, West Virginia. Cabell also owns and operates a children's hospital, outpatient surgery center, cancer center, and manages a community hospital 50 miles northeast of Huntington. St. Mary's also has ownership interests in a number of other facilities, including an emergency room, outpatient laboratory, and imaging center.

As described in the FTC's complaint, St. Mary's parent, Pallottine Health Services ("Pallottine"), began exploring selling St. Mary's in the spring of 2013 via a Request for Proposal ("RFP") process. In June 2014, Pallottine initiated discussions with Cabell, and the parties executed a definitive agreement on November 7, 2014, pursuant to which Cabell would effectively acquire St. Mary's. According to a press release issued by the parties, the parties filed their Hart-Scott-Rodino premerger notification forms in December 2014.[3] Since that time, the parties have indicated that they have been providing the FTC with information to support the transaction, including producing hundreds of thousands of documents and voluminous amounts of data.

The FTC's Challenge

According to the FTC's administrative complaint, after the Proposed Acquisition is consummated, Cabell would own the only general acute care hospital within the Huntington Area. Cabell would also hold a "dominant share" of the market for (1) general acute care inpatient hospital services and (2) outpatient surgical services. The only other hospital that serves more than a "negligible percentage" of area residents is King's Daughters in Ashland,

[3] Cabell, News Release, "FTC Challenges Plans to Acquire St. Mary's Medical Center" (Nov. 6, 2015), http://cabellhuntington.org/news/wns/ftc-challenges-plans-to-acquire-st-mary-s-medicalcenter.

Kentucky.[4] The FTC alleges that other hospitals are farther away and have a "minimal presence."[5]

The FTC's complaint also alleges that Cabell and St. Mary's are each other's closest competitor for commercial health plans and patients. Such competition includes not just price competition in the form of reimbursement rates, but also competition to improve quality and attract patients. Specifically, the FTC's complaint states that the parties "competed vigorously on non-price dimensions, working to improve performance on quality measures, expand service lines, invest in new technology, and otherwise improve hospital quality to attract patients from one another."[6]

The FTC also pointed to a number of instances where the parties attempted to reduce their head-to-head competition through various collusive conduct, including allocating services lines and even "tacit and explicit coordination in the form of joint contracting" and "secret territorial agreements."[7] Interestingly, the FTC is not alleging that the parties violate Section 1 of the Sherman Act, despite these factual allegations, and it is unclear from the complaint how these alleged actions show that the parties are close competitors.

The West Virginia Settlement

On July 31, 2015, West Virginia Attorney General Patrick Morrisey cleared the Proposed Acquisition pursuant to a settlement agreement between the parties and communicated to the FTC that it should approve the transaction. The settlement with the West Virginia Attorney General's Office provides that both hospitals agree to adhere to several behavioral conditions for a seven-year period following the Proposed Acquisition, including rate limitations, market entry,

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[4] Cabell Compl. at ¶ 37.

[5] *Id.*

[6] *Id.* at ¶ 4.

[7] *Id.* at ¶ 5.

efficiencies, and the preservation of St. Mary's as an institution. For instance, the parties agree that neither hospital will increase its service rates beyond the benchmark rate established by the West Virginia Health Care Authority, nor will either hospital oppose the award of a certificate of need by the state Health Care Authority to any health care provider that seeks to provide services in their market area. In addition, the parties agreed to develop programs to improve access and enhance the quality of health care and maintain St. Mary's as a freestanding organization.

The FTC nonetheless seeks to challenge the Proposed Acquisition and claims that the West Virginia settlement falls short of replicating the benefits of competition between parties. Specifically, the FTC argues that the settlement does not protect health plans that would seek to renegotiate their agreements to obtain better terms from Cabell and St. Mary's. The FTC also argues that the settlement does not preserve quality competition between Cabell and St. Mary's. Finally, the FTC raises concerns that when the settlement agreement expires in seven years, Huntington-area employers and residents will be subject to the full harmful effects of a "virtual monopoly" for hospital services in their community.

