The Mergers & Acquisitions Review

Ninth Edition

Editor
Mark Zerdin

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EDITOR'S PREFACE

By a number of measures, it could be argued that it has been some time since the outlook for the M&A market looked healthier. The past year has seen a boom in deal making, with many markets seeing post-crisis peaks and some recording all-time highs. Looking behind the headline figures, however, a number of factors suggest deal making may not continue to grow as rapidly as it has done recently.

One key driver affecting global figures is the widely expected rise of US interest rates. Cheap debt has played a significant part in the surge of US deal making in the first few months of 2015, and the prospects of a rate rise may have some dampening effects. However, the most recent indications from the Federal Reserve have suggested that any rise will be gradual and some market participants have pushed back predictions for the first rate rise to December 2015. Meanwhile, eurozone and UK interest rates look likely to remain low for some time further.

The eurozone returned to the headlines in June as the prospect of a Greek exit looked increasingly real. Even assuming Greece remains in the euro (as now seems likely), the crisis has severely damaged the relationship between Greece and its creditors. The brinksmanship exhibited by all parties means that meaningful progress cannot occur except at the conclusion of a crisis: the idea that reform will benefit Greece has been lost and each measure extracted by creditors is couched as a concession. However, while the political debate has become ever more fractious, the market's response to the crisis has been relatively sanguine. This is largely a result of the fact that the volume of Greek debt is no longer in the market, but in the hands of institutions. But it is also a sign of the general market recovery and expectations that major economies will continue to grow.

Perhaps one of the more interesting emerging trends in the last year is the interplay between growth and productivity. Some commentators have suggested that the recent rise in deal making is a symptom of a climate in which businesses remain reluctant to invest in capital and productivity. Pessimistic about the opportunities for organic growth, companies instead seek to grow profits through cost savings on mergers. It is difficult to generalise about such matters: inevitably, deal drivers will vary from industry to industry, from market to market. However, if synergies have been the principal motivation in much of the year's deal making (it certainly has been in a number of large-cap deals) then it may be that the market is a little farther from sustainable growth than some would like to think.

I would like to thank the contributors for their support in producing the ninth edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
August 2015

Chapter 2

EU COMPETITION OVERVIEW

Götz Drauz and Michael Rosenthal[1]

I INTRODUCTION

While the European Commission's highly visible antitrust and state aid investigations arguably dominated the headlines during the past 12 months, the EU's merger control regime, even without a single prohibition decision, still produced a number of important precedents as well as a procedural reform relevant to deal-makers active in the European Union.

Tech mergers, and in particular Facebook's acquisition of WhatsApp drew a lot of attention. With telecoms operators and other third parties up in arms, the review promised heated discussions. Ultimately, however, the Commission noted dryly that the parties were not close competitors and operated in a fast-moving market, and cleared the transaction in Phase I without remedies.

On the legislative front, the Commission issued measures to alleviate the regulatory burden on businesses in unproblematic mergers, while its original proposal to extend the scope of the EU Merger Regulation (EUMR) to the acquisition of certain minority shareholdings below the change-of-control threshold was kept on hold until further notice.

On the administrative front, aside from the usual jurisdictional struggle around the EU's referral system (applied, for example, in the *Facebook/WhatsApp* and *Dolby/Doremi* tech mergers), the Commission, in the case *Marine Harvest/Morpol*, cleared the transaction but subsequently imposed a fine on the buyer for failing to notify the deal to the Commission.

1 Götz Drauz is a senior competition counsel and Michael Rosenthal is the managing partner of Wilson Sonsini Goodrich & Rosati LLP. The authors would like to thank Bastian Voell for his valuable assistance in the preparation of this chapter.

This chapter will address these and other notable developments that have taken place during the past 12 months, along with a brief summary of the most important rules that practitioners need to understand when faced with the possibility of an EU merger control filing.

I JURISDICTION

i Overview

The Commission has exclusive jurisdiction to review 'concentrations with a Community dimension'. Pursuant to Article 3(1) of the EUMR,[2] a 'concentration' is deemed to arise 'where a change of control on a lasting basis'[3] results from either the merger of two or more previously independent undertakings, or the acquisition of control (direct or indirect) of the whole or part of one or more undertakings by one or more other undertakings.

The 'Community dimension' test is turnover-based, and takes into account both the worldwide and EU turnover of the undertakings concerned with the transaction.[4] Concentrations that do not have a Community dimension may be reviewed by the competition authorities of the Member States applying national law. This 'bright-line' allocation mechanism is complemented by the possibility for cases to be reallocated from the Commission to the Member States and vice versa, under a system of referrals.

The case reallocation scheme provides that a referral may be triggered after a notification and, since the new Merger Regulation took effect in 2004, also before a filing is made: Article 4(4) and (5) of the EUMR provide for the possibility of pre-notification referrals at the initiative of the notifying parties;[5] while Articles 9 and 22 of the EUMR provide for the (more burdensome) possibility of post-notification referrals triggered by one or more Member States.

2 Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.

3 The use of warehousing schemes, whereby assets are held temporarily by a financial institution pending their transfer to the ultimate purchaser, may not require notification in certain strictly defined circumstances. See Case T-279/04 – *Editions Odile Jacob v. Commission*.

4 Article 1(2) and (3) of the EUMR.

5 Of particular importance in this regard is the '3-plus rule' set out in Article 4(5) of the EUMR, pursuant to which the notifying parties in a concentration that does not have a Community dimension may nevertheless apply to have the Commission review the transaction, in order to avoid having to file in multiple jurisdictions within the EU, provided that the transaction is notifiable under the laws of at least three Member States, and no Member State objects to the referral.

ii Recent developments

The downsides of the post-notification referrals highlighted in previous years (including in *Hutchison 3G Austria/Orange Austria* and, more recently, in Holcim's cement mergers)[6] led the Commission to launch a public consultation on a reform proposal aimed at making the system 'more business friendly by streamlining and shortening procedures but without fundamentally changing [its] basic features'.[7]

Referrals continue to play a significant role in tech mergers where the parties' revenues regularly do not suffice to exceed the EU Merger Regulation's (and sometimes not even the lowest of the Member States' turnover thresholds) – while their popular products trigger filings in jurisdictions with market share thresholds, namely in Portugal, Spain and the UK. Last year, *Facebook/WhatsApp* was a prominent example of a pre- and *Dolby/Doremi* of a post-notification referral.[8]

In the same consultation, the Commission sought comments from stakeholders on a proposal to extend the scope of the EUMR to the acquisition of certain non-controlling minority shareholdings.[9] The lack of jurisdiction over non-controlling shareholdings has been termed an 'enforcement gap' by former Commissioner Almunia in the past. So far, minority shareholdings are only caught by the German and Austrian merger control systems.

Following closure of the consultation in September 2013, the Commission's White Paper was published in 2014. Stakeholders have questioned the merits of such a reform, particularly in light of the lack of proportionality between the new tools a reform would give the Commission and the limited number of acquisitions of minority stakes that raise competition issues. As a reaction to this criticism, Commissioner Vestager promised to reassess the Commission's proposal.[10]

6 See case M.6497 – *Hutchison 3G Austria/Orange Austria* which involved two transactions that triggered two separate merger control filings – one at EU level and one in Austria. Instead of agreeing on a referral to a single competition authority, the Commission rejected a referral request by the Austrian authority under Article 9 and the Austrians were equally unwilling to refer 'their' part of the deal to the Commission under Article 22. Luckily, the parallel reviews did not result in diverging outcomes. In a more recent 'interlinked deal' involving two transactions notified respectively to the Commission and to the Spanish competition authority pursuant to jurisdictional rules, the Commission accepted the Spanish competition authority's upward referral under Article 22 but rejected Germany's request for a downward referral pursuant to Article 9, thereby limiting the risk of conflicting outcomes (see case COMP/M.7054 – *Cemex/Holcim* assets and case COMP/M.7009 – *Holcim/Cemex West*).

7 See, e.g., amendments to the Best Practices on Cooperation between EU National Competition Authorities.

8 See case M.7217 –*Facebook/WhatsApp* (Article 4(5) referral) and case M.7297 – *Dolby/Doremi*. (Article 22 referral).

9 See http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html.

10 For example, in *Goldman Sachs/TPG Lundy/Verna*, the Commission found that the joint acquisition of a 19 per cent voting interest in Verna, combined with veto rights over the appointment, dismissal of senior management, and the approval of the target's budget and

II PROCEDURE

i Overview

When the jurisdictional test is met, notification to the Commission is mandatory and must be made prior to implementation. The notification itself can be made at any time once a recognised 'triggering event' has occurred. There is no filing deadline. The formal notification of a concentration is usually preceded by confidential contacts with the Directorate-General for Competition, in which the proposed transaction and the filing requirements are discussed, frequently in great detail.[11]

Once notified, the vast majority of cases are cleared by the Commission (sometimes subject to remedies) after what is called a Phase I inquiry (lasting 25 to 35 working days); more complex cases can be subject to an in-depth Phase II review (lasting a further 90 to 105 working days). The EUMR makes provision for further extensions of up to 20 working days in Phase II, at the request or with the consent of the parties, and such extensions are now common.

