The Mergers & Acquisitions Review

Seventh Edition

Editors
Simon Robinson and Mark Zerdin

Law Business Research

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This article was first published in The Mergers & Acquisitions Review, 7th edition
(published in August 2013 – editors Simon Robinson and Mark Zerdin).

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-907606-75-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

PUBLISHER'S NOTE

In presenting this seventh annual edition of *The Mergers & Acquisitions Review*, the publisher would like to extend warm and heartfelt thanks to editor Simon Robinson, who has recently retired from Slaughter and May. Simon has held the position of editor of *The Mergers & Acquisitions Review* since its inauguration seven years ago, and Simon and his partners at Slaughter and May have been instrumental in the success of The Law Reviews series. Thank you Simon.

The publisher would like to welcome Mark Zerdin, also a partner at Slaughter and May, as current and future editor of *The Mergers & Acquisitions Review*. We are delighted to have Mark on board, and we look forward to future editions in Mark's very capable editorial hands.

Gideon Roberton
Publisher, The Law Reviews
August 2013

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AABØ-EVENSEN & CO ADVOKATFIRMA

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AGUILAR CASTILLO LOVE

ANDERSON MŌRI & TOMOTSUNE

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EDITOR'S PREFACE

This past year has seen some surprising twists and turns, not only in the mergers and acquisitions markets but also in the economic and political environments. November saw the re-election of Barack Obama, although this had less of an impact on the markets than an announcement by Ben Bernanke in May that the US Federal Reserve would consider a slowdown in its programme of quantitative easing. On the other side of the Pacific, Xi Jinping has outlined a new communist doctrine – the 'Chinese dream'. The doctrine reflects the changing economic outlook in China where growth will be increasingly consumer rather than investment-led. A new political rhetoric has also emerged in Japan as Shinzo Abe, elected in a landslide December victory, seeks to reinvigorate the Japanese economy. Both rebrandings flirt with nationalist sentiment and the attitude of these two countries towards one another will continue to bear on the region's business environment.

In Europe, despite an awkward Cypriot bailout, the sovereign debt crisis showed signs of stability and government bond yields are falling. Europe also improved its attractiveness in the eyes of investors and remains the largest destination for foreign direct investment. However, there has yet to be a return to growth. Investors seem split fairly evenly between those who believe Europe will emerge from the crisis in the next three years, and those who believe it will take five years or more. In any event, a return to the boom years is unlikely in the near future, particularly as the emerging markets see a relative slowdown. The IMF data for 2012 shows that the combined growth rate of India and China is at its lowest in over 20 years while global growth fell below 2.5 per cent in the second half of 2012. This global slowdown continues to pull M&A figures down making 2012 the fifth consecutive year in which deal values fell globally.

There are reasons for optimism though, particularly in the US market which has seen some substantial deals (the acquisitions of Heinz and Virgin Media being particular highlights). These deals have been made possible by the return of debt financing where the right deal can attract very favourable terms. Equities have also performed much more strongly over the past year. In May 2013 both the Dow Jones and the FTSE 100 hit record highs – validating to some extent the aggressive monetary policies pursued in

the US and the UK. Whether political will can start to lift the markets more broadly still remains to be seen.

I would like to thank the contributors for their support in producing the seventh 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 2013

Chapter 4

US ANTITRUST

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

I US COMPETITION OVERVIEW

During the campaign for the 2008 election, President Obama promised to 'reinvigorate' antitrust enforcement, which he claimed had been lacking under the Bush Administration.[2] Although antitrust enforcement during the past four years was likely not as 'reinvigorated' as the Obama Administration had initially intended, antitrust enforcement, particularly in the area of mergers and acquisitions, has been significantly more active than during the previous Administration. Despite the economic downturn that marked the beginning of the President's first term, there has been a significant increase in the review of mergers and acquisitions and enforcement actions over the past four years compared with the previous eight years under President Bush.

In fact, the rates of second requests and challenges to transactions during the first four years of the Obama Administration were approximately 1.4 and 2.0 times higher, respectively, than during the last four years of the Bush Administration. Despite the slowdown of merger activity over the past four years, there have been 153 challenges to transactions compared with 121 during the last four years of the Bush Administration when the economy was more robust. The following charts[3] set out data for transactions

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

2 Statement of Senator Barack Obama for The American Antitrust Institute (September 2007), available at www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

3 See Hart-Scott-Rodino Annual Reports for fiscal years ended 2012, 2011, 2010, 2009, 2008, 2007, 2006, and 2005, available at www.ftc.gov/bc/anncompreports.shtm. 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

reported to the US antitrust agencies – the Department of Justice (DoJ) Antitrust Division and the Federal Trade Commission (FTC) – over the past eight years.

Fiscal year	*2005*	*2006*	*2007*	*2008*	*2009*	*2010*	*2011*	*2012*
Transactions reported*	1,675	1,768	2,201	1,726	716	1,166	1,450	1,429
Second requests†	50	45	63	41	31	42	55	49
DoJ	25	17	32	20	16	22	31	29
FTC	25	28	31	21	15	20	24	20
% Second requests‡	3.1%	2.6%	3.0%	2.5%	4.5%	3.7%	3.9%	3.5%

* See Hart-Scott-Rodino Annual Report for Fiscal Year 2012, at Appendix A, available at www.ftc.gov/bc/anncompreports.shtm.
† Id.
‡ Id. at p. 6

Despite the slight decline in second requests in fiscal year 2012,[4] the number of challenges increased from 37 to 44, which is the most since fiscal year 2001 when the antitrust agencies challenged a total of 55 mergers. Moreover, fiscal year 2012 represented the FTC's most active year since fiscal year 2000 when it challenged 32 transactions.

Fiscal year	*2005*	*2006*	*2007*	*2008*	*2009*	*2010*	*2011*	*2012*
Challenges*	18	32	34	37	31	41	37	44
DoJ	4	16	12	16	12	19	20	19
FTC	14	16	22	21	19	22	17	25

* See Hart-Scott-Rodino Annual Reports for fiscal years ended 2012, 2011, 2010, 2009, 2008, 2007, 2006, and 2005, available at www.ftc.gov/bc/anncompreports.shtm.

Two of the DoJ's significant investigations over the past year involved familiar faces in merger challenges from the past few years – Anheuser-Busch InBev (InBev) and T-Mobile. The settlement terms in *InBev/Grupo Modelo* in many ways mirror those in the *InBev/Anheuser-Busch* settlement in 2009, requiring the divestiture of sufficient physical and IP assets to establish a selection of brands as a fully independent competitor. The DoJ's review of the *T-Mobile/Metro PCS* deal went much better for the parties than the failed *AT&T/T-Mobile* merger in 2011. The DoJ ultimately closed its investigation into the *T-Mobile/Metro PCS* merger, finding that the transaction is not likely to harm competition at national or local levels and that it may have a pro-competitive impact in that it increases T-Mobile's ability to compete with the three largest wireless telecommunications providers by improving its scale and spectrum position.

investigation in the European Union and other jurisdictions. 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.

