



# Merger Control

# 2017

**Sixth Edition**

Editors:

**Nigel Parr & Ross Mackenzie**

# CONTENTS

<b>Preface</b>	Nigel Parr & Ross Mackenzie, <i>Ashurst LLP</i>	
<b>General chapter</b>	<i>The economics of UK merger control: retrospect and prospect</i> Ben Forbes & Mat Hughes, <i>AlixPartners UK LLP</i>	1
<b>Country chapters</b>		
<b>Albania</b>	Anisa Rrumbullaku, <i>CR PARTNERS</i>	14
<b>Australia</b>	Sharon Henrick & Wayne Leach, <i>King &amp; Wood Mallesons</i>	19
<b>Austria</b>	Dr. Lukas Flener, <i>Fellner Wratzfeld &amp; Partner Rechtsanwälte GmbH</i>	32
<b>Brazil</b>	Leonardo Rocha e Silva & José Rubens Battazza Iasbech, <i>Pinheiro Neto Advogados</i>	38
<b>Canada</b>	Randall J. Hofley, Micah Wood & Kevin H. MacDonald, <i>Blake, Cassels &amp; Graydon LLP</i>	48
<b>Chile</b>	Ignacio Larrain Jiménez, Álvaro Espinosa Vásquez & Pascale Fouillioux Puentes, <i>Philippi Prietocarrizosa Ferrero DU &amp; Uría</i>	61
<b>China</b>	Ding Liang, <i>DeHeng Law Offices</i>	70
<b>Cyprus</b>	George Middleton & Constantina Mitsingas, <i>Chryssafinis and Polyviou LLC</i>	75
<b>European Union</b>	Peter Broadhurst, Koen Platteau & Tony Woodgate, <i>Simmons &amp; Simmons LLP</i>	79
<b>Finland</b>	Katri Joenpolvi, Leena Lindberg & Jarno Käkälä, <i>Krogerus Attorneys Ltd</i>	91
<b>France</b>	Pierre Zelenko & Rahel Wendebourg, <i>Linklaters LLP</i>	100
<b>Germany</b>	Peter Stauber & Rea Diamantatou, <i>Noerr LLP</i>	128
<b>Hong Kong</b>	Neil Carabine & James Wilkinson, <i>King &amp; Wood Mallesons</i>	140
<b>India</b>	G.R. Bhatia, Abdullah Hussain & Kanika Chaudhary Nayar, <i>Luthra &amp; Luthra Law Offices</i>	149
<b>Israel</b>	Dr. David E. Tadmor & Shai Bakal, <i>Tadmor &amp; Co. Yuval Levy &amp; Co., Attorneys-at-Law</i>	154
<b>Italy</b>	Luciano Vasques, <i>DDPV Studio Legale</i>	167
<b>Japan</b>	Masahiro Nakatsukasa, <i>Chuo Sogo Law Office, P.C.</i>	174
<b>Macedonia</b>	Jasmina I. Jovanovik & Dragan Dameski, <i>Debarliev, Dameski &amp; Kelesoska, Attorneys at Law</i>	184
<b>Malta</b>	Ron Galea Cavallazzi & Lisa Abela, <i>Camilleri Preziosi Advocates</i>	190
<b>Netherlands</b>	Fanny-Marie Brisdet & Else Marije Meinders, <i>BRISDET</i>	193
<b>Romania</b>	Silviu Stoica & Mihaela Ion, <i>Popovici Nițu Stoica &amp; Asociații</i>	197
<b>Singapore</b>	Daren Shiau & Elsa Chen, <i>Allen &amp; Gledhill LLP</i>	207
<b>South Africa</b>	Marianne Wagener and Candice Upfold, <i>Norton Rose Fulbright South Africa Inc.</i>	217
<b>Sweden</b>	Peter Forsberg & Haris Catovic, <i>Hannes Snellman Attorneys Ltd</i>	231
<b>Switzerland</b>	Franz HOFFET & Marcel Dietrich, <i>Homburger</i>	243
<b>Turkey</b>	Gönenç Gürkaynak & Öznur İnanılır, <i>ELIG, Attorneys-at-Law</i>	252
<b>Ukraine</b>	Igor Svehkar, Alexey Pustovit & Oleksandr Voznyuk, <i>Asters</i>	261
<b>United Kingdom</b>	Alan Davis & Angelique Bret, <i>Pinsent Masons LLP</i> , Bojana Ignjatovic, <i>RBB Economics</i>	266
<b>USA</b>	Christopher A. Williams, Roisin E. Comerford & Paul S. Jin, <i>Wilson Sonsini Goodrich &amp; Rosati PC</i>	277