Notifying parties must not implement a notifiable concentration before having received clearance, unless a derogation pursuant to Article 7(3) is granted by the Commission. Violation of the suspension obligation can lead to the imposition of a fine of up to 10 per cent of the aggregate turnover of the notifying party or parties (Article 7 of the EUMR). The Commission has a policy of imposing heavy fines in such circumstances.

ii Recent developments

1 January 2014 marked the entry into effect of the Commission's reform to simplify its review of concentrations under the EUMR. In particular, the Commission revised the Notice on Simplified Procedure (enabling a greater percentage of reportable mergers to benefit from simplified review) and the Merger Implementing Regulation (detailing the information required in the context of a merger notification). In parallel, it also updated its Model Text for divestiture commitments.

The new regime allows for a less burdensome filing in cases that *prima facie* do not give rise to anti-competitive effects by raising the horizontal threshold from 15 to 20 per cent and the vertical threshold from 25 to 30 per cent.[12] Cases where the combined

business plan, meant on the facts that they alone could exercise decisive influence over the target business. See Case M.6842 – *Goldman Sachs/TPG Lundy/Verna*. For an example of the acquisition of *de facto* sole control based on the analysis of historic voting patterns at shareholders' meetings see Case M.6957 – *IF P&C/Topdanmark*.

11 See 'DG Competition Best Practices on the conduct of EC merger control proceedings', 20 January 2004, available at: http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf.

12 Under the former regime, mergers and acquisitions of control were eligible to file under the simplified procedure where the combined market share of all the parties to the transaction engaged in business activities in the same product and geographical market was less than 15 per cent, and the individual or combined market shares of all parties to the concentration

market shares are between 20 per cent and 50 per cent, and where the actual increase in market shares as a result of the merger is nominal also qualify for simplified review.[13]

Furthermore, following the amendment to the Implementing Regulation, the Commission now considers that simplified merger cases that do not give rise to horizontal overlaps or vertical links in the EEA can be notified without pre-notification contacts between the parties and the Commission's case handlers. However, in most cases, pre-notification contacts will still be useful to assess what is considered necessary by the Commission in order for the notification not to be considered incomplete.

The Commission has also created a new 'super-simplified procedure' for joint ventures entirely active outside the EEA that meet the EU thresholds as a result of the activities of their parent companies. While those changes are welcome, they are relevant to a limited number of cases only. The parties to a notifiable merger will in many cases therefore still be exposed to arguably excessive data requests and unpredictable timetables.

There have been a remarkable number of cases last year where the Commission stopped the clock. Recently, this practice has been increasingly used to buy time for the revision of remedy proposals. For instance, in the *Orange/Jazztel*[14] and *Zimmer/Biomet*[15] proceedings, the Commission stopped the clock just before formal remedy offers were expected. This way, adequate undertakings may be shaped prior to the issuance of a statement of objections.

Finally, with regard to the Commission's fining powers, the Commission's *Marine Harvest/Morpol* investigation merits mention.[16] After having cleared the deal subject to conditions, nine months later, in July 2014, the Commission imposed a fine of €20 million on Marine Harvest for early implementation of its acquisition of competitor Morpol.[17] In cases of violation of the suspension obligation, the Commission enjoys broad discretion in setting the level of the fines.[18]

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on any market upstream or downstream of any product market in which any other party was active were below 25 per cent.

13 The reform attempts to address criticism resulting from the EU's lengthy and cumbersome pre-notification process by allowing mergers that do not give rise to any horizontal or vertical links in the EEA to be notified without pre-notification. This attempt has been proven successful – given that the percentage of cases which were handled under the former simplified procedure regime increased from 60 per cent in 2013 to roughly 70 per cent in 2014.

14 Case COMP/M.7421 – *Orange/Jazztel*.

15 Case COMP/M.7265 – *Zimmer/Biomet*.

16 Case COMP/M. 6850 – *Marine Harvest/Morpol*.

17 Case COMP/M.7184 – *Marine Harvest/Morpol*.

18 See case T-332/09 – *Electrabel v. Commission*. In its judgment of 12 December 2012, the General Court dismissed an action brought by Electrabel for the annulment of a fine of €20 million that had been levied on Electrabel by the Commission for acquiring *de facto* sole control of a competitor without notifying the operation in Brussels. The General Court ruled that the fact that the merger did not raise competition concerns could not be a factor used to determine the gravity of the infringement, where this is only discovered after implementation;

III SUBSTANTIVE ASSESSMENT

i Overview

The substantive test under the EUMR is whether the proposed transaction would lead to a 'significant impediment of effective competition, in particular as a result of the creation or strengthening of a dominant position' (the SIEC test). The substantive assessment of a notified concentration by the Commission thus requires the careful examination of the likely effects of the proposed transaction on every affected market.

This analysis starts by identifying the various types of competitive effects brought about by the concentration (which may coexist in a single transaction): horizontal effects, arising when the parties to the concentration are actual or potential competitors; vertical effects, arising where the parties are active at different levels of a supply chain; and conglomerate effects, arising when the parties are active on different but related markets.

When the Commission reaches the preliminary conclusion that a concentration raises competition concerns, the parties will be invited to offer commitments (commonly referred to as 'remedies') with a view to securing conditional approval. In fact, being able to design effective remedies that address the Commission's concerns (without jeopardising the value of the transaction)[19] could make the difference between clearance and prohibition.

The Commission prefers structural remedies to behavioural remedies.[20] More specifically, the Remedies Notice distinguishes 'between divestitures, other structural remedies, such as granting access to key infrastructure or inputs on non-discriminatory terms, and commitments relating to the future behaviour of the merged entity'.[21] Divestitures and the 'removal of links between the parties and competitors' are considered as the 'preferred remedy'.[22]

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nor was the fact that the breach was committed negligently rather than deliberately sufficient to justify a reduction in the fine.

19 Two prominent examples of withdrawals due to concerns in relation to the scope of the requested remedies are BHP Billiton's attempted acquisition of Rio Tinto (Case COMP/M.4985) and OMV's failed attempt to acquire MOL (Case COMP/M.4799). Furthermore, in March 2011, Merck and Sanofi abandoned their animal health care joint venture before notification, citing 'the extent of the anticipated divestitures' as a major obstacle to closing. Also in 2011, SC Johnson had to withdraw its notification of the planned acquisition of Sara Lee's household insecticide business (Case COMP/M.5969). In 2012, the most notable withdrawal was the decision of the three founding members of Compagnia Italiana di Navigazione (CIN) to abandon their joint acquisition of the passenger and freight business of the troubled Italian ferry group, Tirrenia (Case COMP/M.6362).

20 See, for example, Remedies Notice, paragraphs 10, 15, 17 and 69.

21 Remedies Notice, paragraph 17.

22 Remedies Notice, paragraphs 58–61 ('Whilst being the preferred remedy, divestitures or the removal of links with competitors are not the only remedy possible to eliminate certain competition concerns').

However, the assessment of the effectiveness of a remedy in a particular case cannot be based on a theoretical framework resulting in a preference for one kind of remedy over another. Instead, an effects-based assessment is required which, on a case-by-case basis, selects the appropriate and proportionate remedy depending on the theory of harm identified by the Commission. Recent cases suggest that the Commission is willing to adopt a more flexible approach, at least in certain industries.[23]

ii Recent developments

During the past 12 months, in the absence of any prohibition decision, the negotiation and design of successful remedy packages took (again) centre stage, resulting in a number of conditional clearance decisions. In this context, it can be observed that the up-front buyer approach continues to be used more and more frequently by the European Commission – which effectively means that parties may have to start working on the architecture of possible divestments before notification.

For example, in order to secure clearance for their cement merger even in Phase I, Holcim and Lafarge committed to divesting most of the operations where their activities overlapped. The Commission cleared the deal subject to full compliance with the commitments and insisted that the parties must not close the transaction until they have entered into a binding agreement with a buyer, approved by the Commission, for the divested assets.[24]

A notable exception to this tightening in remedy policy was the Commission's *Syniverse/Mach* decision on a merger, which, according to the Commission, combined 'the first and the second-largest supplier, creating a dominant player with virtual monopoly market shares'. Following a sophisticated economic analysis (including a switching analysis that examined customers' sourcing patterns over a four-year period that suggested that demand for all contracts was contestable and, accordingly, that the parties' historical market share did not matter), the Commission ultimately cleared the deal (without upfront buyer solution) subject to the divestment of a business that was big enough to qualify as an alternative supplier to even the biggest customers.[25]

The recent *Liberty Gloabl/Corelio/W&W/De Vijver Media* decision[26] is a rare example where the Commission accepted the licensing of IP rights as a stand-alone remedy. In order to address the Commission's concern that the merged entity could have refused to license TV channels which were considered to be essential input to competing TV distributors on the Belgian market, the parties committed themselves to providing licenses under fair, reasonable and non-discriminatory terms for the next seven years.

23 The Commission's seemingly less hostile approach to behavioural remedies reflects policy in the United States where the Department of Justice's guide to merger remedies (June 2011) recognises that conduct remedies can preserve a merger's potential efficiencies while remedying competitive harm, and are therefore more flexible than simple structural remedies (i.e., divestitures).

24 Case COMP/M.7252 – *Holcim/Lafarge*.

25 Case COMP/M.6690 – *Syniverse/Mach*.

26 Case COMP/M.7194 – *Liberty Gloabl/Corelio/W&W/De Vijver Media*.

Unconditional clearances of horizontal mergers with high market shares included tech mergers *Dolby/Doremi*, and *Facebook/WhatsApp*. With regard to the latter, the Commission confirmed the approach taken in *Microsoft/Skype* in 2011, namely that large market shares are 'ephemeral' in the recent and fast-growing consumer communications sector which is characterised by frequent market entry and short innovation cycles. In *Dolby/Doremi*, the Commission also stressed the fast moving nature of the relevant market noting that the parties' market shares were mainly the reflection of a first mover advantage.