4 The fiscal year runs from 1 October to 30 September.

The FTC has continued to place a significant emphasis on promoting competition in the heath-care sector. Over the last year, the FTC challenged four deals involving health-care service providers, two pharmaceutical mergers, and one medical device acquisition. The FTC also proposed changes to the Hart-Scott-Rodino Act's pre-merger notification rules involving exclusive licences in the pharmaceutical industry that, if promulgated, would significantly increase the types of pharmaceutical licensing transactions that would require pre-merger notification under the HSR Act. Moreover, the FTC achieved a significant victory before the Supreme Court in *FTC v. Phoebe Putney Health System, Inc*, which unanimously found that the state-action exemption did not apply to a Georgia law that merely delegated general corporate power to hospital authorities.

The past year also serves as a reminder that the DoJ and FTC will not hesitate to investigate or challenge post-consummation mergers that did not require a pre-merger notification under the Hart-Scott-Rodino Act. The DoJ is presently litigating Bazaarvoice's acquisition of PowerReviews, Inc, which is set for trial in September 2013. The FTC has been involved in two post-consummation challenges over the past year. The first challenge, involving Renown Health's consummated acquisitions of two cardiology groups, has been settled with Renown agreeing to allow up to 10 of its staff cardiologists to join competing cardiology practices. The second challenge, involving St. Luke's Health System's acquisition of Idaho's largest independent, multi-specialty physician practice group, Saltzer Medical Group, is set for trial in September 2013. Notably, the FTC initiated a preliminary investigation into Google's consummated acquisition of Waze, which develops and markets a community-based traffic and navigation application for mobile phones.

Over the past two years the US antitrust agencies continued their efforts to improve cooperation and coordination with other competition agencies around the world. In October 2011, the DoJ, FTC, and the European Commission issued revised Best Practices in Merger Investigation, a framework for inter-agency cooperation when a merger is reviewed by both US antitrust authorities and the European Commission. The antitrust agencies also entered into a cooperation agreement with the Fiscalía Nacional Económica – the Chilean competition authority – in March 2011, a memorandum of understanding with China's three antimonopoly agencies in July 2011, and a memorandum of understanding with the Ministry of Corporate Affairs and the Competition Commission of India in September 2011. The US antitrust agencies provide *United Technologies/Goodrich Corporation* as an example of the importance of cooperation among international enforcement agencies touting that: 'Close cooperation between the DoJ, European Commission, and Canadian Competition Bureau achieved a coordinated remedy that will preserve competition in the United States and internationally.'[5]

However, cooperation does not guarantee consistent outcomes, remedies, or timing of clearance for a proposed merger across multiple jurisdictions. Inconsistencies may arise simply from different procedures or jurisdictional effects, but in some cases inconsistencies result from different views on how to resolve potential anti-competitive

5 See Hart-Scott-Rodino Annual Report for Fiscal Year 2012, at pp. 12–13, available at www.ftc.gov/bc/anncompreports.shtm.

concerns with a transaction. The *Seagate/Samsung* and *Western Digital/Hitachi* hard disk drive (HDD) transactions and Deutsche Börse's attempt to acquire NYSE Euronext, discussed in last year's chapter, are prime examples. While the competition authorities in the United States, the European Union and Japan unconditionally cleared Seagate's acquisition of Samsung's HDD business, China's Anti-Monopoly Bureau of the Ministry of Commerce required significant remedies. In *Deutsche Börse/NYSE Euronext*, the DoJ proposed clearance subject to remedies while the European Commission decided to block the merger entirely.

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.[6] 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, the 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:

a the value of the aggregate total amount of voting securities, non-corporate interests, and/or assets being acquired exceeds $70.9 million, and either the ultimate parent entity (UPE) of the acquiring entity or the UPE of the acquired entity has at least $14.2 million in assets or sales, and the other UPE has at least $141.8 million in assets or sales; or

b the value of the aggregate total amount of voting securities, non-corporate interests, and/or assets being acquired exceeds $283.6 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').[7] 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).

6 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.

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

ii Recent developments

Proposed amendments to the HSR Rules regarding the transfer of patent rights in the pharmaceutical industry

In August 2012, the FTC issued a notice of proposed rule-making in which it attempts to clarify when a transfer of rights to a patent in the pharmaceutical industry is a potentially reportable asset acquisition under the HSR Act.[8] The proposed rule would broaden the types of patent rights transfers that are subject to pre-merger notification by treating the retention of certain rights by a licensor as no longer sufficient to render the patent rights transfer non-exclusive for HSR purposes.

The FTC Premerger Notification Office (PNO)[9] has long viewed the transfer of exclusive rights to a patent as a potentially reportable asset acquisition, as reflected in numerous PNO informal interpretations. The PNO considers the exclusive transfer of rights to 'make, use, and sell' under a patent to be a potentially reportable transaction even if the transfer is limited to a particular field of use, period of time, or geographic area. However, if the licensor retains certain rights to the patent itself or to license the patent to others for the same field of use, geographic area, and time period as than granted to the licensee, then the licence is not considered sufficiently exclusive for HSR purposes.

The retention of manufacturing rights is generally sufficient to render an otherwise exclusive licensing arrangement non-exclusive even if the grantor has no intent to manufacture the product. On the other hand, merely retaining the right to co-develop, co-promote, or co-market a product has in most instances has not been sufficient in the PNO's view to render an otherwise exclusive licence non-exclusive for HSR purposes.

The NPR establishes an 'all commercially significant rights' test for determining whether the transfer of exclusive rights to a patent is a potentially reportable asset acquisition. The proposed rule is limited to transactions in the pharmaceutical industry because transactions in that industry present 'unique incentives for the use of exclusive licenses'.[10] The proposed rule defines 'all commercially significant rights' as 'the exclusive rights to a patent that allow only the recipient of the exclusive patent rights to use the patent in a particular therapeutic area (or specific indication within a therapeutic area)'. The retention of 'limited manufacturing rights' and/or 'co-rights' will not affect whether a transfer of all commercially significant rights has occurred.

The portion of the proposed rule viewing the retention of co-rights (i.e., shared rights in developing, promoting, marketing, and commercialising the product covered by the patent) are not sufficient to render an otherwise exclusive licence non-exclusive is largely a codification of the PNO's existing position reflected in its informal interpretations. The portion finding that the retention of limited manufacturing rights

8 See Notice of Proposed Rulemaking Regarding Certain Licensing Transactions in Pharmaceutical Industry, 77 Fed. Reg. 50057 (20 August 2012), available at www.ftc.gov/os/2012/08/120813hsr-ipnprm.pdf.

9 The PNO is responsible for administering the HSR premerger notification program, including providing informal interpretations on the application of the HSR Rules.

10 77 Fed. Reg. 50057, 50059 (20 August 2012).

(i.e., the right to manufacture exclusively for the licensee) is not sufficient to render an otherwise exclusive licence non-exclusive is a significant departure from the PNO's current policy. Apparently, to justify this change in approach, the FTC takes the position that 'the right to manufacture is far less important than the right to commercialize' in licensing arrangements in the pharmaceutical industry.