What The FTC's Challenge Means

The FTC has long been suspicious of conduct remedies in merger enforcement. Recently, Deborah Feinstein, the Director of the Bureau of Competition explained why the FTC "generally rejects such requests [for conduct remedies] in merger cases."[8] In the FTC's view, conduct remedies do not restore the competitive status quo of having two separate, independent competitors and therefore may be an inferior substitute to determine market behavior. Furthermore, and as described in the FTC's complaint in *Cabell*, conduct

[8] Speech by D. Feinstein, "Antitrust Enforcement in Health Care: Proscription, not Prescription," Fifth National Accountable Care Organization Summit – Washington, DC, June 19, 2014, https://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf.

remedies typically focus on price, ignoring the impact of a transaction on quality improvements or innovation.

Despite this general policy, however, the FTC has not sought to block other transactions that were cleared by states pursuant to conduct remedies. For example, in 2012, the Pennsylvania Attorney General's Office settled charges that the acquisition by Geisinger Health System Foundation ("GHS") of Bloomsburg Hospital violated section 7 of the Clayton Act.[9] That settlement contained a number of restrictions on managed care contracting, including independent third party review of GHS rate proposals. The FTC did not join the enforcement action, but it also did not challenge the transaction.

There are a number of possible reasons why the FTC chose to challenge *Cabell* but not other recent, similar state settlements of hospital mergers. For one, it could be that the anticompetitive effects of the Proposed Acquisition were especially significant. Thus, even with some pricing restrictions in place with the state of West Virginia, the FTC felt it had to challenge the Proposed Transaction. Here, it is worth keeping in mind that the Commissioner vote to challenge the Proposed Acquisition was 4-0, with even Republican Commissioner Maureen Ohlhausen (who has dissented in previous FTC enforcement actions[10]) voting to authorize the complaint.

Another possibility is that *Cabell* presented the FTC with a unique opportunity to finally bring a challenge to a state conduct remedy settlement. In its press release, the FTC stated that it may not immediately pursue an action in federal court, because the merging hospitals are still awaiting approvals from the West Virginia Health Care Authority and the Catholic Church before they can

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[9] "Geisinger-Lewistown deal approved after antitrust drama," Central Pennsylvania Business Journal, http://www.cpbj.com/article/20131029/CPBJ01/131029719/geisingerlewistown-deal-approved-after-antitrust-drama.

[10] *See e.g.,* In the Matter of Nomi Technologies, Inc., Dissenting Statement of Commissioner Maureen Ohlhausen, https://www.ftc.gov/system/files/documents/public_statements/799571/150828nomitechmkostatement.pdf.

close the transaction, which may take months.[11] This delay therefore provides the FTC with the ability to conduct further discovery and try the case on the merits in front of an FTC administrative law judge prior to having to seek a preliminary injunction in federal court, which would require that the FTC demonstrate to a federal judge that the Proposed Acquisition would likely substantially lessen competition under Section 7 of the Clayton Act. A federal district court judge may also find it compelling that an administrative process challenging the Proposed Acquisition has been underway when considering the FTC's request for a preliminary injunction.

Conclusion

The FTC's decision to challenge the Proposed Acquisition is extraordinary. As discussed in this article, it is the first time that the FTC has challenged a hospital merger that had been cleared by a state Attorney General pursuant to a settlement agreement. Importantly, the FTC's burden is not to show that that the settlement falls short of a complete remedy, but that even with the settlement in place, the Proposed Acquisition would substantially lessen competition under Section 7 of the Clayton Act. Nonetheless, the lesson from *Cabell* is that having state Attorney General support no longer provides merging hospitals with the assurance that the FTC will not challenge the transaction. Notwithstanding the settlement agreement, the FTC's action is consistent with previous challenges to hospital mergers in that the merging hospitals have high market share and complaints from payors. This action also reminds us that the FTC remains hyper-focused on the parties' internal business documents, as the complaint is replete with citations to documents describing competition between the parties.

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[11] Press Release, "FTC Challenges Proposed Merger of Two West Virginia Hospitals," https://www.ftc.gov/news-events/press-releases/2015/11/ftc-challenges-proposed-merger-two-west-virginia-hospitals.

International Roundup

David Dueck, Meaghan Parry, and Brittany Shamess[*]

It has been just over one year since Margrethe Vestager took office at the European Commission ("EC" or "Commission"), but the new Commissioner for Competition has already made it clear that she will be taking a harder line on telecommunications ("telecom") mergers than her predecessor, particular where the merger will reduce the number of competitors from four to three. In the past year, under the leadership of Vestager, the EC imposed significant remedies before clearing the Orange/Jazztel telecom merger in Spain and scuppered the TeliaSonera/Telenor joint venture in Denmark. Concerns about higher prices, stunted innovation, and lack of investment figured prominently in both of these cases.