In *Bekaert/Pirelli Steel Tyre Cord Business*, the existence of countervailing buying power saved the deal while in *Ferrero International/Oltan Group* the fact that customers bought from four or five different suppliers, including the market leaders, enabled the Commission to clear the transaction without remedies. Multi-sourcing (or rather multi-homing) by customers also played an important role in *Facebook/WhatsApp* – in the context of a detailed closeness of competition analysis comparing the parties' messaging systems.

In cases where it is possible to identify a suitable and viable divestment business, the sale of which addresses the Commission's concerns and eliminates the competitive overlap between the parties in the problematic markets, such as *Holcim/Lafarge*, the Commission continues to be willing to clear even large transactions involving a significant number of horizontal overlaps without the need for a time-consuming Phase II investigation – provided parties are prepared to engage in extensive pre-notification discussions (and are willing to accept upfront buyer solutions).

Finally, the General Court upheld the Commission's clearance of the *Microsoft/Skype* merger confirming, in particular, the Commission's market definition (not viewing the Skype platform as a separate market) and its finding that, in fast-growing sectors that are characterised by short innovation cycles, 'large market shares may turn out to be ephemeral'. In that case, the Commission found that foreclosure effects invoked by Cisco were 'too uncertain to be considered a direct and immediate effect' of the merger.

Chapter 4

US ANTITRUST

Scott A Sher, Christopher A Williams and Bradley T Tennis[1]

I US COMPETITION OVERVIEW

Merger activity rebounded from a slight dip in 2012 and 2013 to reach its highest level – at 1,663 transactions reported under the HSR Act in US government fiscal year 2014 – since the worldwide economic slowdown in 2008. The following chart sets out reporting and enforcement data for transactions reported to the US antitrust agencies – the Department of Justice, the Antitrust Division (DoJ) and the Federal Trade Commission (FTC) – over the past eight years. Consistent with both agencies' promises under the Obama Administration to undertake more vigorous antitrust enforcement, the overall number of agency challenges remained high at 37. Although this represents a sharp drop in the rate of challenged transactions – owing in part to a corresponding rise in the number of reported transactions – at 2.3 per cent the agency challenge rate remains higher than each of the last four years of the previous administration.

Transactions reported[1,2]	2,201	1,726	716	1,166	1,450	1,429	1,326	1,663
Second requests[3]	63	41	31	42	55	49	47	-
DoJ	32	20	16	22	31	29	25	-
FTC	31	21	15	20	24	20	22	-
% Second requests	3.0%	2.5%	4.5%	3.7%	3.9%	3.5%	3.7%	-
Challenges[4]	34	37	31	41	37	44	38	37
DoJ	12	16	12	19	20	19	15	20
FTC	22	21	19	22	17	25	23	17

1 Scott A Sher is a partner and Christopher A Williams and Bradley T Tennis are associates at Wilson Sonsini Goodrich & Rosati, PC.

1 The US government fiscal year runs from 1 October through 30 September 30 of the following calendar year.
2 See Hart-Scott-Rodino Annual Reports for fiscal years ended 2013, 2012, 2011, 2010, 2009, 2008, and 2007, available at www.ftc.gov/bc/anncompreports.shtm. As of the time of this writing, the US antitrust agencies have not released the Hart-Scott-Rodino annual report for fiscal year 2014. For partial statistics on fiscal year 2014 reviews, see 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 www.justice.gov/atr/division-update/2015/civil-program-update.
3 A 'second request' is a request by one of the US antitrust agencies for additional information and documentary material, which extends the initial waiting period. A second request is akin to a Phase II investigation in the European Union and other jurisdictions.
4 A 'challenge' to a transaction is defined as: (1) resolution by consent decree; (2) an administrative complaint along with a request for a preliminary injunction; or (3) abandonment or restructuring of the transaction after the agency informs the parties of its antitrust concerns.

In a noteworthy step to update agency enforcement policies, in January 2015 the Federal Trade Commission issued a request for public comment on a proposal to conduct a broad retrospective study of the FTC's orders requiring divestiture or another remedy issued between 2006 and 2012.[2] The new study would update and expand upon a 1999 study on the same subject.[3] Based on the results of the 1999 study, the FTC made a number of changes to its divestiture processes, including: 'shortening the length of the divestiture period, requiring up-front buyers more frequently in cases in which less than an on-going business was divested, and requiring monitors more frequently'.[4] FTC Chairwoman Edith Ramirez stated that the aim of the proposed study is to 'provide valuable information to ensure that our remedies continue achieving their primary goal – maintaining competition in the affected markets'.[5]

The FTC will evaluate the 92 orders issued during the study period with methodologies depending on the agency's industry-specific experience. For 15 orders in the supermarkets, drug stores, funeral homes, hospitals, and clinics markets, the FTC proposes sending tailored questionnaires to buyers of divested assets.[6] For 24 orders in the pharmaceutical industry, the FTC proposes to rely on a synthesis of information it has already obtained through compliance reports, monitors and publicly available information and to reach out to industry participants only if it discovers significant information gaps.[7] For the remaining 53 orders, the FTC plans to conduct interviews of divestiture buyers, significant competitors in the appropriate markets, and customers.[8]

2 https://www.ftc.gov/system/files/documents/federal_register_notices/2015/01/1501hsrdivestiturefrn1.pdf.
3 See www.ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf.
4 https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies.
5 Id.
6 Id.
7 Id.
8 Id.

Assistant Attorney General Bill Baer echoed the need for the antitrust agencies to think carefully about remedies in a 6 February 2015 speech.[9] Baer, who was the Director of the FTC Bureau of Competition when the 1999 remedies study was prepared, reflected on the effectiveness of the remedies the DoJ had imposed in the recent *Anheuser-Busch InBev/Grupo Modelo* and *American/US Airways* mergers, arguing that consumers were already benefitting from the aggressive divestitures the DoJ imposed in those cases.[10] The FTC study and Baer's remarks indicate that the agencies will continue the recent trend of broader or more stringent remedy requirements, including the increased use of conduct remedies in support of traditional structural remedies and the expansion of supply, transitional services, and technology licensing agreements.

II MERGER NOTIFICATION UNDER THE HSR ACT

i Overview

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) provides notification and waiting requirements for certain transactions in order to provide the US antitrust agencies the opportunity to review these transaction prior to consummation.[11] Any acquisition of voting securities, non-corporate interests (e.g., LLC or partnership), or assets is subject to the HSR Act, including an acquisition of a majority or minority of a company's voting stock, acquisition of voting securities in connection with formation of a joint venture, or an acquisition of tangible or intangible assets (e.g., patents and certain exclusive licences).

Generally, parties to a transaction are required to file an HSR Premerger Notification and Report Form (HSR Form) with the FTC and DoJ if one of the following thresholds is met:[12]

a the value of the aggregate total amount of voting securities, non-corporate interests or assets being acquired exceeds $76.3 million, and either the ultimate parent entity (UPE) of the acquired entity or the UPE of the acquired entity has at least $15.3 million in assets or sales, and the other UPE has at least $152.5 million in assets or sales; or

9 www.justice.gov/atr/public/speeches/311710.pdf.

10 Id.

11 The DoJ and FTC also have the authority to investigate and challenge transactions that are not reportable under the HSR Act, whether or not such transactions have been consummated.

12 The notification thresholds are adjusted annually to reflect changes in the US Gross National Product (GNP). The thresholds listed in the main body took effect 24 February 2014. The 2014 thresholds (with corresponding 2015 thresholds following in parentheses) were: $15.2 ($15.3) million; $75.9 ($76.3) million; $151.7 ($152.5) million; and $303.4 ($305.1) million. There are additional thresholds for more uncommon transactions, but the thresholds and tests listed here cover the majority of reported transactions.

b the value of the aggregate total amount of voting securities, non-corporate interests or assets being acquired exceeds $305.1 million, regardless of the size of the parties.

The parties must wait 30 days (15 days for a cash tender offer or bankruptcy sale) after filing the HSR Form before consummating the transaction, unless the parties request and receive early termination of the waiting period from the antitrust agencies. At the end of the initial 30-day waiting period, the agency responsible for reviewing the transaction may issue a request for additional documentary material (a 'second request').[13] The responsible agency may extend the waiting period up to 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 or bankruptcy sale, after the acquiring party complies).

ii HSR notification and pre-merger conduct enforcement

Berkshire Hathaway

On 20 August 2014, the Department of Justice announced that Berkshire Hathaway would pay $896,000 in civil penalties related to its conversion of convertible notes that it owned into voting securities in USG Corp.[14] Under the HSR Act, the conversion of convertible notes, options, warrants and other voting securities with no present voting rights for members of the board of directors into voting securities is reportable if the reporting thresholds are met and no exemption applies. The complaint alleged that Berkshire Hathaway violated the HSR Act by failing to make a filing in connection with a $41 million acquisition of Symetra voting securities on 25 June 2013.[15] Berkshire Hathaway made a corrective HSR filing for that acquisition in July, but subsequently violated the Act a second time in December by failing to report its conversion of convertible notes into voting securities of USG Corp. The DoJ's suit confirms that the agencies will aggressively police violations of the premerger notification requirements of the HSR Act, which carry a maximum penalty of $16,000 a day.