The Pharmaceutical Research and Manufacturers of America (PhRMA) has submitted comments and met with Commissioners Ramirez and Wright requesting that the FTC refrain from adopting the proposed rule-making, which will increase the number of HSR filings in the pharmaceutical industry.[11] PhRMA asserts that the NPR expands the reach of the HSR Act and that the FTC lacks the authority to do so.[12] PhRMA further asserts that the NPR does not comply with the Administrative Procedure Act because the FTC did not provide a reasoned explanation in the NPR for expanding the requirements of the HSR Act or for singling out the pharmaceutical industry for these increased burdens.

Antitrust agencies actively enforce violations of the HSR pre-merger notification requirements

Over the past year, the DoJ and FTC have sought penalties against three different parties for failure to observe the HSR notification and waiting period requirements. Historically, the FTC has, in its discretion, not sought civil penalties for a first-time inadvertent violation, particularly if the individual or company promptly notifies the antitrust agencies upon discovery of the violation (i.e., through a corrective filing). However, the FTC 'will not hesitate to seek appropriate penalties where [it] believe[s] individuals and companies subsequently failed to comply with their filing violations', as demonstrated in the enforcement actions against MacAndrews & Forbes Holdings Inc and Barry Diller, discussed below.[13] The *Biglari* action, discussed below, demonstrates that the FTC construes the passive investment exemption narrowly and will seek action against companies that it believes are trying to abuse it.[14] It also demonstrates the importance of submitting a corrective filing through the proper procedures rather than claiming that a standard HSR filing was intended to address a prior inadvertent failure to file.

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11 See 'HSR IP Rulemaking, Project No. P989316 – Comments of PhRMA on Notice of Proposed Rulemaking Regarding Certain Licensing Transactions in Pharmaceutical Industry', (25 October 2012), available at www.ftc.gov/os/comments/premergeriprights/561795-00004-84972.pdf.

12 See Summaries of Communications with Commissioner Ramirez (18 April 2013) and Commission Wright (3 April 2013), available at www.ftc.gov/os/comments/premergeriprights/index.shtm.

13 See FTC Press Release, 'Investment Firm of MacAndrews & Forbes to Pay $720,000 Penalty to Resolve FTC Allegations Related to Premerger Filing Requirements', dated 20 June 2013, available at www.ftc.gov/opa/2013/06/macandrews.shtm.

14 See FTC Press Release, 'Biglari Holdings, Inc., to Pay $850,000 Penalty to Resolve FTC Allegations That it Violated U.S. Premerger Notification Requirements', dated 25 September 2012, available at www.ftc.gov/opa/2012/09/biglari.shtm.

United States v. Biglari Holdings, Inc[15]

In September 2012, the FTC and DoJ announced that Biglari Holdings, Inc (Biglari) had agreed to pay an $850,000 civil penalty to settle charges of violating the notification and waiting requirements of the HSR Act with respect to its acquisitions of voting securities of Cracker Barrel Old Country Store, Inc (Cracker Barrel) in June 2011. In a series of transactions between 24 May 2011 and 13 June 2011, Biglari acquired approximately 8.7 per cent of the outstanding voting securities of Cracker Barrel. As a result of share purchases on 8 June 2011, Biglari held in excess of the then-$66.0 million HSR threshold.

The HSR Act contains an exemption for acquisitions of up to 10 per cent of voting securities if the acquisition is made 'solely for the purpose of investment,' which means that 'the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.'[16] However, if the buyer 'decides to influence or participate in management' of the acquired entity, the stock is no longer held 'solely for the purpose of investment'.[17]

The FTC alleges in its complaint that Biglari intended to actively participate in the management of Cracker Barrel, as evidenced by it requesting two seats on Cracker Barrel's board in a meeting with the CEO and CFO of Cracker Barrel. Therefore, Biglari was ineligible for the passive investor exemption, and its acquisitions of Cracker Barrel shares from 8 to 13 June 2011 were in violation of the HSR Act.

On 26 August 2011, Biglari submitted an HSR filing to acquire additional stock of Cracker Barrel and received early termination of the waiting period on 22 September 2011. Biglari was deemed to be in violation of the HSR Act from its 8 June 2011 acquisition of Cracker Barrel shares until 22 September 2011, the date on which early termination was granted on the August HSR filing. The maximum civil penalty faced by Biglari was $1.71 million (i.e., $16,000 per day for each day during which it was in violation of the HSR Act). The settlement was roughly half of the maximum penalty.

In a press release Biglari claimed that its August 2011 HSR filing was a 'corrective filing' to address what had been an inadvertent failure to file an HSR notification and not an attempt to rely on the passive investment exception for its June share purchases.[18] Biglari contends that it decided to settle the matter in order to avoid the unnecessary legal expense of challenging it.

15 See Docket, FTC File No. 111 0224, Case No. 1:12-cv-01586, available at www.ftc.gov/os/caselist/1110224/index.shtm.

16 See 16 C.F.R. 801.1(i)(1).

17 See Example to 16 C.F.R. 801.1(i)(1).

18 Biglari Holdings Responds to FTC Allegations, PR Newswire (25 September 2012), available at www.prnewswire.com/news-releases/biglari-holdings-responds-to-ftc-allegations-171247081.html.

United States v. MacAndrews & Forbes Holdings Inc[19]

In June 2012, the FTC and DoJ announced that the investment firm MacAndrews & Forbes Holdings, Inc (M&F) had agreed to pay a $720,000 civil penalty to settle charges of violating the notification and waiting requirements of the HSR Act with respect to his acquisitions of voting securities of Scientific Games Corporation (SG) in June 2012.

On 1 February 2007, M&F submitted an HSR filing to acquire voting securities of SG and received early termination on 9 February 2007. As a result of this filing and an exemption in the HSR Rules, M&F could acquire shares in SG up to the next notification threshold for a period of five years – until 9 February 2012 – without making an HSR filing. M&F acquired additional shares of SG on 4 and 5 June 2012 (i.e., after the five-year period had expired) without making an HSR filing. It made a corrective filing on 16 August 2012 notifying the agencies of its violation.

M&F had previously submitted a corrective filing on 13 May 2011, in connection with the acquisition of voting securities of SIGA Technologies Inc it made on 7 January 2011. The FTC did not seek penalties at that time for that violation.

United States v. Barry Diller[20]

In July 2012, the FTC and DoJ announced that corporate investor Barry Diller had agreed to pay a $480,000 civil penalty to settle charges of violating the notification and waiting requirements of the HSR Act with respect to his acquisitions of voting securities of the Coca-Cola Company (Coke).