# USA

Christopher A. Williams, Roisin E. Comerford & Paul S. Jin  
Wilson Sonsini Goodrich & Rosati PC

## Overview of merger control activity during the last 12 months

The Antitrust Division of the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) (collectively, the Agencies) are responsible for antitrust merger enforcement at the national level. Each agency devotes significant resources to reviewing merger-related activity and challenging those transactions that the Agencies believe will substantially lessen competition. Most merger investigations and challenges result from transactions reported to the Agencies under the U.S. premerger notification program established by the Hart–Scott–Rodino Antitrust Improvements Act of 1976, as amended (the HSR Act). However, the Agencies also have the authority to challenge non-reportable mergers before or after they are consummated, under Section 7 of the Clayton Act (e.g., Valeant/Paragon).

The Agencies under the Obama Administration aggressively pursued merger enforcement. Excluding the overlapping fiscal year,<sup>1</sup> the Agencies averaged approximately 9.7 more merger challenges per year under President Obama than under President Bush.<sup>2</sup> The last full fiscal year of the Obama Administration was its most active. In fiscal year 2016, the Agencies brought 47 merger challenges (i.e., transactions that are subject to remedies, challenged in court, or abandoned due to antitrust concerns) – the most since fiscal year 2001, when the Agencies challenged a total of 55 mergers.

<b>U.S. Merger Enforcement Data<sup>3</sup></b>										
<b>Fiscal Year</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016<sup>4</sup></b>
Transactions reported	2,201	1,726	716	1,116	1,450	1,429	1,326	1,663	1,801	1,833
<b>Second Requests</b>										
DOJ	32	20	16	22	31	29	22	21	27	29
FTC	31	21	15	20	24	20	25	30	20	-
Total	63	41	31	42	55	49	47	51	47	-
Percentage <sup>5</sup>	3.0%	2.5%	4.5%	3.7%	3.9%	3.5%	3.7%	3.2%	2.6%	-
<b>Challenges</b>										
DOJ	12	16	12	19	20	19	15	16	20	25
FTC	22	21	19	22	18	25	23	17	22	22
Total	34	37	31	41	37	44	38	33	42	47
Percentage <sup>6</sup>	1.6%	2.2%	4.5%	3.6%	2.6%	3.1%	3.0%	2.0%	2.4%	-

While the Trump Administration is more likely to be conservative in bringing merger challenges, the Agencies are likely to continue to thoroughly investigate potentially problematic transactions. Agency staff largely drive the investigation process so the likelihood of receiving a Second Request should not materially change under the new administration. However, a goal of the Agencies under the new administration may be to “narrow the scope and expense” of Second Requests and other investigations.<sup>7</sup> The Agencies may also be more willing to agree to less onerous remedies than under the prior administration.

#### Department of Justice, Antitrust Division

The DOJ challenged 25 mergers during fiscal year 2016: 15 included actions filed in federal court and 10 involved transactions that were either restructured or abandoned prior to the DOJ filing a complaint in federal court. During the first eight months of fiscal year 2017, the DOJ has initiated at least eight merger challenges.

Over the past year (June 1, 2016 to May 31, 2017) the DOJ announced the following settlements that required divestitures:

- *GTCR/PR Newswire*: This transaction involved, among other things, two of the largest media contact databases in the country – Cision and Agility. Media contact databases are used by businesses and other organisations to identify journalists and other influences for public relations purposes. Cision, owned by GTCR, is the largest media contact database provider in U.S. Similarly, PR Newswire’s Agility business is the third-largest media contact database provider in the U.S. The DOJ was concerned the merger would create a duopoly in the industry and as such required PR Newswire to divest its Agility business.
- *Huntington/FirstMerit*: Antitrust clearance for the acquisition of FirstMerit Bank required the parties to divest two branches in Ashtabula County, Ohio, and 11 branches in Stark County, Ohio. The companies agreed to sell or lease branches closed within two years of the consummation of the merger in Ashtabula County or Stark County, Ohio, to FDIC-insured depository institutions offering deposit and credit services to small businesses, presumably to replace lost competition. As part of the settlement with the DOJ, the parties also agreed to suspend existing, and not to enter into new, non-compete agreements with their branch managers and loan officers located in Ashtabula County and Stark County, Ohio, for a period of 180 days following the consummation of their merger.
- *ABI/SABMiller*: In ABI’s acquisition of SABMiller, the DOJ required ABI to divest SABMiller’s entire U.S. business, including SABMiller’s ownership interest in MillerCoors, the right to brew and sell certain SABMiller Beers in the U.S., and the worldwide Miller beer brand rights. ABI is also prohibited from instituting or continuing practices and programs that limit the ability and incentives of independent beer distributors to sell and promote the beers of ABI’s rivals, including high-end craft and import beers. Finally, for the next ten years, ABI must allow for DOJ review of all acquisitions of beer distributors or brewers – including non-HSR reportable craft brewer acquisitions – prior to consummating those transactions.
- *Nexstar/Media General*: The DOJ also reached a settlement with Nexstar and Media General, requiring Nexstar Broadcasting Group to divest seven broadcast television stations in order to proceed with its \$4.6 billion acquisition of Media General Corporation. The DOJ stated that the divestitures were necessary in order to prevent increased prices in “broadcast television spot advertising and the fees charged to multichannel video programming distributors (MVPDs) – such as cable and satellite providers – for the