Telecom mergers are not the only mergers facing obstacles around the world, as antitrust agencies in Brazil, Europe and the U.S. have been subjecting Ball Corporation's ("Ball") proposed acquisition of Rexam PLC ("Rexam") to close scrutiny in the face of significant customer opposition to the deal. Meanwhile, using both a metaphorical carrot and a stick with its merger review regime, China has sought to streamline its merger review process while at the same time also sanctioning a number of companies engaging in gun-jumping behaviour. In addition, China has signed a cooperation framework with the EC for enhanced cooperation and information exchange between the two agencies.

I. Telecommunications Mergers in the European Union

(i) Orange/Jazztel

The EC opened an in-depth investigation into the Orange/Jazztel merger in

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December 2014, warning that the proposed acquisition could result in higher prices for customers in Spain and lessen the merged entity's incentive to exert competitive pressure on the remaining two competitors (Telefónica and Vodafone).[1] Although the merged entity would not have been in a dominant position, the acquisition of Jazztel would almost double Orange's market share in broadband Internet access, enabling it to surpass the number two competitor, Vodafone, with a market share of about 30%.[2]

In May 2015, the parties secured regulatory approval for the merger, subject to certain commitments. Orange agreed to divest an optical fibre network in five major cities and grant the purchaser wholesale access to its DSL network for an unlimited number of lines. Orange also agreed to grant wholesale access to its mobile networks, including its 4G services, if the purchaser did not already have access to such mobile services.[3]

(ii) TeliaSonera/Telenor

TeliaSonera and Telenor were forced to abandon the proposed merger of their Danish operations into a new joint venture in the face of opposition from the EC. The EC opened an in-depth investigation into the TeliaSonera/Telenor joint venture in April 2015, listing similar competition concerns to those in the Orange/Jazztel merger: (i) lower incentives to compete, leading to higher prices, less innovation, and lower quality; (ii) a reduction in the choice of alternative host networks for mobile virtual network operators ("MVNOs") and thus a weakening in their negotiating position; and (iii) a risk that the reduction in the number of

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[1] European Commission, "Mergers: Commission Opens In-Depth Investigation into Orange's Proposed Acquisition of Jazztel" (December 4, 2014), online: http://europa.eu/rapid/press-release_IP-14-2367_en.htm.

[2] *Ibid*; Tom Fairless, "Orange Secures EU Approval for Jazztel Acquisition", *Wall Street Journal* (May 19, 2015), online: http://www.wsj.com/articles/orange-secures-eu-approval-for-jazztel-acquisition-1432034640; European Commission, "Mergers: Commission Clears Acquisition of Jazztel by Orange, Subject to Conditions – Further Details" (May 19, 2015), online: http://europa.eu/rapid/press-release_MEMO-15-4998_en.htm.

[3] European Commission, "Mergers: Commission Clears Acquisition of Jazztel by Orange, Subject to Conditions" (May 19, 2105), online: http://europa.eu/rapid/press-release_IP-15-4997_en.htm.

competitors would reduce competitive pressure and increase the likelihood that mobile network operators ("MNOs") would coordinate behavior and increase prices. The EC also noted that the merger would reduce the number of MNOs in Denmark from four to three, combining the second and third largest operators in the mobile retail market to create the largest competitor (in terms of both revenue and number of subscribers).[4]

In order to address the Commission's concerns, the parties submitted two remedy packages that were aimed at facilitating the entry of a new MNO. In their first proposal, the parties offered to make spectrum available for a new self-standing mobile network and to grant wholesale access to their joint network. In their second proposal, the parties offered to divest their 40% stake in a shared telecom network and to divest a secondary brand. Both proposals were deemed insufficient by the EC insofar as they fell short of creating a strong and independent MNO in Denmark. The first proposal was rejected because the EC had "serious doubts that it would lead to the envisaged entry of a new fourth operator in Demark", while the second proposal was rejected for being insufficient in scope and scale and for lacking precision on fundamental aspects, such as the financial participation by the potential entrant in the shared network.[5]

On September 11, 2015, TeliaSonera and Telenor announced that they were abandoning the proposed merger, stating that the "merger discussions have now reached a point where it is no longer possible to gain approval for the proposed transaction."[6] The decision to abandon the transaction was made before

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[4] European Commission, "Mergers: Commission Opens In-Depth Investigation into the Proposed Merger of TeliaSonera and Telenor's Danish Telecommunications Activities" (April 8, 2015), available: http://europa.eu/rapid/press-release_IP-15-4749_en.htm.