On 1 November 2010, Mr Diller acquired voting securities of Coke in excess of the then-$63.4 million threshold. Between 1 November 2010 and 26 April 2012, Mr Diller acquired additional shares of Coke voting securities, but failed to submit the requisite HSR filings. On 27 April 2012, he acquired more shares – holding in excess of the next higher notification threshold, which at that time was $136.4 million – and again filed to submit an HSR notification. None of these acquisitions qualified for the passive investor exemption because Mr Diller intended to participate in the formulation, determination, or direction of the basic business decisions of Coke through his membership on the board of directors of Coke.

Mr Diller had previously made a corrective filing in connection with the acquisition of voting securities of CitySearch Inc in 1998. The FTC declined to seek penalties at that time, but informed Diller that he was responsible for establishing an effective compliance programme.

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

19 See Docket, FTC File No. 121 0203, Case No. 1:13-cv-00926, available at www.ftc.gov/os/caselist/1210203/index.shtm.

20 See Docket, FTC File No. 121 0179, Case No. 1:13-cv-01002, available at www.ftc.gov/os/caselist/1210179/index.shtm.

in any section of the country'.[21] 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.[22] 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.[23]

i Department of Justice

New DoJ Antitrust chief Bill Baer has not been shy about exercising the DoJ's power to challenge mergers and extract significant concessions in the first six months of his tenure. In April 2013, the agency reached a settlement with Anheuser-Busch InBev, allowing its $20 billion acquisition of the Grupo Modelo breweries to go through only with substantital divestitures. Baer's DoJ also challenged Bazaarvoice's acquisition of PowerReviews post-consummation and is set to take the case to trial before the end of the year. The DoJ also flexed its muscle in August 2012, requiring a broad range of conduct and structural remedies to limit the potential anti-competitive impact of a spectrum sale and joint marketing and research agreement among Verizon and four major cable providers. These cases highlight the agency's continued focus on the real-world competitive impacts and reinforce the need for practitioners to carefully consider antitrust implications even in the type of deals that have not traditionally received substantial scrutiny.

Anheuser-Busch/Modelo

In mid-2012 Anheuser-Busch InBev (InBev) announced a $20 billion acquisition of Mexican brewing consortium Grupo Modelo in a deal that, from a competition law perspective, has many parallels with InBev's purchase of Anheuser-Busch four years earlier. In 2008, InBev agreed to purchase Anheuser-Busch, which at the time controlled roughly 50 per cent of the US beer market, although the market share varied considerably from region to region.[24] The transaction was challenged by the DOJ, but the case was settled when InBev agreed to divest the US physical and intellectual property assets related to Labatt brands in order to protect competition in several upstate New York markets.[25] As a result of the acquisition, InBev also gained a 50 per cent non-controlling share of Grupo Modelo, which Anheuser-Busch had built up through the exercise of purchase options over the previous 15 years.

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21 15 U.S.C. Section 18.

22 Section 15 of the Clayton Act, 15 U.S.C. Section 25.

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

24 See complaint, *United States v. InBev et al.*, 08-cv-01965, available at www.justice.gov/atr/cases/f239400/239440.htm.

25 See memorandum order, *United States v. InBev et al.*, 08-sv-01965, available at www.justice.gov/atr/cases/f248900/248957.htm.

On 29 June 2012 InBev announced that it would acquire the half of Grupo Modelo that it did not already own for $20.1 billion in an all-cash transaction.[26] The transaction was to occur in two stages: first, Grupo Modelo would consolidate its corporate structure, and, second, InBev would acquire all outstanding shares of the newly consolidated Modelo. In a separate transaction, InBev was to sell Modelo's 50 per cent share in Crown Imports Inc, a joint venture owned equally by Modelo and Constellation Beers Ltd (a wholly-owned subsidiary of Constellation Brands formerly known as Barton Beers, Ltd), to Constellation Brands Inc for $1.85 billion.[27]

The transaction was plainly structured to pre-empt the type of local competition concerns that led to the divestiture of Anheuser-Busch's US Labatt assets in 2008. In particular, InBev planned to sell Modelo's interest in Crown Imports, which distributes certain Modelo brands in the United States, subject to an importer agreement.[28] The terms of the importer agreement in some respects mimic the relief obtained in the *InBev/Anheuser-Busch* acquisition. For instance, Constellation would have complete authority over prices to US consumers, and InBev would only be able to repurchase its interest in Crown after a 10-year period (the same period for which the 2009 settlement terms related to the Anheuser-Busch acquisition were to be in place).

Nevertheless, the import agreement also contains provisions that limit the competitive freedom of Crown as compared with the divested Labatt assets. Where the purchaser of the US Labatt assets received a perpetual licence to brew its own beer, Crown would have remained dependent on Modelo's Mexican breweries for its supply.[29] In addition, Crown would have been prohibited from distributing other 'Mexican style' beers in the United States without InBev's consent.[30] Finally, while the licences and rights transferred in the Labatt divestiture were fully transferable, Crown would have received only a non-transferable sub-licence to Modelo IP and could not transfer its exclusive right to import Modelo brands into the United States.[31]

Noting both that the proposed sale of Modelo's interest in Crown under the import agreement would not preserve an independent competitive threat to InBev and that there was no indication that Constellation would not continue to be subject to Anheuser-Busch's price leadership, the DoJ filed suit to block the acquisition in January

26 See Philip Blenkinsop, *Reuters*, 'AB InBev Buys out Corona Maker Modelo for $20 Billion', 29 June 2012, available at www.reuters.com/article/2012/06/29/us-modelo-abinbev-idUSBRE85S0B420120629.

27 Duane D Stanford, *Bloomberg*, 'Constellation Brands Doubles Down on Corona in Move Beyond Wine, 30 June 2012, available at www.bloomberg.com/news/2012-06-29/constellation-rises-after-buying-out-corona-distribution-1-.html.

28 Amended and Restated Importer Agreement, available at www.sec.gov/Archives/edgar/data/16918/000119312512291933/d374243dex21.htm.

29 Amended and Restated Importer Agreement, available at www.sec.gov/Archives/edgar/data/16918/000119312512291933/d374243dex21.htm

30 Id.

31 Id.

2013.[32] The DoJ alleged that the combination, as proposed, would damage competition in the beer market across the United States and in at least 26 specific metropolitan areas.

The DoJ reached a settlement with the two parties on 19 April 2013.[33] The terms of the agreement in many ways mirror those in the *InBev/Anheuser-Busch* settlement four years earlier. The new combined entity was required to sell all US-based Modelo assets as well as any assets, rights, or interests – including Modelo's newest and most advanced brewery in Mexico – necessary for Constellation to compete independently in the United States.[34] The DoJ's aggressive challenge to this merger indicates that federal regulators will closely scrutinise the actual competitive effects of a merger, notwithstanding parties' attempts to mimic settlement terms of related cases as a pre-emptive remedy.