retransmission of broadcast television programming to MVPD subscribers . . . in six designated market areas (DMAs) located across the United States.”

- *Wabtec/Faiveley Transport*: Westinghouse Air Brake Technologies Corporation (Wabtec) proposed to acquire Faiveley Transport in October 2015. In order to secure antitrust clearance, Wabtec, a global rail equipment supplier, was required to divest the entire U.S. freight car brakes business of Faiveley. The DOJ noted that without the settlement “[t]he acquisition as originally proposed would have eliminated Faiveley as one of only three major companies that supplies freight car brake components in the U.S. and eliminated Faiveley as a pipeline competitor in the development, manufacture and sale of freight car control valves – essentially freezing a century-old duopoly in that market.”
- *Alaska Airlines/Virgin America*: In Alaska Airlines’s proposed acquisition of Virgin America, the DOJ required Alaska Air Group Inc. to significantly reduce the scope of its codeshare agreement with American Airlines. The DOJ said that the modifications were secured to “ensure that Alaska will have the incentive to vigorously compete with American as Virgin does today”.
- *AMC/Carmike Cinemas*: AMC Entertainment Holdings Inc. was required to divest theatres in 15 local markets and to divest most of its holdings and relinquish all of its governance rights in National Cinemedia LLC (NCM) in order to complete its acquisition of Carmike Cinemas Inc., valued at \$1.2 billion. AMC was also required to transfer 24 theatres with a total of 384 screens to the network of Screenvision LLC, under the settlement.
- *Clear Channel Outdoor/Fairway Media Group*: When Clear Channel Outdoor and Fairway Media Group proposed a \$150 million swap of outdoor advertising assets located in multiple U.S. markets, the DOJ required the parties to divest billboards in Atlanta and Indianapolis before granting antitrust clearance for the proposed swap. The DOJ said that without the required divestitures, “advertisers who purchase outdoor advertising on billboards located in the Atlanta and Indianapolis metropolitan markets would likely face higher prices and lower quality services.”
- *Smiths Group/Morpho Detection*: In April 2016, Smiths, a supplier of desktop explosive trace detection devices (ETD) in the United States, proposed to acquire Morpho Detection, an alleged competitor, from Safran S.A. The DOJ required Smiths Group plc to divest Morpho Detection LLC and Morpho Detection International LLC’s global ETD business in order to proceed with its proposed \$710 million acquisition.
- *Danone/WhiteWave*: In order to gain antitrust approval for its proposed \$12.5 billion acquisition of The WhiteWave Foods Company Inc., the DOJ required Danone S.A. to divest its Stonyfield Farms business. The DOJ said that, “without the divestiture, the proposed acquisition likely would reduce competition between the two leading participants and top brands in the markets for raw and fluid organic milk, potentially harming dairy farmers in the northeast and U.S. consumers of fluid organic milk.”

At least two mergers over the past year were abandoned after the DOJ expressed concerns that the transactions raised serious antitrust issues:

- *LAM/KLA*: Lam Research Corp. and KLA-Tencor Corp., a supplier of semiconductor fabrication equipment and a supplier of metrology and inspection equipment, announced plans to merge in October 2015 in a deal worth \$10.6 billion. The parties abandoned the transaction a year later after the Department of Justice expressed concerns. Renata Hesse, the previous Acting Assistant Attorney General of the DOJ’s Antitrust Division,

noted that “[i]nnovation in the semiconductor industry is critically important to the American economy, and the proposed transaction presented concerns about the ability of the merged firm to foreclose competitors’ development of leading edge fabrication tools and process technology on a timely basis.” In publicising its concerns, the DOJ cited the fact that metrology and inspection technologies are growing increasingly important to the successful development of semiconductor fabrication equipment and process technology. The DOJ also cited concerns that “KLA-Tencor’s leading position in several metrology and inspection markets could have created the potential for Lam Research to foreclose its competitors by reducing their timely access to key KLA-Tencor equipment and related services.”