[5] Margrethe Vestager, "Competition in Telecom Markets", Speech at the 42nd Annual Conference on International Antitrust Law and Policy Fordham University (October 2, 2015), online: https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-telecom-markets_en.

[6] TeliaSonera, "TeliaSonera and Telenor Withdraw from Merger in Denmark" (September 11, 2015), online: http://www.teliasonera.com/en/newsroom/press-releases/2015/9/teliasonera-and-telenor-withdraw-from-merger-in-denmark/.

the EC issued a formal decision. However, Vestager later confirmed that the Commission was on the road towards prohibiting the merger.[7]

(iii) Lessons for Future Telecom Mergers in the EC

The pattern emerging from Vestager's first year in office is clear: regulatory approval will not come easy for telecom mergers that raise competition concerns, as Vestager appears to be taking a harder line on telecom mergers than her predecessor.[8] The Commission will look for structural remedies to resolve competition concerns in telecom mergers and greet any "consolidation leads to investment" argument with extreme skepticism. The EC stamp of approval will only be granted to remedies that address the EC's concerns in a comprehensive and effective manner. Further insight into Vestager's approach was provided in her recent speech at the Annual Conference on International Antitrust Law and Policy on October 2, 2015, during which Vestager spoke about the lessons that could be drawn from the abandoned TeliaSonera/Telenor joint venture.

a. <u>No Magic Number?</u>

The first lesson that Vestager outlined in her speech is that there is "no magic number" for how many MNOs the Commission regards as necessary in any particular market. As Vestager noted, the EC follows a case-by-case approach and assesses each transaction on its own merits when reviewing mergers.[9]

However, notwithstanding this general statement, Vestager also stated, "Research seems to suggest that a reduction of the number of players from four-to-three in a national mobile market in the EU can lead to higher prices for consumers."[10] Vestager's comments regarding "no magic number" also stand in

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[7] Vestager, "Competition in Telecom Markets," *supra* note 5.

[8] Under the EC's former Competition Commission, Joaquín Almunia, the EC cleared a number of large telecommunications mergers, notably Telefónica's €8.6 billion acquisition of KPN's German mobile operator, E-Plus.

[9] *Ibid.*

[10] *Ibid.*

contrast to the position taken by Ofcom (the United Kingdom's telecom regulator), which has made it clear that it prefers to see four operators in the British telecom market. As Ofcom's Chief Executive confirmed in a recent speech, "[W]e continue to believe that four operators is a competitive number that has delivered good results for consumers and sustainable returns for companies."[11]

b. Structural Remedies

Another lesson that can be gleamed from the TeliaSonera/Telenor merger is that the EC will look for strong, structural remedies to resolve competition concerns in telecom mergers, such as the creation of a new MNO. As Vestager stated in her recent speech, "The more structural the remedy, the better."[12]

Vestager's preference for structural remedies suggests that the quasi-structural remedies which were accepted in telecom mergers under Joaquín Almunia's tenure (such as in Hutchison 3G Austria/Orange Austria,[13] Hutchison 3G UK/Telefónica Ireland,[14] and Telefónica Deutschland/E-Plus[15]) will no longer be deemed sufficient. In those cases, the Commission considered the establishment of new MVNOs to be enough to address the competition concerns. However, in her speech, Vestager noted that the establishment of MVNOs "is a

[11] Mark Briggs, "Ofcom Chief says Merger Risk Harm to Consumers", *Global Competition Review* (October 9, 2015), online: http://globalcompetitionreview.com/news/article/39644/ofcom-chief-says-mergers-risk-harm-consumers/.

[12] Vestager, "Competition in Telecom Markets," *supra* note 5.

[13] European Commission, "Mergers: Commission Clears Acquisition of Austrian Mobile Phone Operator Orange by H3G, Subject to Conditions" (December 12, 2012), online: http://europa.eu/rapid/press-release_IP-12-1361_en.htm.