Bazaarvoice[35]

On 10 January 2013, the DoJ filed suit to challenge Bazaarvoice Inc's acquisition of PowerReviews Inc. Although the transaction was valued at $168.2 million, it was not reported under the Hart-Scott-Rodino Act because the parties did not meet the Act's 'size-of-person' tests.[36] Consequently, the DoJ's investigation and subsequent challenge were initiated after the transaction had already closed.[37] The complaint alleges that Bazaarvoice is the dominant supplier of software platforms for collecting and displaying consumer-generated product ratings and reviews (PRR platforms) in the United States. By acquiring PowerReviews, its closest rival according to the DoJ's complaint, Bazaarvoice can allegedly insulate itself from meaningful competition for PRR platforms.[38]

In a press release, Bazaarvoice took issue with the government's market definition, arguing that: 'Ratings and reviews are but one of the many tools that brands and retailers can use to engage with their customers.'[39] The DoJ complaint omits typical allegations

32 Complaint, *United States v. Anheuser-Busch InBev et al.*, 13-cv-00127, available at www.justice.gov/atr/cases/f292100/292100.pdf.

33 U.S. Dep't of Justice, Press Release, 'Justice Department Reaches Settlement with Anheuser-Busch InBev and Grupo Modelo in Beer Case', 19 April 2013, available at www.justice.gov/atr/public/press_releases/2013/296018.htm.

34 Id.

35 Disclosure: The authors' firm, Wilson Sonsini Goodrich & Rosati, represents Bazaarvoice in this matter. The statements made in this article are based on publicly available information and do not necessarily reflect the views of Wilson Sonsini Goodrich & Rosati or Bazaarvoice.

36 U.S. Dep't of Justice, Press Release, 'Justice Department Files Antitrust Lawsuit Against Bazaarvoice Inc. Regarding the Company's Acquisition of PowerReviews Inc.', 10 January 2013, available at www.justice.gov/opa/pr/2013/January/13-at-039.html.

37 Id.

38 Complaint, *United States v. Bazaarvoice Inc.*, 13-cv-0133 (N.D. Cal. 10 January 2013), available at www.justice.gov/atr/cases/f291100/291187.pdf.

39 Bazaarvoice Inc., Press Release, 'Statement of Bazaarvoice on Yesterday's Filing of an Antitrust action Against it by the Department of Justice', 11 January 2013, available at www.bazaarvoice.com/about/newsroom/press-releases/Statement-of-Bazaarvoice-on-Yesterdays-Filing-of-an-Antitrust-Action-Against-it-by-the-Department-of-Justice.html.

of market share or market concentration, perhaps reflecting a trend of increased focus on alleging competitive impact. To that end, the complaint relies on the defendant's alleged statements concerning the likely competitive effects of the acquisition, referencing a number of internal Bazaarvoice documents that purport to indicate that Bazaarvoice believed the acquisition would 'eliminate' its 'primary competitor', provide 'relief from […] price erosion,' and '[c]reate significant competitive barriers to entry'.[40] Bazaarvoice responded that these documents were taken out of context and faulted the DoJ for not taking sufficient account of the company's ordinary course documents and economic evidence.[41] The *Bazaarvoice* case is particularly notable for the impact that Bazaarvoice's internal documents appear to have had on the DoJ's decision to file a suit. These types of 'hot' documents can lead to increased agency scrutiny, and as the *Bazaarvoice* case shows, possibly even a merger challenge.

The *Bazaarvoice* suit also highlights the risk of scrutiny under the antitrust laws notwithstanding exemption from the Hart-Scott-Rodino reporting requirements. Other notable post-closing challenges in recent years include the 2009 DoJ suit to undo Election Systems & Software's acquisition of Premier Election Services[42] and the 2012 FTC decision ordering ProMedica to divest St. Luke's hospital.[43] Finally, the Federal Trade Commission has reportedly initiated a preliminary inquiry into Google's over $1 billion acquisition of Israel-based Waze. Public reports indicate that the transaction did not need to be reported because it met the foreign issuer exemption of the HSR Rules.[44] These actions highlight the fact that the antitrust agencies can and will challenge acquisitions that are not reportable under the HSR Act if they believe such acquisitions raise potential harm to competition.

United States v. Bazaarvoice, Inc is currently pending before the US District Court for the Northern District of California and is currently scheduled to go to trial in September.[45]

United Technologies/Goodrich Corporation

In March 2012, Goodrich Corp shareholders approved a proposed $18.4 billion acquisition by United Technologies Corp (UTC),[46] the 'largest merger in the history

40 Complaint, footnote 38, *supra*, paragraphs 3–9.

41 Press Release, footnote 39, *supra*.

42 U.S. Dep't of Justice, Press Release, 'Justice Department Requires Key Divestiture in Election Systems & Software/Premier Election Solutions Merger', 8 March 2010, available at www.justice.gov/opa/pr/2010/March/10-at-235.html.

43 Opinion of the Commission, *In re ProMedica Health System, Inc.*, No. 9346, available at www.ftc.gov/os/adjpro/d9346/120625promedicaopinion.pdf.

44 Alexei Oreskovic, *Reuters*, 'FTC Conducting Preliminary Inquiry of Google's Waze Acquisition', 24 June 2013, available at www.reuters.com/article/2013/06/24/google-waze-idUSL2N0F01R620130624. Adam J Miller, Lexology, 'Keep it off my Waze', 25 June 2013, available at www.lexology. com/library/detail.aspx?g=d2d52245-e2a0-4485-85ed-fe4caac12c58.

45 Bazaarvoice Inc., Third Quarter Earnings Conference Call, 21 February 2013, available at www.sec.gov/Archives/edgar/data/1330421/000119312513070536/d492314dex991.htm.

46 Josh Cable, *IndustryWeek*, 'Goodrich Shareholders Green-Light United Technologies Merger', 14 March 2012, available at www.industryweek.com/software-amp-systems/goodrich-

of the aircraft industry'.[47] Under the terms of the deal, Goodrich would be folded in to UTC's existing aerospace division, Hamilton Sundstrand, already one of the largest suppliers of advanced aerospace products in the world.[48] The DoJ found that the deal would combine the only two significant producers of large main engine generators for aircraft and give UTC a 50 per cent stake in one of only two competitors producing engine control systems for large aircraft turbine engines.[49] In addition, Goodrich was a critical supplier of engine control systems to several of UTC's competitors.[50] Accordingly, the DoJ required that UTC divest Goodrich's assets relating to those three markets.[51]

Due to UTC's global reach, cooperation among national antitrust regimes was essential to ensure that competition would be preserved both domestically and internationally.[52] The US DoJ worked closely with both the European Commission and the Canadian Competition Bureau to establish a coordinated remedy that would address the concerns of all three agencies.[53] In addition, the DoJ discussed the proposed deal with competition authorities in Mexico and Brazil.[54] As US companies continue to expand their international presence and foreign companies continue to expand their domestic presence, it is becoming more and more critical that competition authorities coordinate their efforts with their counterparts in other countries. Continued cooperation and coordination will help to ensure consistent remedies across jurisdictions while protecting each country's ability to enforce its competition laws within its borders.