Flakeboard/SierraPine

On 7 November 2014, the DoJ filed a complaint related to Flakeboard America Ltd's proposed acquisition of particleboard and fiberboard mills from competitor SierraPine alleging that the merging companies coordinated while the merger was under review by the DoJ to close SierraPine's Springfield, Oregon mill and move the customers to Flakeboard.[16] According to the complaint, the companies' proposed merger agreement included an unusual provision for SierraPine to shut down a certain facility after the HSR waiting period had expired but before the acquisition closed.[17] A labour dispute

13 See Section 7A(e) of the Clayton Act, 15 U.S.C. Section 18A(e).

14 www.justice.gov/atr/public/press_releases/2014/308144.htm.

15 www.justice.gov/atr/cases/f308100/308150.pdf.

16 www.justice.gov/atr/cases/f309700/309788.pdf.

17 Id. Paragraph 16-17.

arose shortly after the transaction was announced in January 2014, and the parties agreed that SierraPine would shut down the facility in mid-March.[18] Because of a close DoJ investigation, discussed further below, the plant was closed before the relevant waiting period expired. In addition, SierraPine provided Flakeboard with competitively sensitive information about the customers served by the plant and instructed its sales staff to refer those customers to Flakeboard.[19] The DoJ alleged that the agreement constituted a *per se* violation of Section 1 of the Sherman Act.

In settlement papers filed with the complaint, each party agreed to pay $1.9 million in penalties for violation of the waiting period requirements of the HSR Act, and FlakeBoard agreed to disgorge $1.15 million as an estimate of the profits earned as a result of the unlawful coordination.[20] The DoJ noted that the parties' cooperation with the investigation – including providing evidence of unlawful premerger conduct – was a significant factor in the DoJ's decision not to seek the maximum fine of $16,000 per day, which would have amounted to nearly $3.6 million for each party. The *Flakeboard* case is the DoJ's first gun-jumping suit since 2010, but serves as an important reminder that, in the words of Assistant Attorney General Bill Baer, '[c]ompanies proposing to merge must remain separate and independent during the government's investigation.'[21]

III MERGER ENFORCEMENT ACTIVITY

Section 7 of the Clayton Act prohibits acquisitions or mergers where the effect 'may be substantially to lessen competition, or tend to create a monopoly' in 'any line of commerce in any section of the country'.[22] The US antitrust agencies may enforce Section 7 by trying to block the merger or through resolution by consent decree. To enforce the Clayton Act, the DoJ must bring an action in a federal district court to permanently enjoin the merger.[23] By contrast, the FTC's merger enforcement procedure has both judicial and administrative elements. Prior to or during an administrative adjudicative proceeding, the FTC may bring a suit in federal court to obtain preliminary injunctive relief against the merger or acquisition pending completion of the administrative proceeding.[24]

i Department of Justice

In the 2014 fiscal year, the DoJ challenged 20 mergers – matching the 2011 record for the Obama Administration – and has announced at least nine additional challenges for the first two-thirds of fiscal year 2015. Over the past year, five of the DoJ's challenged mergers were abandoned in response to concerns that they could raise significant

18 Id. Paragraph 20.

19 Id. Paragraphs 21-24.

20 www.justice.gov/atr/cases/f309700/309796.pdf.

21 www.justice.gov/atr/public/press_releases/2014/309786.htm.

22 15 U.S.C. Section 18.

23 Section 15 of the Clayton Act; 15 U.S.C. Section 25.

24 Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. Section 53(b).

antitrust issues. The sections below describe a selection of significant DoJ investigations and challenges in the past year.

As of this writing, the DoJ continues to review a number of major transactions that could have significant effects on competition, including Halliburton's $34.6 acquisition of Baker Hughes, AT&T's $48.5 billion acquisition of DirecTV, and Charter's $55 billion acquisition of Time Warner Cable and Bright House Networks. The DoJ's resolution of these deals in the months (or years) to come will have significant effects not only on the transacting parties' industries but on the tenor and scope of agency review of these kinds of industry-defining deals.

National CineMedia/Screenvision

On 3 November 2014, the Department of Justice filed suit to block the $375 million acquisition of Screenvision LLC by National CineMedia Inc (NCM).[25] Cinema advertising networks are an intermediary between advertisers and exhibitors who create a 'preshow' of advertisements and other content to display to movie patrons before the previews and feature film begin.[26] The DoJ's complaint characterised the two parties as the only significant cinema advertising networks in the United States with a combined share of 88 per cent of movie screens in the United States.[27] The only other significant competitor identified by the DoJ – Spotlight Cinema Networks – served just 700 screens operated by niche exhibitors compared with a combined 34,000 served by the parties.[28]

The DoJ's complaint focused on particularly vigorous competition between NCM and Screenvision in the past two years resulting from Screenvision's aggressive pricing policies to win long-term exclusive contracts with exhibitors away from NCM.[29] Rather than '[r]eset[ting] NCM [prices] to current market levels,' the DoJ alleged, NCM simply decided to buy Screenvision rather than compete with it.[30] Announcing that the DoJ had filed suit to block the deal and was prepared to proceed to trial, Assistant Attorney General Bill Baer characterised the deal as a 'merger to monopoly' and 'exactly the type of transaction the antitrust laws were designed to prohibit'.[31] Less than a month before trial was scheduled to begin, NCM announced that it would abandon the deal, with Baer remarking: 'This scheme to eliminate competition should never have been considered, much less publicly proposed.'[32]

The *NCM* case is notable for a number of reasons. First, the DoJ's complaint contains numerous examples of 'bad' documents created by NCM executives, including the observation that Screenvision's strategy of undercutting NCM's pricing was 'a very

25 www.justice.gov/atr/cases/f309600/309659.pdf.

26 Id. Paragraphs 1-3.

27 Id. Paragraph 4.

28 Id. Paragraphs 25-26.

29 Id. Paragraphs 34-40.

30 Id. Paragraph 41.

31 www.justice.gov/atr/public/press_releases/2014/309656.htm.

32 www.justice.gov/atr/public/press_releases/2015/312525.htm.

unusual strategy in a duopoly'[33] and that NCM needed to 'buy [Screenvision] before either us or [Screenvision] does a stupid deal.'[34] The *NCM* case thus serves as a continued reminder following the *Bazaarvoice* challenge that merging parties' internal assessments of competition in the market can play a major role in the DoJ's decision to bring suit and how the case is framed. Second, the case serves as another example of the DoJ's continued narrow approach to advertising markets (discussed further below in the context of the Department's ongoing review of broadcast television acquisitions). The DoJ complaint cited key differences in cinema preshow advertising, including the availability of high-quality audio and video equipment, the availability of longer advertisement forms, the inability of movie patrons to skip or avoid the advertisements, and the ability to reach weekend viewers.[35]

Tyson Foods/Hillshire

The DoJ filed a consent order on 27 August 2014 to settle competitive concerns arising from Tyson Foods's $8.55 billion acquisition of rival Hillshire Brands Company.[36] Hillshire purchases sows for use in pork sausage manufacturing and, unique among major manufacturers purchases more than half of its sows directly from approximately 100 individual farmers.[37] Most manufacturers purchase buy primarily from sow marketers, which act as an intermediary to consolidate the output of individual farmers.[38] One such marketer is Tyson's Heinold Hog Markets division.[39] Tyson does not itself process sows into sausage,[40] and Hillshire does not resell the sows it purchases to other processers.[41] Thus, the DoJ's challenge preceded on the somewhat uncommonly applied theory that the merger would give the combined company monopsony power in the market for buying sows from farmers with approximately 35 per cent of the total market.[42] To settle the DoJ's concerns, Tyson agreed to divest its Heinold division in its entirety to a government-approved buyer.[43] The DoJ asserted that the divestiture would restore competition among bidders for individual breeders' sows.

Comcast/Time Warner

Comcast's proposed $45.2 billion acquisition of Time Warner Cable was undoubtedly the most headline-grabbing deal reviewed by the DoJ in the past year. After a lengthy review

33 www.justice.gov/atr/cases/f309600/309659.pdf Paragraphs 34-35.
34 Id. Paragraph 40.
35 www.justice.gov/atr/cases/f309600/309659.pdf at Paragraph 19.
36 http://ir.tyson.com/investor-relations/news-releases/news-releases-details/2014/Tyson-Foods-and-Hillshire-Brands-Announce-Definitive-Merger-Agreement/default.aspx.
37 www.justice.gov/atr/cases/f308500/308564.pdf Paragraph 14.
38 Id. Paragraph 11.
39 Id. Paragraph 3.
40 Id. Paragraph 8.
41 Id. Paragraph 9.
42 Id. Paragraph 16, 19.
43 www.justice.gov/atr/cases/f310000/310034.pdf.

coordinated between the DoJ and the FCC, Comcast announced that it would abandon the transaction on 24 April 2015.[44] In testimony before the US House of Representatives Judiciary Subcommittee on Regulatory Reform, Assistant Attorney General Bill Baer observed that the merger 'would have created a market where one company provided almost 60 per cent of high-speed internet access.'[45] FCC Chairman Tom Wheeler stated that as a result, the 'proposed merger would have posed an unacceptable risk to competition and innovation especially given the growing importance of high-speed broadband to online video and innovative new services.'[46] In light of their significant concerns about the competitive impact of the merger, both the DoJ and FCC said that Comcast's decision to abandon the merger was in the best interest of consumers.[47]

Two significant related telecommunications and television deals remain under DoJ review: AT&T's $48.5 billion proposed acquisition of DirecTV as well as Charter's recently announced deal to acquire Time Warner Cable and Bright House Communications for $55 billion. Neither deal appears to pose the same kind of competitive risk that the DoJ observed in Comcast's abandoned bid, but both will still likely face close scrutiny. AT&T and DirecTV are not as similar as Comcast and Time Warner, with AT&T holding a 6 per cent share of the Pay-TV market and DirecTV lacking a competitive high-speed internet offering.[48] In addition, where Comcast would have held more than 60 per cent of high-speed internet subscribers, the combined Charter/Time Warner would still be the number two player in the market behind Comcast with a roughly 30 per cent share. Finally, unlike Charter, Comcast owns significant programming interests as a result of its acquisition of NBC Universal, which remains subject to a 2011 consent decree.