[14] European Commission, "Mergers: Commission Clears Acquisition of Telefonica Ireland by Hutchison 3G, Subject to Conditions" (May 28, 2014), online: http://europa.eu/rapid/press-release_IP-14-607_en.htm.

[15] European Commission, "Mergers: Commission Clears Acquisition of E-Plus by Telefónica Deutschland, Subject to Conditions" (July 2, 2014), online: http://europa.eu/rapid/press-release_IP-14-771_en.htm.

less structural solution than creating a new MNO."[16] Although Vestager said that she does not question the conclusion in those cases, she also stated that it is "probably too early to conclude on the effectiveness of the remedies in those cases as they are still being implemented."[17]

c. Link between Investment and Competition

Finally, Vestager stressed that any "consolidation leads to investment" efficiency argument will be carefully scrutinized, as there is no compelling evidence to suggest that a reduction in the number of competitors will lead to higher overall investment by MNOs. In practice, this means that the EC will "assess whether post-merger investment plans are credible and likely, merger-specific, and with benefits for end-consumers as opposed to shareholders."[18]

Vestager's skepticism of the "consolidation leads to investment" argument echoes comments made by her predecessor, Joaquín Almunia, in 2014, stating, "While we often hear that we need larger players in Europe to be able to finance the investments needed to deploy the next-generation networks, creating larger players within national markets just reinforces market power at this level.[19]

II. Brazil and the European Union

On October 5, 2015, Brazil's Council for Economic Defence ("CADE") announced that it was submitting the US$6.7 billion (€5.9 billion) proposed acquisition of Rexam PLC ("Rexam") by Ball Corporation ("Ball") for analysis to CADE's Tribunal.[20] This decision is consistent with the July 20, 2015 decision

[16] Vestager, "Competition in Telecom Markets," *supra* note 5.

[17] *Ibid.*

[18] *Ibid.*

[19] Joaquín Almunia, "Fighting for the Single Market", Speech at European Competition Forum (February 11, 2014), online: http://europa.eu/rapid/press-release_SPEECH-14-119_en.htm.

[20] Council for Economic Defence, "Superintendence Issues Technical Opinion on Ball/Rexam Merger Transaction in the Sector of Metal Beverage Cans" (October 5, 2015), online: http://www.cade.gov.br/Default.aspx?6bde2ffa0a1ff53dc977c867f257 [Technical Opinion on Ball/Rexam].

by the EC to open an in-depth investigation to assess whether this transaction complies with the EU Merger Regulation[21], as well as the April 7, 2015 decision of the US Federal Trade Commission to issue a second request for information in connection with this transaction.[22]

The proposed deal marks the biggest takeover to date in the metal and glass packaging industry.[23] Rexam and Ball are, respectively, the first and second largest beverage can manufacturers in the European Economic Area, and the market leaders worldwide.[24] They supply an array of international clients, including beverage companies such as Coca-Cola, PepsiCo, MillerCoors, AB InBev, Heineken, Diageo and Red Bull. After the conclusion of the proposed transaction, the merged companies will control 61 percent of the market in North America, 69 percent of the market in Europe and up to 74 percent of the market in Brazil.[25]

CADE and the EC have indicated that their key concerns regarding the transaction involve the potential exercise of market power by the merged companies. The beverage can industry is characterized by high entry barriers because of the need to ensure sufficiently large customer orders and the significant investment required to build a plant. As a result, entry and expansion is difficult, and takes considerable time. Given these barriers to entry, the EC has stated that the combination of Rexam and Ball is likely to result in price increases

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[21] European Commission, "Commission Opens In-depth Investigation into Ball's Proposed Acquisition of Beverage Can Manufacturer Rexam" (July 20, 2015), online: http://europa.eu/rapid/press-release_IP-15-5417_en.htm [Ball/Rexam In-depth Investigation].

[22] Ball Corporation, "Ball Receives Second Request for Information from FTC" (April 7, 2015), online: http://phx.corporate-ir.net/phoenix.zhtml?c=115234&p=irol-newsArticle&ID=2032728.

[23] Aoife White, "Ball Offers Concessions in EU Antitrust Review of Rexam Deal", *Bloomberg Business* (November 19, 2015), online: http://www.bloomberg.com/news/articles/2015-11-19/ball-offers-concessions-to-eu-in-antitrust-review-of-rexam-deal [Ball Offers Concessions].