Verizon/cable company transactions

The Department of Justice entered into a settlement in August 2012 with Verizon and four major cable companies – Comcast, Time Warner Cable, Bright House Networks, and Cox Communications – requiring alterations to a series of agreements governing a technology joint venture and the sale of cable-cell service bundles.[55] Verizon had reached an agreement in 2011 to acquire unused spectrum from the four cable companies and, in 2012, reached

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shareholders-green-light-united-technologies-merger.

47 U.S. Dep't of Justice, Press Release, 'Justice Department Requires Divestitures in Order for United Technologies Corporation to Proceed with Its Acquisition of Goodrich Corporation', 26 July 2012, available at www.justice.gov/opa/pr/2012/July/12-at-925.html.

48 Michael J de la Merced, *New York Times*, 'Goodrich Sale for $16 Billion is Confirmed', 21 September 2011, available at http://dealbook.nytimes.com/2011/09/21/united-technologies-clinches-16-4-billion-deal-for-goodrich/.

49 Press Release, footnote 47, *supra*.

50 Id.

51 Id.

52 Id.

53 Id.

54 Id.

55 U.S. Dep't of Justice, Press Release, 'Justice Department Requires Changes to Verizon-Cable Company Transactions to Protect Consumers, Allows Procompetitive Spectrum Acquisitions to Go Forward', 26 August 2012, available at www.justice.gov/opa/pr/2012/August/12-at-1014.html.

an agreement to sell a portion of that spectrum to T-Mobile. At the time of Verizon's spectrum acquisition, it also reached agreements with the cable companies whereby each would cross-market each others' wireless and wireline products and the companies would establish an exclusive research joint venture.[56]

Critics of the arrangement noted that it could serve as a competitive 'truce' among formerly competitive providers of wireline services by requiring Verizon to sell voice, video and broadband services offered by the four traditional cable companies on an equivalent basis with its competing FiOS product.[57] In other words, the agreements could have brought an end to facilities-based competition between Verizon and traditional cable providers. In addition, critics argued that the sale of spectrum would further entrench Verizon and other national providers of wireless services to the detriment of smaller carriers.[58]

However, the DoJ ultimately approved the agreements, attempting to resolve the potential for anti-competitive impact with a wide-ranging series of requirements and prohibitions.[59] Under the settlement, Verizon would be forbidden from selling competitive cable products in areas serviced by FiOS and eliminated contractual barriers on Verizon continuing to develop and sell the service.[60] In addition, the settlement limited the term of the agreement (now ending in December 2016) and removed restrictions on independent technology development outside the joint venture.[61] The spectrum sale was approved as initially structured.[62]

Owing to the complexity of both the deal structure itself and the DoJ's series of remedial alterations, the Department will need to closely monitor competitive activity in this market as well as communications among Verizon and the cable companies to ensure compliance.

T-Mobile/MetroPCS

T-Mobile again found itself in the DoJ's sights following the failed merger with AT&T in 2011, although this time the results were more favourable. Following the DoJ's successful bid to block the *AT&T/T-Mobile* merger, Deutsche Telekom announced in October of

56 Id.

57 Id.

58 For example, Ira Teinowitz, *The Deal*, 'Verizon Spectrum Deals Spark Criticism', 22 March 2012, available at www.thedeal.com/content/regulatory/verizon-spectrum-deals-spartk-criticism.php; Juliana Gruenwald, *National Journal*, 'Critics Worry Verizon-Cable Deal Will Doom Key Goal of 1996 Telecom Act', 16 August 2012, available at www.nationaljournal.com/blogs/techdailydose/2012/08/critics-worry-verizon-cable-deal-will-doom-key-goal-of-1996-telecom-act-16; Alex Sherman et al., *Bloomberg*, 'Verizon-Cable Agreement Said to Gain Antitrust Approval', 16 August 2012, available at www.bloomberg.com/news/2012-08-16/verizon-cable-agreement-said-to-win-antitrust-approval-tomorrow.html.

59 Proposed Final Judgment, *United States v. Verizon Communications Inc. et al.*, No. 12-cv-01354 (D.D.C. 16 August 2012), available at www.justice.gov/atr/cases/f286100/286102.pdf.

60 Id.

61 Id.

62 Id.

last year that it would acquire regional cellular carrier MetroPCS and combine it with T-Mobile.[63] In its closing statement issued 13 March 2013, the DoJ noted that many aspects of competition among the major players in the mobile wireless space, including plan pricing, take place at a national level; a regional carrier such as MetroPCS has little influence on the pricing practices of national carriers such as T-Mobile. Moreover, the DoJ noted that the sale may have the pro-competitive effect of improving T-Mobile's spectrum holdings, helping the newly merged company to compete against the larger national carriers.[64] Although the AT&T case suggests that the DoJ will strongly resist further consolidation at a national level, the DoJ's approval of T-Mobile's acquisition of MetroPCS indicates that the Department is less concerned that mergers might create anti-competitive effects in the mobile wireless market on a local level.

ii FTC

The FTC has also continued to aggressively enforce the antitrust laws, particularly in the health-care field. The past year has seen a substantial number of FTC challenges to hospital mergers and acquisitions of medical practices and services. Of particular note, the FTC won a unanimous decision in the Supreme Court that the state-action doctrine did not insulate a particular hospital merger from review under federal antitrust laws. The FTC has also continued to review the impact of mergers or acquisitions on licensing commitments related to standard-essential patents (SEPs), requiring Google and Robert Bosch GmbH to refrain from seeking injunctions on willing licensees of their SEPs. Finally, like the DoJ, the FTC has sounded a cautionary note for deals not reportable under the HSR Act by undertaking a preliminary investigation into Google's unreported acquisition of Waze.[65]

Integrated Device/PLX Technology

On 18 December 2012, the FTC filed an administrative complaint to block Integrated Device Technology's proposed $330 million acquisition of PLX Technology.[66] According to the complaint, the combined company would have had a near monopoly on the manufacture and sale of PCIe switches, which 'perform critical connectivity functions in computers and other electronic devices'.[67] These switches make use of a standard interface to allow communication between discrete components of a computer or electronic

63 Chloe Albanesius, *PC Mag*, 'T-Mobile Confirms Plans to Merge with MetroPCS', 3 October 2012, available at www.pcmag.com/article2/0,2817,2410507,00.asp.

64 U.S. Dep't of Justice, Press Release, 'Department of Justice Antitrust Division Statement on the Closing of Its Investigation of the T-Mobile/MetroPCS Merger', 12 March 2013, available at www.justice.gov/opa/pr/2013/March/13-at-298.html.

65 This investigation is briefly discussed in the section regarding *United States v. Bazaarvoice, Inc* above.

66 Complaint, *In re Integrated Device Technology Inc. & PLX Technology, Inc.*, No. 9354, available at www.ftc.gov/os/adjpro/d9354/121218idtplxadmincmpt.pdf.