Continental AG/Veyance Technologies

In December 2014, the DoJ reached a settlement permitting the $1.8 billion Continental AG acquisition of Veyance Technologies on the condition that Veyance divest its North American commercial air springs business.[49] The complaint alleged that the merger would have resulted in an effective duopoly in the markets for commercial air springs sold to OEMs and in the aftermarket.[50] The parties further resolved DoJ concerns that the transaction could limit competition in the market for automotive air conditioning barrier hose after Continental agreed to waive an exclusive supply agreement with the only significant competitor for Veyance's barrier hose.[51] The DoJ coordinated closely

44 http://corporate.comcast.com/news-information/news-feed/comcast-twc-charter-transactions-terminated.

45 www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-testimony-us-house-representatives.

46 https://www.fcc.gov/document/chairmans-statement-comcast-twc-merger.

47 Id.; http://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department.

48 See www.leichtmanresearch.com/press/030315release.html.

49 www.justice.gov/atr/public/press_releases/2014/310440.htm.

50 www.justice.gov/atr/cases/f310400/310451.pdf Paragraphs 20, 34.

51 www.justice.gov/atr/public/press_releases/2014/310440.htm.

with antitrust authorities in Canada, Brazil, and Mexico to share analyses and ensure that remedies were both consistent and responsive to each authority's local concerns.[52]

Applied Materials/Tokyo Electron

On 27 April 2015, Applied Materials and Tokyo Electron, the two largest firms with the 'know-how, resources and ability to develop and supply high-volume non-lithography semiconductor manufacturing equipment' announced that they would abandon their proposed $10 billion merger.[53] The companies abandoned the deal in advance of a DoJ complaint in response to the Department's determination that a proposed remedy package would not resolve its competitive concerns, particularly with respect to the development of next-generation semiconductors.[54] During the investigation, the DoJ cooperated with the Korean Fair Trade Commission (KFTC), China's Ministry of Commerce (MOFCOM), and Germany's Federal Cartel Office (Bundeskartellamt).[55]

Broadcast television acquisitions

The DoJ continued its aggressive enforcement of broadcast television station acquisitions, challenging an additional three deals in the past year. In each case, the DoJ continued to assert narrow markets for broadcast television spot advertising in specific designated market areas (DMAs).

First, the DoJ announced in July 2014 that it would require divestiture the WHTM-TV ABC affiliate station in Sinclair Broadcast Group's proposed $963 million acquisition of Perpetual Corp.[56] The WHTM-TV station had previous competed with Sinclair-owned WHP-TV and WLYH-TV in the market for broadcast television spot advertising in parts of central Pennsylvania, and the merger would give Sinclair control over three of the six stations in that market.[57] The Department also considered the competitive effect of Sinclair's acquisition of the WCIV-TV ABC affiliate in Charleston, South Carolina in light of Sinclar's close partnership and operation agreement with Cunningham Broadcasting, which owns Charleston's Fox affiliate, WTAT-TV.[58] The DoJ concluded that advertisers do not view those stations as close substitutes and thus the acquisition would not significantly impact competition.[59]

Second, the DoJ announced substantial divestitures in Media General Inc's proposed $1.5 billion acquisition of LIN Media LLC in October 2014.[60] The DoJ asserted that the acquisition would have harmed competition in the broadcast television

52 www.justice.gov/atr/division-update/2015/international-program-update.

53 www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-aba ndon-merger-plans-after-justice-department.

54 Id.

55 Id.

56 www.justice.gov/atr/public/press_releases/2014/307134.htm.

57 Id.

58 Id.

59 Id.

60 www.justice.gov/atr/public/press_releases/2014/309608.htm.

spot advertising markets for the Birmingham, Alabama; Savannah, Georgia; Mobile, Alabama/Pensacola, Florida; Providence, Rhode Island/New Bedford, Massachusetts; and Green Bay/Appleton, Wisconsin DMAs.[61] Media General was required to divest stations in those markets – affiliated with a range of broadcast networks – to Heart Television, Inc, Meredith Corporation, Sinclair Broadcast Group or other approved buyers.[62]

Third, in November the DoJ required Nexstar, Communications Corporation of America (CCA), and Silver Point Partners to divest their interests in WEVV-TV (a CBS and Fox affiliate in Evansville, Indiana) to Bayou City Broadcasting Evansville Inc or an alternative approved buyer before Nexstar's acquisition of CCA could proceed.[63] The DoJ argued that the transaction would have given Nexstar control of three of the four major broadcast television affiliated in the Evansville DMA – it would have also controlled the ABC and CW affiliate stations – harming competition in the market for broadcast television spot advertising.[64]

The treatment of these deals[65] is consistent with the DoJ's prior practice in broadcast television deals – as noted in the context of the *Gannett/Belo* deal in the previous edition of this chapter – and with the DoJ's treatment of other advertising markets – as noted in the description of the *CineMedia/Screenvision* deal above. The DoJ continues to rely on differences in the advertising medium itself (here the 'combination of sight, sound, and motion that makes television unique'[66]) to distinguish broadcast television spot advertising from print or radio media and the 'reach' of broadcast television networks to distinguish the market from subscription channel advertising or internet-based video advertising.[67] As alternatives to traditional broadcast media continue to gain traction with consumers, the DoJ may have to change its long-standing approach to evaluating competitive effects of these kinds of broadcast television station acquisitions.

Enforcement in forest products industries

In the past year and a half, the DoJ has investigated a number of mergers and acquisitions in forest product industries. First, in May 2014, Louisiana Pacific Corp abandoned its proposed acquisition of Ainsworth Lumber Co Ltd in response to DoJ concerns that the deal would like have anti-competitive effects in the market for a type of wood-based panelling known as oriented strip boards (OSBs).[68] The DoJ found that the merging parties were two of four significant suppliers of OSBs in the Pacific Northwest and two

61 Id.

62 Id.

63 www.justice.gov/atr/public/press_releases/2014/310050.htm.

64 Id.

65 See www.justice.gov/atr/cases/f309600/309622.pdf (Media General complaint); www.justice.gov/atr/cases/f310000/310052.pdf (Nexstar complaint); www.justice.gov/atr/cases/f307100/307154.pdf (Sinclair complaint).

66 E.g., www.justice.gov/atr/cases/f309600/309622.pdf Paragraph 10.

67 E.g., id. Paragraphs 11-12.

68 www.justice.gov/atr/public/press_releases/2014/305936.htm.

of three significant suppliers in the Upper Midwest.[69] The combination would have given the combined firm a 63 per cent and a 55 per cent share in those markets, respectively.[70] In addition to eliminating head-to-head competition between the two parties, the merger would have allowed the combined firm to more effectively target individual customers for price increases and coordinate with remaining suppliers.[71] The seller, Ainsworth, is a Canadian corporation, and the DoJ worked closely with the Canadian Competition Bureau (CCB) in evaluating the likely competitive effects of the merger.[72]

In October 2014 Flakeboard abandoned plans to purchase three particleboard and fiberboard mills from its rival SierraPine after a nine-month investigation. As noted above, the *Flakeboard* case is particularly notable because the DoJ separately brought a suit alleging that the parties 'jumped the gun' by entering into an agreement that resulted in one of SierraPine's mills being shut down during the investigation and the mill's customers being transferred to Flakeboard. In addition to the premerger coordination between the parties, the DoJ was troubled by the potential competitive effect of the acquisition.[73] Specifically, the DoJ concluded that the deal threatened competition in the medium density fiberboard (MDF) market, which only had four significant suppliers (including the merging parties) on the West Coast.[74] The Department found that for many customers, Flakeboard and SierraPine were the two closest suppliers and that after the acquisition Flakeboard would have had a 58 per cent share of the market for the thick, dense grades of MDF sold on to West Coast customers.[75] Thus, the acquisition would have eliminated significant head-to-head competition in the market and enhanced the ability of remaining competitors to unlawfully coordinate.[76]

Finally, on 31 December 2014, the DoJ announced a settlement in Verso Paper Corp's $1.4 billion acquisition of NewPage Holdings, Inc requiring the parties to divest two paper mills before closing the transaction.[77] The DoJ's complaint, filed concurrently with a consent order, alleged that the transaction would have harmed competition in the markets for coated publication paper and label paper in North America.[78] The combined entity would have held a 50 per cent share in the coated freesheet paper market, with the number two player itself holding a 30 per cent share, a 40 per cent share in the coated groundwood paper market, and a 70 per cent in the label paper market.[79] The DoJ found that competition between the merging parties would be particularly important as demand for coated publication papers declines and higher-cost competitors exit

69 Id.

70 Id.

71 Id.

72 Id.

73 www.justice.gov/atr/public/press_releases/2014/309005.htm.