- *Deere/Precision Planting (Monsanto)*: In 2015, Monsanto Co signed an agreement to sell its Precision Planting LLC farm equipment business to machinery maker Deere & Co. According to the DOJ, the proposed deal would have combined the only two significant U.S. providers of high-speed precision planting systems. Precision planting technology is designed to allow farmers to plant corn, soybeans, and other row crops accurately at higher speeds, and is expected to become the industry standard in the coming years. The DOJ filed suit on Aug. 31, 2016, to block the acquisition, alleging that the transaction was a merger-to-monopoly in that particular market. In May 2017, before the scheduled trial date, the parties abandoned the deal, which the Acting Assistant Attorney General of the Justice Department’s Antitrust Division, Andrew Finch, heralded as a “a victory for American farmers and consumers”. Mr. Finch described agriculture as “one of the most important sectors of our economy” and noted the Antitrust Division’s continued interest in protecting competition within that sector.

The DOJ also filed suit to block two mergers of health insurance companies in 2016 – Aetna/Humana and Anthem/Cigna. These were arguably the two most important challenges to transactions on antitrust grounds in 2016.

- *Aetna/Humana*: Health insurance companies Aetna and Humana ultimately abandoned their plans to merge, originally announced in July 2015, after the DOJ moved to block the deal. Aetna planned to acquire Humana for \$37 billion. The DOJ filed suit against the parties to stop the merger in July 2016, a year later, along with eight states and the District of Columbia. The DOJ alleged that the merger would hurt competition in the health care market, leading to higher prices for consumers and fewer services for Medicare patients. In January 2017, after a 13-day trial in December 2016, a federal judge agreed with the DOJ and ruled the proposed acquisition should be blocked. In February 2017, the parties abandoned the deal, as opposed to extending the merger agreement and appealing the decision.
- *Anthem/Cigna*: In July 2015, health-insurer Anthem announced it had entered into an agreement to acquire its rival Cigna in a \$54 billion acquisition. The DOJ sued the parties in July 2016, joined by a number of states, alleging the merger of two of the nation’s largest insurers would make it harder for large national employers to get competitive rates for health insurance. In February 2017, judge Amy Berman Jackson, U.S. District Court for the District of Columbia, ruled that “the evidence has shown that the merger is likely to result in higher prices,” and ruled that the merger should be blocked. The parties appealed the ruling, and the United States Court of Appeals for the District of Columbia decided in April 2017 that the District Court’s ruling should be upheld. Cigna moved to abandon the deal and such a move was approved by a Delaware judge in May 2017.

In November 2012, the DOJ also sued to block EnergySolutions' proposed \$367 million acquisition of Waste Control Specialists. The DOJ described the transaction as one that would combine the two most significant competitors for the disposal of low-level radioactive waste (LLRW) available to commercial customers in 36 states, as well as in the District of Columbia and Puerto Rico. According to the lawsuit filed in the U.S. District Court for the District of Delaware, the transaction would deny commercial generators of LLRW the benefits of vigorous competition that have led to significantly lower prices, better service and innovation in recent years. Customers of the parties who stand to be harmed by the acquisition, according to DOJ, include commercial generators of LLRW such as universities and hospitals working on life-saving treatments.

Perhaps the most notable transaction under review by the antitrust authorities at present is AT&T's proposed \$85 billion acquisition of Time Warner. On the campaign trail, President Donald Trump vowed on to stop the proposed transaction. However, since inauguration, reports suggest that President Trump has not weighed in on the transaction. The President's nominee to run the DOJ's Antitrust Division, Makan Delrahim has had, apparently, "no conversations" with the president about the Time Warner deal.<sup>8</sup> Mr. Delrahim has publicly stated that vertical transactions, of which AT&T/Time Warner is one, can "raise competitive concerns".<sup>9</sup> Mr. Delrahim commented that, "[t]o the extent that firms with market power take anticompetitive exclusionary actions to limit competition on the internet, the Antitrust Division can and should use the antitrust laws to protect that competition," and continued that "[i]t would not be appropriate to utilize the antitrust laws to reach objectives beyond protecting competition."<sup>10</sup>