[24] Ball/Rexam In-depth Investigation, *supra* note 21.

[25] Sonya Lalli, "Ball/Rexam Meets Resistance in Brazil", *Global Competition Review* (October 8, 2015), online: http://globalcompetitionreview.com/news/article/39638/ballrexam-meets-resistance-brazil/ [Ball/Rexam Meets Resistance].

for their customers and ultimately for end consumers.[26] Moreover, every client of Ball and Rexam is challenging the deal formally or informally.[27]

Ball can back out of the deal if competition authorities demand that it sell assets that generate more than US$1.58 billion (€1.4 billion).[28] Although Ball recently offered commitments to the EC, it has declined to publicly provide details regarding the results of its discussions.[29] The EC has stated that it will make a ruling by January 22, 2016,[30] and in Brazil, CADE's Tribunal has until early 2016 to make the final decision about whether to clear the proposed merger.[31]

III. China

(i) Gun Jumping

On March 20, 2014, China's MOFCOM issued a notice announcing that it would publish decisions sanctioning companies that participate in "gun jumping" by failing to file notifications for transactions that meet the merger filing thresholds. Following this notice, on September 29, 2015, MOFCOM published four gun jumping administrative penalty decisions, imposing fines on a total of six companies.

In the first decision, MOFCOM imposed a fine of ¥200,000 (US$31,000) on both BesTV New Media Co. and Microsoft. The parties formed a joint venture in September 2013 in order to sell game applications for Microsoft's XBoxOne.

[26] Technical Opinion on Ball/Rexam, *supra* note 20; See also: Ball/Rexam In-depth Investigation, *supra* note 21.

[27] Ball/Rexam Meets Resistance, *supra* note 25.

[28] Harry Phillips, "Divestitures could Total $1.58 billion for Ball/Rexam Container Deal", *Global Competition Review* (February 19, 2015) http://globalcompetitionreview.com/news/article/38027/divestitures-total-158-billion-ballrexam-container-deal.

[29] Ball Offers Concessions, *supra* note 23.

[30] Ball Offers Concessions, *supra* note 23.

[31] Ball/Rexam Meets Resistance, *supra* note 25.

After being informed by a third party that the parties had failed to file a notification, MOFCOM began its investigation in January 2015.

In the second decision, MOFCOM imposed a fine of ¥150,000 (US$23,000) on both CSR Nanjing Puzhen Rolling Stock and Bombardier Transportation Sweden. The parties formed a joint venture in November 2014 for the production of automated vehicles for a monorail system in China. The parties voluntarily approached MOFCOM to submit a late notification in December 2014.

In the third decision, MOFCOM imposed a fine of ¥200,000 (US$31,000) on Shanghai Fosun Pharmaceutical ("Fosun"). Fosun planned to acquire a 65 percent stake in Suzhou Erye Pharmaceutical Co. Ltd. ("Erye") by purchasing 35 percent of the shares itself and then purchasing 30 percent through an overseas subsidiary. During its pre-review consultation in December 2014, Fosun disclosed its intention to acquire the controlling 65 percent stake, but it had already completed the 35 percent share transfer prior to MOFCOM's approval.

In the last decision, MOFCOM imposed a fine of ¥150,000 (US$23,000) on Fujian Electronics and Information Group ("Fujian"). Fujian signed an agreement to acquire a 35 percent stake in Shenzhen Chino Communication Co. Ltd. ("Shenzhen") without notifying MOFCOM. Two weeks later, a Fujian Electronics subsidiary entered into an agreement to purchase 100 percent of Shenzhen's shares. During the public notice period for this share purchase, a third party informed MOFCOM that Fujian had already acquired control over Shenzen, which prompted a MOFCOM investigation in December 2014.[32]

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[32] Norton Rose Fulbright, "Competition Law Developments in East Asia" (September 2015), online: http://www.nortonrosefulbright.com/knowledge/publications/132796/competition-law-developments-in-east-asia-september-2015.

Under China's legislation, MOFCOM is able to impose fines of up to ¥500,000 (US $77,000), and can also take actions such as unwinding an already completed deal.[33] In the four decisions discussed above, MOFCOM chose to apply only administrative penalties because none of the transactions resulted in a restriction of competition in the relevant markets. Additionally, MOFCOM fined each of the parties an amount less than the maximum statutory amount because all of the parties actively cooperated with MOFCOM's investigations.