74 Id.

75 Id.

76 Id.

77 www.justice.gov/atr/public/press_releases/2014/310824.htm.

78 www.justice.gov/atr/cases/f310800/310829.pdf.

79 Id. Paragraphs 28, 30, 36.

the market.[80] Under the terms of the consent order, Verso was required to divest two NewPage mills that collectively accounted for roughly the same level of production as Verso operated before the transaction to Catalyst Paper Corporation (or an alternative, independent buyer if approved by the government).[81]

ii Federal Trade Commission

In US government fiscal year 2014, the Federal Trade Commission challenged 17 transactions, with 13 resulting in a consent order, three being abandoned during the FTC's investigation, and one being abandoned after the FTC had issued an administrative complaint. In the first half of fiscal year 2015, the FTC has initiated a further 11 enforcement actions, including a number challenges – discussed below – that have led to an administrative complaint unresolved by a consent order. The sections below discuss a selection of significant or noteworthy FTC challenges and investigations over the past year.

In addition to the challenges discussed below, the FTC continues to investigate a number of significant transactions, including, for instance, Staples's proposed $6.3 billion acquisition of Office Depot. In 2013, the FTC declined to challenge the combination of Office Depot and Officemax, then the second and third largest office supply superstores behind Staples.[82] In that deal, the FTC focused on growing competition for consumer sales of office supplies through other brick-and-mortar stores, such as mass merchants like Costco and Wal-Mart, as well as through online channels, such as Amazon.[83] This latest acquisition would leave only a single major office supply superstore chain operating in the United States, and it remains to be seen whether the FTC will be persuaded that competition from other distribution channels will be a sufficient competitive check on the post-merger Staples.

Sysco/US Foods

On 19 February, the FTC announced that it had filed an administrative complaint seeking to block the merger between Sysco and US Foods following a yearlong investigation.[84] The Commission voted 3-2 to file the complaint, with Commissioners Ohlhausen and Wright dissenting.[85] The complaint alleged that the merger would harm competition in the national market and 32 local markets for broadline food distribution, which is distinguished by 'extensive product lines, including national-brand and private-label food products, and provide frequent and flexible delivery, high levels of customer service,

80 www.justice.gov/atr/public/press_releases/2014/310824.htm.

81 Id.

82 www.ftc.gov/sites/default/files/documents/closing_letters/office-depot-inc./officemax-inc./131101officedepotofficemaxstatement.pdf.

83 Id.

84 https://www.ftc.gov/news-events/press-releases/2015/02/ftc-challenges-proposed-merger-sysco-us-foods.

85 Id.

and other value-added services such as order tracking, menu planning, and nutritional information.'[86]

Sysco and US Food collectively hold a roughly 75 per cent share of the national market, with the next largest distributor maintaining just an 11 per cent share.[87] The two companies are alleged to be the only broadline distributors with truly national footprints, and regional consortia or *ad hoc* networks of smaller distributors would be unable to constrain the post-merger firm's conduct.[88] For example, the FTC cited a US Foods document noting that 'regional players will bid, but not be seriously considered' for a certain national customer's business.[89] In addition, the FTC asserted that the two companies were the best available distribution options for customers in 32 local markets based on the locations of the parties' and competitors distribution centres around the country.[90]

The FTC's complaint specifically alleged that a proposed divestiture of 11 distribution centres to rival Performance Food Group (PFG), which holds a 5 per cent national market share, would not be sufficient to mitigate the competitive risks posed by the acquisition.[91] The FTC argued that the addition of those centres would not give PFG the national footprint necessary to compete for national customers nor the overall scale and capacity necessary to compete against Sysco as effectively as US Foods has pre-merger.[92] Although Sysco had announced its intention to challenge the FTC's complaint,[93] it chose to abandon the transaction after a federal court issued an order broadly accepting the FTC's theory and enjoining the transaction from closing pending trial.[94]

Dollar Tree/Family Dollar

Over the second half of 2014, Family Dollar – a leading national discount retailer – was subject to highly publicised competing acquisition attempts by rivals: (1) an $8.5 billion offer from number three player, Dollar Tree and (2) a $9.1 billion bid by the market leader, Dollar General.[95] In July, Family Dollar's board of directors approved Dollar Tree's

86 Id.

87 https://www.ftc.gov/system/files/documents/cases/150219syscopt3cmpt.pdf Paragraph 6.

88 Id. Paragraph 10.

89 Id. Paragraph 57.

90 Id. Paragraphs 11, 41-42.

91 Id. Paragraph 12.

92 Id.

93 http://investors.sysco.com/press-releases/Press-Release-Details/2015/Sysco-to-Contest-Federal-Trade-Commissions-Attempt-to-Block-Proposed-US-Foods-Merger/default.aspx.

94 https://www.ftc.gov/news-events/press-releases/2015/07/following-syscos-abandonment-proposed-merger-us-foods-ftc-closes.

95 http://investor.familydollar.com/investors-relations/news-releases/Press-Release-Details/2014/Family-Dollar-Certifies-Substantial-Compliance-With-FTCS-Second-Requests/default.aspx.

offer.[96] In August, Family Dollar's board issued a statement rejecting Dollar General's higher offer and reaffirming its support for the original *Dollar Tree* deal.[97] The Family Dollar board specifically cited antitrust and other regulatory concerns, concluding that the Dollar General offer was not reasonably likely to be concluded on the proposed terms.[98] After Family Dollar's board rejected a revised proposal,[99] Dollar General issued a conditional tender offer to acquire Family Dollar's shares that would expire on 20 January 2015.[100] The Family Dollar board recommended that shareholders refuse to tender their shares.[101]

In mid-October 2014, Family Dollar certified that it had achieved substantial compliance with the FTC's second requests regarding both proposed acquisitions.[102] The following January, Family Dollar's board issued an open letter to shareholders urging them not to tender their shares on the basis of FTC feedback on the two proposals.[103] Specifically, the board stated that the FTC had indicated that a divestiture of between 3,500 and 4,000 stores may be necessary to settle competitive concerns arising from the overlap with Dollar General, but that only roughly 300 stores would need to be divested under the Dollar Tree proposal.[104] On 22 January 2015, Family Dollar shareholders formally rejected Dollar General's hostile takeover attempt.[105] Family Dollar's decision to reject the Dollar General offer shows the impact that the expected outcome of close antitrust scrutiny can have on the merger process. On 2 July the FTC announced that it

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96 http://investor.familydollar.com/investors-relations/news-releases/Press-Release-Details/2014/Dollar-Tree-Inc-to-Acquire-Family-Dollar-Stores-Inc-to-Create-North-Americas-Leading-Discount-Retailer/default.aspx.

97 http://investor.familydollar.com/investors-relations/news-releases/Press-Release-Details/2014/Family-Dollar-Board-of-Directors-Rejects-Proposal-from-Dollar-General-Based-on-Antitrust-Issues/default.aspx.

98 Id.

99 http://investor.familydollar.com/investors-relations/news-releases/Press-Release-Details/2014/Family-Dollar-Board-of-Directors-Rejects-Revised-Proposal-from-Dollar-General-Based-on-Antitrust-Issues/default.aspx.

100 http://investor.familydollar.com/investors-relations/news-releases/Press-Release-Details/2014/Family-Dollar-Board-of-Directors-Rejects-Dollar-Generals-Illusory-Tender-Offer/default.aspx.

101 Id.

102 http://investor.familydollar.com/investors-relations/news-releases/Press-Release-Details/2014/Family-Dollar-Certifies-Substantial-Compliance-With-FTCS-Second-Requests/default.aspx.

103 http://investor.familydollar.com/investors-relations/news-releases/Press-Release-Details/2015/Family-Dollar-Issues-Open-Letter-to-Stockholders/default.aspx.

104 Id.

105 http://investor.familydollar.com/investors-relations/news-releases/Press-Release-Details/2015/Family-Dollar-Stockholders-Approve-Dollar-Tree-Merger/default.aspx.

had reached an agreement requiring the divestiture of 330 Family Dollar stores to private equity firm Sycamore Partners to allow the acquisition by Dollar Tree to close.[106]

Verisk Analytics/EagleView Technology

In December 2014, the FTC unanimously voted to issue an administrative complaint to block the $650 million acquisition of EagleView Technology by Verisk Analytics, alleging that the combination would result in a nearly 100 per cent monopoly of the US market for rooftop aerial measurement products used by insurance companies to evaluate property claims.[107] The complaint alleged that EagleView held a roughly 90 per cent share of the market and proclaimed itself the 'industry standard' in aerial rooftop measurement products.[108] Verisk, through its Xactware Solutions subsidiary, entered the market roughly two years ago and has developed into the only significant competitor to EagleView with a roughly 9 per cent market share.[109] The FTC further alleged that EagleView had used the threat of patent litigation to force other competitors from the market, but that Verisk would have a strong incentive to resist similar tactics because it provides the dominant software platform used to process insurance claims subject to assessment through aerial rooftop measurement products and thus has strong pre-existing relationships with insurance companies.[110] The day after the FTC filed its administrative complaint, the parties announced that they would abandon the transaction.[111]

Reynolds American/Lorillard

In March 2015, the Federal Trade Commission voted to accept a divestiture package proposed by Reynolds American Inc. and Lorillard, Inc. to secure approval for their $27.4 billion merger.[112] Reynolds American and Lorillard agreed to divest four cigarette brands (Reynolds's Winston, Kool, and Salem brands as well as Lorillard's Maverick brand).[113] The merging parties held 26 per cent and 15 per cent market shares, respectively, and were the second and third-largest players trailing Philip Morris USA, which leads the market with a 51 per cent share.[114] The majority found that divestiture of those four brands to Imperial, currently a fringe player in the US market, would

106 https://www.ftc.gov/news-events/press-releases/2015/07/ftc-requires-dollar-tree-family-dollar-divest-330-stores.