67 Fed'l Trade Comm'n, Press Release, 'FTC Issues Complaint Seeking to Block Integrated Device Technology, Inc's Proposed $330 Million Acquisition of PLX Technology, Inc.', 18 December 2012, available at www.ftc.gov/opa/2012/12/idtplx.shtm.

system.[68] The FTC found that the two companies were each other's closest competitor in the $100 million worldwide market for the switches and that the combined firm would have held a market share in excess of 85 per cent.[69] By eliminating price competition between the two companies, the merger would have led to higher prices, reduced innovation, and worse service, according to the complaint.[70]

The Commission authorised its staff to seek a preliminary injunction in federal court to prevent the transaction from being consummated before the FTC's administrative adjudication was completed.[71] However, Integrated Device Technologies abandoned the transaction in January 2013, mooting the FTC's complaint.[72]

FTC v. Phoebe Putney Health System Inc[73]

In February 2013, the FTC prevailed before the Supreme Court in a case involving a challenge to a merger between two hospitals in Georgia. In *FTC v. Phoebe Putney Health System Inc*, the Supreme Court unanimously held that the state-action doctrine (or '*Parker*' doctrine) did not immunise the transaction from the federal antitrust laws. The state-action doctrine provides immunity from the federal antitrust laws where the challenged transaction or other conduct is 'clearly articulated and affirmatively expressed as state policy', and that policy is 'actively supervised by the State'.

The Hospital Authority of Albany-Dougherty County, which owns Phoebe Putney Memorial Hospital (Memorial), sought to acquire Palmyra Medical Center (Palmyra) and then lease Palmyra to an affiliate of Memorial for $1 per year. Memorial and Palmyra are the only two hospitals in Dougherty County and are located within two miles of each other. Together, they 'account for 86 percent of the market for acute-care hospital services provided to commercial health care plans and their customers in the six counties surrounding Albany' (i.e., the relevant market).

The FTC filed suit to enjoin the merger in federal district court in Georgia, alleging that the transaction would harm competition and raises prices in the relevant market. The district court dismissed the FTC's motion for a preliminary injunction on state-action grounds. Then, the FTC appealed the district court's decision to the Eleventh Circuit, which affirmed the judgment of the district court. The Supreme Court granted certiorari and dismissed the Eleventh Circuit's ruling.

The Supreme Court found that a Georgia law delegating general corporate powers to hospital authorities, including the power to acquire hospitals by purchase, lease, or other means, 'does not clearly articulate and affirmatively express a state policy empowering the Authority to make acquisitions of existing hospitals that will substantially lessen

68 Id.

69 Id.

70 Id.

71 Id.

72 Order Dismissing Complaint, *In re Integrated Device Technology, Inc. & PLX Technology, Inc.*, No. 9354, available at www.ftc.gov/os/adjpro/d9354/130115idtcmpt.pdf.

73 See *FTC v. Phoebe Putney Health System, Inc*, 133 S. Ct. 1003 (2013).

competition'. Georgia, by delegating such general powers, without more, 'can hardly be said to have "contemplated"' that they will be used anti-competitively.

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

The FTC has challenged several mergers and acquisitions in the health-care sector over the past year, including four deals involving health-care providers, two pharmaceutical mergers, and one medical device acquisition.

Of the provider challenges, two resulted in settlements, one transaction was abandoned, and the other is pending a request for injunctive relief before a federal district court.

In *Renown Health/SNCA & RHP*, the FTC took action against acquisitions of two cardiology groups by Renown Health: Sierra Nevada Cardiology Associates and Reno Heart Physicians.[74] The contracts between Renown and the newly acquired physicians included 'non-compete' provisions. As a result of the transaction, Renown Health employed 88 per cent of the cardiologists in the Reno, Nevada area. In order to settle the complaint, Renown agreed to release its staff cardiologists from the non-compete agreements, allowing up to 10 of them to join competing cardiology practices.

In *Universal Health Services (UHS)/Ascend Health*, the FTC challenged UHS's proposed acquisition of Ascend Health, alleging that it would result in UHS controlling nearly 100 per cent of the market for acute inpatient psychiatric services to commercially insured patients in the El Paso/Santa Teresa area.[75] In order to resolve the FTC's conerns, UHS agreed to sell an acute inpatient psychiatric facility, called Peak Behavioral Health, to Strategic Behavioral Health.

In *Reading Health System (RHS)/Surgical Institute of Reading (SIR)*, the FTC authorised an action to block RHS's proposed acquisition of SIR, alleging that the transaction would result in post-merger market shares ranging from 49 to 71 per cent in the markets for inpatient orthopaedic surgical services; outpatient orthopedic surgical services; outpatient ear, nose, and throat surgical services; and outpatient general surgical services.[76] In November 2012 the parties abandoned the transaction.

In *St Luke's Health System/Saltzer Medical Group*, the FTC, together with the Idaho Attorney General, filed a complaint in federal district court seeking injunctive relief with respect to St. Luke's acquisition of Idaho's largest independent, multi-specialty physician practice group, Saltzer Medical Group.[77] The joint complaint alleged that the combined

74 See *In the Matter of Renown Health, a corporation*, FTC File No. 111 0101, available at http://ftc.gov/os/caselist/1110101/index.shtm.

75 See *In the Matter of Alan B Miller, a natural person; and Universal Health Services, Inc., a corporation*, Docket No. C-4372, FTC File No. 121 0157, available at http://ftc.gov/os/caselist/1210157/index.shtm.

76 See *In the Matter of Reading Health System, a corporation, and Surgical Institute of Reading, a limited partnership,* FTC File No. 121 0155, Docket No. 9353, available at http://ftc.gov/os/adjpro/d9353/index.shtm.

77 See *Federal Trade Commission and State of Idaho, Plaintiffs, v. St. Luke's Health System, Ltd, and Saltzer Medical Group, P.A., Defendants,* (United States District Court for the District of

entity controls nearly 60 per cent of the market for adult primary care physician services sold to commercial health plans in the Nampa, Idaho area and will ultimately lead to higher costs for consumers. A trial date is set for September 2013 in the US District Court for the District of Idaho.

The FTC challenged two pharmaceutical transactions – both of which involved competitive overlap in several generic drug products – and a medical device deal.

In *Watson Pharmaceuticals/Actavis Group*, the FTC's complaint alleged that Watson's proposed acquisition of Actavis would reduce competition in 21 generic drug product markets.[78] In six of those markets, Actavis and Watson each had a generic product in the market. The transaction would reduce the number of competitors from five to four suppliers for two of the drugs, four to three for three of the drugs, and three to two for one of the drugs. In one market, Actavis sold the branded drug, and Watson was the only generic competitor in the market. In eight of the markets, one party had a generic in the market and the other had one in development, with the total number of competitors in the market ranging from one to three. In six of the markets, no generics were available, and Watson and Actavis were two of among a limited number of likely potential suppliers. To resolve the FTC's concerns, the parties agreed to sell assets related to four of the drugs to Sandoz and eighteen of the drugs to Par Pharmaceuticals, relinquish marketing rights to two of the drugs to another company, and to transfer manufacturing rights back to Pfizer for one of the drugs.