To date, more than 40 companies have been fined and punished by MOFCOM.[34] This trend is unlikely to change, and this latest round of publicized gun-jumping penalties demonstrates that China is steadily increasing its enforcement activity.

(ii) Revised Merger Review Process

On September 15, 2015, revisions designed to streamline China's merger review process came into effect removing the pre-acceptance review stage of the merger review process, which constitutes the most significant change to the procedures of MOFCOM since the Chinese Anti-Monopoly Law took effect in 2008.[35] Prior to these revisions, three officials in the MOFCOM Consultation Division were responsible for reviewing merger notifications for completeness before MOFCOM's official acceptance of a transaction for review. This pre-acceptance review stage created two inefficiencies that extended the merger review process. First, there was no time limit for this stage. Second, once

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[33] Sonya Lalli, "Mofcom Ramps up Enforcement in China", *Global Competition Review* (September 30, 2015), online: http://globalcompetitionreview.com/news/article/39577/mofcom-ramps-enforcement-china/.

[34] Kaye Scholer LLP, "China Gets Serious About Gun-Jumping" (October 15, 2015), online: http://www.kayescholer.com/in-the-market/publications/client_alerts/20151015-antitrust-alert-ec-china-update-china-gets-serious-about-gun-jumping-european-commission-and-china-sign-best-practices-cooperation-framework.

[35] Freshfields, Bruckhaus, Deringer LLP, "No More Formal Consultation During PRC Merger Review" (September 14, 2015), online: http://www.lexology.com/library/detail.aspx?g=3f40c9b8-f746-452e-8f60-8a5ccf19b4dc/

MOFCOM accepted a filing, the case would pass from the Consultation Division to a different review team, which had had no prior involvement in the case.

The revisions will see the pre-acceptance review stage eliminated, with MOFCOM's Consultation Division becoming one of three divisions responsible for merger reviews in their entirety. The Consultation Division, as well as the Economic Division and the Legal Division, will now be responsible for both the pre-acceptance review and the substantive review of all cases. Each of the three divisions will be allocated responsibility for particular industries and will scrutinize all filings within those sectors, which will develop sector-specific experience and expertise.[36]

IV. China and the European Union

On October 15, 2015, the European Commission and Chinese MOFCOM agreed to a best practices cooperation framework for merger reviews (the "Cooperation Framework").[37] The signing of the Cooperation Framework reflects an ambition for enhanced cooperation and information exchange between the two authorities. It will be important for merging parties to take into account this enhanced coordination when developing a strategy for global merger control approval.

The Cooperation Framework builds on the 2012 Memorandum of Understanding between the EC and Chinese National Development and Reform Commission ("NDRC") and State Administration for Industry and Commerce ("SAIC"), which established that the EC and Chinese authorities may exchange non-confidential information, experiences, and views on the same or related

[36] Tom Madge-Wyld, "MOFCOM Streamlines Merger Process", *Global Competition Review* (September 15, 2015), online: http://globalcompetitionreview.com/news/article/39473/mofcom-streamlines-merger-process/.

[37] "Practical Guidance for Cooperation on Reviewing Merger Cases between Directorate-General for Competition of European Commission and Ministry of Commerce of P.R. China" (October 15, 2015), online: http://ec.europa.eu/competition/international/bilateral/practical_guidance_mofcom_en.pdf [Cooperation Framework].

antitrust enforcement matters and, where appropriate and practicable, directly coordinate their enforcement activities.[38] The new Cooperation Framework, which is specific to the context of merger control investigations, establishes that the two sides may exchange confidential information (in accordance with confidentiality waivers) and will ensure the protection of business secrets and other confidential information.[39] The new framework will facilitate communication on substantive and procedural issues, such as the definition of relevant markets, theories of harm, competitive impact assessments and remedies.[40]

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[38] Memorandum of Understanding on Cooperation in the Area of Anti-Monopoly Law (September 20, 2012), online: http://ec.europa.eu/competition/international/bilateral/mou_china_en.pdf.

[39] Cooperation Framework, *supra* note 37.

[40] European Commission, "Mergers: Commission Signs Best Practices Cooperation Framework with China" (October 15, 2015), online: http://europa.eu/rapid/press-release_IP-15-5843_en.htm.

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