107 https://www.ftc.gov/news-events/press-releases/2014/12/ftc-challenges-verisk-analytics-incs-proposed-acquisition.

108 https://www.ftc.gov/system/files/documents/cases/141216veriskcmpt.pdf Paragraph 3.

109 Id.

110 Id.

111 https://www.ftc.gov/news-events/press-releases/2014/12/statement-ftc-bureau-competition-director-deborah-feinstein.

112 https://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-reynolds-lorillard-divest-four-cigarette-brands.

113 https://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-reynolds-lorillard-divest-four-cigarette-brands.

114 https://www.ftc.gov/system/files/documents/cases/150526reynoldsstatement.pdf.

restore competition lost as a result of the merger.[115] Commissioners Brill and Wright dissented on different grounds. Commissioner Brill issued a statement arguing that the divestitures were not sufficient to prevent unilateral or coordinated anti-competitive effects post-merger, particularly because the divested brands had declining share and Imperial had not previously been successful developing its Winston brand in the United States.[116] Commissioner Wright argued that because the arrangement was presented to the FTC as a three-way deal, the Commission should have simply closed its investigation and allowed the deal to close normally.[117]

Par Petroleum/Mid Pac Petroleum

On 18 March 2015, the FTC announced that Par Petroleum had agreed to terminate its storage and throughput rights at a key gasoline terminal in Hawaii in connection with its $102 million acquisition of Mid Pac Petroleum.[118] According to a 4-1 majority of Commissioners, only Par Petroleum, Chevron, and Aloha Petroleum own commercial gasoline terminals in Hawaii that are capable of receiving economical shipments of imported Hawaii-grade gasoline blendstock (HIBOB).[119] Par and Chevron are capable of locally producing enough HIBOB locally to meet Hawaiian demand, but Aloha's threat to import HIBOB was a critical constraint on prices charged by local refiners.[120] Mid Pac Petroleum had a long-term throughput and storage agreement at Aloha's facility, and the post-merger Par allegedly would have been able to use the agreement to impair Aloha's ability to import HIBOB on competitive terms by increasing storage to diminish the capacity available to Aloha.[121] Commissioner Wright issued a dissenting statement, arguing that neither the record nor the Commission's economic analysis showed that it would be profitable for Par to adopt such an exclusionary strategy.[122]

Holcim/Lafarge and ZF Friedrichshafen/TRW Automotive Holdings

In May, Holcim Ltd and Lafarge SA agreed to a number of cement plants, a quarry, and terminals and other distribution assets in connection with their $25 billion merger creating the world's largest cement manufacturer.[123] A 4-1 FTC majority approved the divestment package to settle concerns that the merger would harm competition for the

115 Id.

116 https://www.ftc.gov/system/files/documents/cases/150526reynoldsbrillstatement-1.pdf.

117 https://www.ftc.gov/system/files/documents/cases/150526reynoldswrightstatement.pdf.

118 https://www.ftc.gov/news-events/press-releases/2015/03/ftc-puts-conditions-par-petroleum-corporations-acquisition-mid.

119 https://www.ftc.gov/system/files/documents/public_statements/642341/150318parpetroleumstatement.pdf.

120 Id.

121 Id.

122 https://www.ftc.gov/system/files/documents/public_statements/630951/150318parpetroleumwrightstatement.pdf.

123 https://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets.

manufacture of portland cement (an essential ingredient for concrete) in 12 local and regional markets and for the manufacture of slag cement (a specialised product for more durable concrete structures) in two additional markets.[124] The consent order reflects close coordination between the FTC and the Canadian Competition Bureau (CCB). The divestiture of Holcim's Trident, Montana and Mississauga, Ontario plants as well as related distribution terminals resolve the FTC's concerns about competition in the northern United States and are part of a larger divestment package required to address the CCB's concerns.[125]

The FTC majority found that the merger would have likely led to unilateral anti-competitive effects in the identified local and regional markets in addition to increasing the likelihood of post-merger coordination among the remaining manufacturers.[126] In a lengthy statement dissenting in part from the majority's decision, Commissioner Wright asserted that in six markets the majority's finding of likely unilateral anti-competitive effects rests on 'little more than the change in market structure' rather than particularised evidence of competitive harm and thus has no economic basis.[127] In addition, Commissioner Wright took issue with the majority's evidence of an increased likelihood of coordinated effects, arguing again that the majority's reliance on structural evidence did not provide a sound economic basis for its conclusions.[128]

Also in May 2015, a 4-1 FTC majority voted to approve a divestment package to remedy competitive concerns in the $12.4 billion merger between ZF Friedrichshafen (ZF) and TRW Automotive Holdings's (TRW), which will create the world's second-largest automotive parts supplier.[129] The merging parties both produce tie rods, which link the wheels of a vehicle to the steering control mechanism.[130] Because of their weight, it is not economical to ship tie rods over long distances and thus North American customers primarily rely on customers with production facilities in the United States, Canada, or Mexico.[131] ZF and TRW hold market shares of 23 per cent and 18 per cent respectively in the North American market with USK Internacional (Urresko) leading the market with a 58 per cent share.[132] The majority noted that the merger would result in a highly concentrated market with an increased likelihood of both unilateral and coordinated

124 https://www.ftc.gov/system/files/documents/cases/150504holcimcmpt.pdf.

125 https://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets.

126 https://www.ftc.gov/system/files/documents/public_statements/641681/150508holcimlafargecommstmt.pdf.

127 https://www.ftc.gov/system/files/documents/public_statements/641691/150508holcimlafargejdwstmt.pdf.

128 Id.

129 https://www.ftc.gov/news-events/press-releases/2015/05/ftc-puts-conditions-merger-auto-parts-suppliers-zf.

130 https://www.ftc.gov/system/files/documents/public_statements/641721/150508zeppelincommstmt.pdf.

131 Id.

132 Id.

anti-competitive effects.[133] The majority thus accepted the parties' offer to divest TRW's North American and European linkage and suspension business, which simultaneously satisfied the European Commission's competitive concerns.[134] Commissioner Wright issued a dissenting statement on similar grounds to his dissent in *Holcim/Lafarge*, arguing that modern economic theory does not support condemning increases in concentration without more particularised evidence of likely competitive harm.[135]

The FTC continues to aggressively enforce the antitrust laws in health-care industry

The FTC has continued to focus closely on mergers in the health-care industries, including pharmaceuticals, hospitals and other care providers, and medical devices. Each year, enforcement in these areas makes up a significant portion of the FTC's overall activity. Notably, each of the actions discussed below was approved by a unanimous vote of the Commissioners – a marked contrast to the dissenting statements generated by Commission votes in other areas – indicating broad consensus with the analytical techniques and evidentiary standards that the FTC has developed in this sector.

Steris Synergy Health

On 29 May 2015, the FTC announced that it would attempt to block Steris Corporation's proposed $1.9 billion acquisition of Synergy Health in order to protect future competition in regional markets for sterilisation of products using radiation, particularly x-ray or gamma radiation.[136] The administrative complaint alleges that gamma radiation is currently the only sterilisation method on the market in the United States that is suitable for sterilisation of high-density health-care products in large volumes.[137] X-ray sterilisation is expected to become a close substitute for gamma ray sterilisation in the future.[138] Most customers purchase sterilisation services on a contract basis and are not capable of developing an in-hour solution.[139] Currently, Steris and Sterigenics are the only providers of contract gamma ray sterilisation services operating in the United States.[140] Synergy, the third major provider of contract sterilisation services globally, does not currently offer gamma ray sterilisation in the United States.[141] However, the company had a well-developed plan to enter the US market with x-ray sterilisation,[142] which according

133 Id.

134 Id.

135 https://www.ftc.gov/system/files/documents/public_statements/641701/150508zeppelinjdwstmt.pdf.

136 https://www.ftc.gov/news-events/press-releases/2015/05/ftc-challenges-merger-companies-provide-sterilization-services.

137 https://www.ftc.gov/system/files/documents/cases/150529sterissynergypart3cmpt.pdf Paragraphs 27-28.

138 Id. Paragraphs 29-30.

139 Id. Paragraphs 40-42.

140 Id. Paragraph 54.

141 Id. Paragraph 57.

142 Id. Paragraphs 57-58.

to the FTC would have substantially de-concentrated the relevant markets.[143] The FTC thus alleged that the acquisition would deprive consumers of the benefits of future competition between Synergy and the incumbent US gamma sterilisation providers.[144] Steris has announced that it plans to contest the FTC's challenge and that it welcomes 'full judicial review of the competitive effects of the combination'.[145]

Surgery Center Holdings/Symbion Holdings

In the past year, the FTC has continued to closely scrutinise hospital transactions for their effect on local competition between health-care service providers. For example, in October 2014, the FTC announced that it would require divestiture of an ambulatory surgery centre in Orange City, Florida in Surgery Center Holdings, Inc's $792 million purchase of Symbion Holdings Corporation.[146] The FTC's complaint alleged that the parties operated two of the three largest providers of outpatient surgical services to commercially insured patients in a geographic market approximating the southwest section of Volusia County, Florida.[147]

St. Luke's Health System/Salzer Medical Group

The FTC scored a significant win with the Ninth Circuit Court of Appeals upholding the district court's decision in favor of the FTC in the *St. Luke's* case. In January 2014, the Idaho district court upheld the FTC's that the merger reduced competition because the combined entity accounted for nearly 80 per cent of the market for adult primary care in Nampa, Idaho.[148] In February 2015, the Ninth Circuit affirmed.[149] Although FTC Bureau of Competition Director Deborah Feinstein praised the court's application of a forward-looking analysis to determine whether a merger ran afoul of the Clayton Act's prohibition against mergers whose effect 'may be to substantially lessen competition',[150] the merging parties have criticised the decision as ignoring the potential efficiency gains from the transaction.