In *Novartis/Fougera*, the FTC's complaint alleged that Novartis' proposed acquisition of Fougera would reduce competition in the generic pharmaceutical markets for three topical drugs (i.e., generic calcipotriene topical solution, generic lidocaine-prilocaine cream, and generic metronidazole topical gel).[79] The transaction would reduce the number of competitors from three to two for each of the three generic topical drugs, and two to one for packages of five 5 gram tubes of generic lidocaine-prilocaine cream. Moreover, the transaction would eliminate potential competition to Fougera's Solaraze, a branded diclofenac sodium gel product indicated for the treatment of actinic keratosis. Novartis, through an agreement with Tolmar, was the first to file for an approval of a generic form of Solaraze with the FDA, and was the only potential competitor to Solaraze for a significant period of time. To settle the complaint, Novartis agreed to end a marketing agreement that allows it to sell three of the topical drug products and return the rights to generic diclofenac sodium gel to the manufacturer, Tolmar.

In *Johnson & Johnson (J&J)/Synthes*, the FTC challenged the proposed acquisition of Synthes by J&J, alleging that it would harm competition in the US market for volar distal radius plating systems, which are used in the surgical treatment of distal radius wrist

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Idaho), Case No. 1:12-cv-00560-BLW-REB, FTC File No. 121 0069, available at www.ftc.gov/os/caselist/1210069/index.shtm.

78 See *In the Matter of Watson Pharmaceuticals Inc., Actavis Inc., Actavis Pharma Holding 4 ehf., and Actavis S.á.r.l.*, Docket No. C-4373, File No. 121 0132, available at www.ftc.gov/os/caselist/1210132/index.shtm.

79 See *In the Matter of Novartis, AG*, FTC File No. 121 0144 , Docket No. C-4364, available at www.ftc.gov/os/caselist/1210144/index.shtm.

fractures.[80] Synthes and J&J are leading manufactures with approximately 42 per cent and 29 per cent of the market for volar distal radial planting systems (i.e., a combined share of over 70 per cent). Their next closest competitors – Stryker and Acumed – each have market shares of less than one-sixth the combined firm. To resolve the FTC's concerns with the transaction, J&J agreed to divest its entire trauma portfolio, which includes its DVR volar distal radial planting system to Biomet.

Robert Bosch Industrietreuhand/SPX

In April 2013, the FTC finalised an order, first proposed the previous November, settling charges that Robert Bosch GmbH's acquisition of SPX Service Solutions would have created a virtual monopoly on air conditioning recycling, recovery, and recharge devices (ACRRRs), which are stand-alone systems used by mechanics servicing automotive air conditioners.[81] In addition, the FTC had alleged that, prior to its acquisition, SPX had anti-competitively refused to license its standard-essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms.[82]

Under the terms of the order, Bosch was required to sell its automotive air conditioning repair business – including Bosch's RTI brand of ACRRRs – to automotive equipment manufacturer Mahle Clevite and terminate agreements that prevent third parties from advertising, servicing, distributing, or selling competitive products in the United States.[83] In addition, Bosch was required to make available to competitors certain key patents essential to compete in the market for ACRRRs and abandon claims for injunctive relief that SPX had initiated against willing licensees of its SEPs, which SPX had agreed to license on FRAND terms as a result of its involvement with the standard-setting group SAE International.[84] Commissioner Ohlhausen dissented from the FTC order and, in a separate statement, argued that 'Simply seeking injunctive relief on a patent subject to a fair, reasonable, and non-discriminatory, or FRAND, license, without more, even if seeking such relief could be construed as a breach of a licensing commitment, should not be deemed either an unfair method of competition or an unfair act or practice under Section 5.'[85]

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80 See *In the Matter of Johnson & Johnson*, Docket No. C-4363, FTC File No. 111 0160, available at www.ftc.gov/os/caselist/1110160/index.shtm.

81 Fed'l Trade Comm'n, Press Release, 'FTC Approves Final Order Settling Competition Changes Against Robert Bosch GmbH; FTC Staff Files Comment with Illinois Legislature Regarding Pain Management Services', 24 April 2013, available at www.ftc.gov/opa/2013/04/bosch-illcrna.shtm.

82 Id.

83 Fed'l Trade Comm'n, Press Release, 'FTC Order Restores Competition in U.S. Market for Equipment Used to Recharge Vehicle Air Conditioning Systems', 26 November 2012, available at http://ftc.gov/opa/2012/11/bosch.shtm.

84 Id.

85 Statement of Commissioner Ohlhausen, *In re Robert Bosch GmbH*, No. 121-0081, available at www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf.

The FTC's allegations against *Bosch/SPX* are similar to those in its complaint regarding Google's use of the patent portfolio acquired along with Motorola Mobility in 2012. The FTC alleged that Google pursued or threatened to pursue injunctions against companies that made use of Motorola's SEPs and were willing to license them on FRAND terms.[86] To settle the complaint, Google entered into a consent order that barred it from seeking injunctions in either federal court or the International Trade Commission against a willing licensee and from preventing the use of patents that Google had previously committed to license on FRAND terms.[87] As in *Bosch*, Commissioner Ohlhausen dissented on the issue of imposing liability under the FTC Act for legitimate use of judicial processes to seek an injunction for SEPs.[88]

In both cases, Commissioner Ohlhausen wrote that the FTC orders created considerable uncertainty for patent holders who might seek an injunction on their SEP by failing to clearly define 'willing licensee' or when a 'commitment' has been made to FRAND licensing.[89] In the *Google* case specifically, Commissioner Ohlhausen also objected to the suggestion that Google's conduct could be regulated by the FTC's consumer protection authority as well as its competition authority, suggesting that the FTC order essentially 'treat[s] sophisticated technology companies, rather than end-users, as 'consumers".[90] Taken together with the DoJ's investigation of a number of SEP acquisition packages in 2012, these cases signal that federal antitrust agencies are taking an increased role in policing the use of competitively significant patents.

86 Fed'l Trade Comm'n, Press Release, 'Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices like Smart Phones, Games and tablets, and in Online Search', 3 January 2013, available at www.ftc.gov/opa/2013/01/google.shtm.

87 Id.

88 Statement of Commissioner Ohlhausen, *In re Motorola Mobility LLC & Google Inc.*, No. 121-0120, 3 January 2013, available at www.ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf.

89 Id.

90 Id. at 4.

Appendix 1

ABOUT THE AUTHORS

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

Mr Sher'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, semiconductor, telecommunications, computer hardware, internet infrastructure and e-commerce industries.

Mr Sher currently serves as vice chair of the Intellectual Property Committee within the American Bar Association's Section of Antitrust Law, and previously served as vice chair of the Mergers and Acquisitions Committee. Mr Sher has also been editor of the *Antitrust Law Journal*, the flagship publication of the Section of Antitrust Law, and regularly contributes antitrust articles to law journals and industry-specific publications.

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

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

Mr Williams's national security experience includes counselling 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, Mr Williams was an associate in the Washington, DC office of Squire, Sanders & Dempsey, where he practised antitrust, international trade, export controls and economic sanctions, and foreign investment law. At 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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