143 Id. Paragraph 64.

144 Id. Paragraph 68.

145 http://phx.corporate-ir.net/phoenix.zhtml?c=68786&p=irol-newsArticle&ID=2054320.

146 https://www.ftc.gov/news-events/press-releases/2014/10/ftc-requires-divestitu re-condition-surgery-center-holdings.

147 www.ftc.gov/system/files/documents/cases/142031higcmpt1.pdf Paragraph 9.

148 See *FTC v. St. Luke's Health System, Ltd.,* No. 13-cv-00116 (D. Idaho, Jan. 24, 2014), consolidated with lead case *St. Alphonsus Medical Center-Nampa et al. v. St. Luke's Health System Ltd.,* No. 1:12-cv-00560 (D. Idaho, Jan. 24, 2014) available at www.ftc.gov/enforcement/cases-proceedings/121-0069/st-lukes-health-system-ltd-saltzer-medical-group-pa.

149 https://www.ftc.gov/system/files/documents/cases/150210stlukeopinion.pdf.

150 https://www.ftc.gov/news-events/blogs/competition-matters/2015/02/9th-circuit-affirms-st-lu kessaltzer-merger-violates.

Medtronic/Covidien

In November, Medtronic agreed to divest Covidien's drug-coated balloon catheter business to Spectranetics to settle charges that Medtronic's proposed $42.9 billion acquisition would harm future competition in that market.[151] Currently CR Bard, Inc is the only supplier of drug-coated balloon catheters indicated for the femoropopliteal artery in the United States.[152] Moreover, Medtronic and Covidien are the only two potential market entrants that have advanced to the clinical trial stage of the FDA approval process, making it unlikely that any other competitors will enter in time to counteract the loss of competition caused by merger.[153]

Pharmaceuticals

Mergers involving pharmaceuticals have continued to receive a high degree of scrutiny from the FTC. In the past year, the FTC has required divestitures of overlapping generic products in four cases to protect competition within generic-specific markets: Akorn Inc's acquisition of VersaPharm Inc (generic injectable rifampin);[154] Sun Pharmaceutical's acquisition of Ranbaxy Laboratories (generic minocycline);[155] Impax Laboratories Inc's acquisition of CorePharma LLC (generic pilocarpine and generic ursodiol);[156] and Actavis plc's acquisition of Forest Laboratories, Inc (generic diltiazem hydrochloride extended release capsules, generic ursodiol, and generic propranolol hydrochloride extended release capsules).[157] In each case, the Commission observed that one or both of the merging parties was a likely future entrant into a concentrated market for the relevant generic. In the *Actavis/Forest Labs* acquisition, the FTC also found that the transaction would delay the introduction of a generic version of Forest's Lamictal ODT as Actavis was the only company to have received FDA approval for a generic.[158] Taking a somewhat different approach, in *Valeant Pharmaceuticals/Precision Dermatology*, the FTC required divestiture of both Precision's branded single-agent topical tretinoins and its generic Retin-A products (both common acne treatments).[159] The FTC concluded that the acquisition would eliminate current competition both in a combined branded and

151 https://www.ftc.gov/news-events/press-releases/2014/11/ftc-puts-conditions-medtronic s-proposed-acquisition-covidien.

152 https://www.ftc.gov/system/files/documents/cases/141126medtroniccmpt.pdf Paragraph 7.

153 Id.

154 https://www.ftc.gov/news-events/press-releases/2014/08/ftc-puts-conditions-akorn-incs-proposed-acquisition-versapharm.

155 https://www.ftc.gov/news-events/press-releases/2015/01/ftc-puts-conditions-su n-pharmaceuticals-proposed-acquisition.

156 https://www.ftc.gov/news-events/press-releases/2015/03/ftc-requires-divestitu res-connection-impax-laboratories-incs

157 https://www.ftc.gov/news-events/press-releases/2014/06/ftc-puts-conditions-actavis-plcs-acquisition-forest-laboratories.

158 Id.

159 https://www.ftc.gov/news-events/press-releases/2014/07/ftc-puts-conditions-valean t-pharmaceuticals-proposed-acquisition.

generic single-agent topical tretinoins market and in a separate generic Retin-A market. The parties were the only two significant branded suppliers in the former market and the two largest suppliers in the latter.[160]

In the past year, the FTC has also required divestitures in a pair of mergers involving over-the-counter drug overlaps. In April the FTC placed conditions on Prestige Brand Holdings Inc's proposed $750 million acquisition of Insight Pharmaceuticals Corporation, finding that the two companies' over-the-counter motion-sickness products (Dramamine and Bonine, respectively) were the only two branded products with significant sales.[161] The FTC required that Prestige divest Bonine to Wellspring Pharmaceuticals.[162] Similarly, in November the FTC required Novartis AG to divest its Habitrol-branded nicotine replacement therapy patch to proceed with a joint venture with GSK.[163] The parties were the only suppliers of branded nicotine patches in the United States and two of three companies that supplied private label patches to retailers.[164]

Finally, in February the FTC required Novartis AG to divest all assets related to its in-development BRAF and MEK inhibitor drugs, which are used both separately and in combination to treat melanoma, in order to complete its acquisition of GSK's cancer treatment portfolio.[165] GSK offers one of only two FDA-approved BRAF inhibitors for sale in the United States (the other is sold by Roche) and the only FDA-approved MEK inhibitor.[166] Novartis is the only like near-term entrant in the BRAF inhibitor market and, with Roche, one of only a handful of companies with a MEK inhibitor in late-stage clinical development.[167] The FTC coordinated with the European Commission to approve a divestiture buyer, Array BioPharma, in order to assure that development of Novartis's BRAF and MEK inhibitor products continues uninterrupted.[168]

160 Id.

161 https://www.ftc.gov/news-events/press-releases/2014/08/ftc-puts-conditions-proposed-acquisition-insight-pharmaceuticals.

162 Id.

163 https://www.ftc.gov/news-events/press-releases/2014/11/ftc-puts-conditions-pharmaceutical-joint-venture-between.

164 Id.

165 https://www.ftc.gov/news-events/press-releases/2015/02/ftc-puts-conditions-novartis-ags-proposed-acquisition.

166 https://www.ftc.gov/system/files/documents/cases/complaint_0.pdf Paragraphs 7-8.

167 Id.

168 https://www.ftc.gov/news-events/press-releases/2015/02/ftc-puts-conditions-novartis-ags-proposed-acquisition.

Appendix 1

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Götz Drauz's practice is focused on EU and German competition law. He has represented companies in some of the most significant merger matters. Named an 'elite' practitioner by *Global Competition Review*, Mr Drauz is recognised in all the principal directories as a leading competition lawyer. Prior to entering private practice, he served at the European Commission for 25 years, most recently as the deputy director-general for competition and previously as the head of the merger task force.

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Scott Sher is a partner in Wilson Sonsini Goodrich & Rosati's Washington, DC, office, where his practice focuses on antitrust counseling and litigation. He represents clients in connection with antitrust issues that arise throughout the merger and acquisition process, from pre-merger counseling through investigations conducted by the Department of Justice, the Federal Trade Commission, the European Commission, China's Ministry of Commerce (MOFCOM), and other foreign regulatory agencies. In addition, Scott has significant experience providing both day-to-day counselling and litigation representation to clients on issues pertaining to intellectual property, joint ventures, pricing and distribution, trade association, and patent pooling matters.

Scott's representations have included a number of cutting-edge cases involving the intersection of antitrust and intellectual property law. He specialises in working with companies in the software, biotechnology, pharmaceutical, semiconductor, telecommunications, computer hardware, internet infrastructure, and e-commerce industries. *Global Competition Review*, in its review of antitrust lawyers in the United States, called Scott 'a true star of the antitrust bar'.

Prior to joining Wilson Sonsini Goodrich & Rosati, Scott clerked for both the Honorable Joseph T Sneed III of the US Court of Appeals for the Ninth Circuit in San Francisco and the Honorable Charles A Legge of the US District Court for the Northern District of California.

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Chris's national security experience includes counseling clients on matters affecting foreign investment, export controls, and economic sanctions laws. He has represented various companies in obtaining clearance before the Committee on Foreign Investment in the United States (CFIUS), as well as in obtaining export approvals and classifications, particularly in the area of encryption, from the US Department of Commerce.

Prior to joining the firm, Chris was an associate in the Washington, DC, office of Squire, Sanders & Dempsey, where he practiced antitrust, international trade, export controls and economic sanctions, and foreign investment law. During law school, he studied comparative law and Latin American competition, trade, and foreign investment law in Chile and Argentina. He was also a fellow in the Marshall-Brennan Constitutional Literacy Program, through which he co-taught a course on constitutional law and juvenile justice at a public high school in the District of Columbia.

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