### Federal Trade Commission

During fiscal year 2016, the FTC initiated 22 merger enforcement actions: 16 resulted in consent orders requiring divestitures; one transaction was abandoned after the FTC obtained a preliminary injunction in federal court (Staples/Office Depot); two hospital mergers, which were abandoned after the FTC obtained a preliminary injunction in federal court, both won by the FTC on appeal (Advocate Health/NorthShore and Pinnacle Health System/Penn State Hershey Medical Center); one challenge to a hospital merger that was later dismissed after a state legislature enacted a law that shielded the acquisition from federal antitrust scrutiny (Cabell Huntington Hospital/St. Mary's Medical Center); one transaction that was abandoned after the FTC filed an administrative complaint and authorised staff to seek a temporary restraining order and preliminary injunction in federal court (Superior Plus/Canexus); and one transaction that was abandoned after the FTC raised concerns during its investigation.<sup>11</sup> During the first eight months of fiscal year 2017, the Commission has initiated at least eight enforcement actions.

The FTC agreed to settle the following challenges initiated over the past 12 months (June 1, 2016 to May 31, 2017) in exchange for a remedy:

- *Energy Transfer Equity/The Williams Companies*: Energy Transfer Equity's proposed \$37.7 billion acquisition of The Williams Companies, another energy company, attracted FTC scrutiny, who claimed the transaction would likely harm competition in the market for "firm pipeline capacity to deliver natural gas" in Florida. The settlement reached with the FTC in June 2016 required the parties to divest Williams' interest in an interstate natural gas pipeline before consummating the transaction. In August 2016, the FTC withdrew its acceptance of the settlement requiring divestiture and the parties abandoned the acquisition.
- *HeidelbergCement/Italcementi*: German HeidelbergCement AG and Italian producer

Italcementi S.p.A., both producers of Portland cement, were required to enter into a settlement with the FTC before completing their proposed \$4.2 billion merger in 2016. Under the settlement, the parties were required to divest an Essroc cement plant and quarry in Martinsburg, West Virginia; seven Essroc terminals in Maryland, Virginia, and Pennsylvania; and a Lehigh terminal in Solvay, New York, and potentially two additional Essroc terminals in Ohio, to an FTC-approved buyer in order to secure antitrust approval for the merger.

- *Ball/Rexam*: In February 2015, Colorado-based Ball Corporation announced its intention to acquire United Kingdom-based Rexam, a fellow aluminium beverage can manufacturer, in a deal worth \$8.4 billion. In June 2016, Ball agreed to sell to Ardagh Group S.A., one of the world's largest producers of glass bottles for the beverage industry and metal cans for the food industry, eight U.S. aluminum can plants and associated assets in order to settle FTC charges that its proposed acquisition was likely anticompetitive. The FTC alleged that without a divestiture, "it is likely that the proposed merger would substantially lessen competition for standard 12-ounce aluminum cans in three regional U.S. markets – the South and Southeast, the Midwest, and the West," and that "the proposed merger would substantially lessen competition for specialty aluminum cans nationwide."
- *Koninklijke Ahold/Delhaize*: In 2015, Koninklijke Ahold and Delhaize Group which together own and operate five well-known U.S. supermarket chains (Stop & Shop, Giant, Martin's, Food Lion and Hannaford), announced plans to merge in a deal valued at \$28 billion. The parties reached a settlement with the FTC before receiving antitrust approval, and agreed to sell 81 stores in 46 local markets in Delaware, Maryland, Massachusetts, New York, Pennsylvania, Virginia, and West Virginia to seven divestiture buyers. The FTC alleged the parties' supermarkets competed closely for shoppers in these markets based on price, format, service, product offerings, promotional activity, and location, such that the proposed merger would increase the likelihood that the post-merger entity could unilaterally exercise market power to consumers' detriment, and that the remaining competitors could coordinate their behaviour to raise prices.
- *Mylan/Meda*: Mylan announced its intention to acquire Swedish pharmaceutical company Meda in a \$7.2 billion acquisition in February 2016. In July 2016, the parties entered into a settlement with the FTC, requiring them to divest two generic drugs – one to treat muscle spasms and stiffness, and one to treat refractory epilepsy. The FTC was concerned that the acquisition would have eliminated competition between the two parties for both drugs, leading consumers to pay higher prices.
- *Teva/Allergan*: Generic and branded pharmaceutical maker Teva, the largest generic pharmaceutical producer in the world, announced its intention to acquire its rival Allergan, the third-largest generic producer in the U.S., in July 2015 for \$40.5 billion. The FTC alleged that the proposed merger would harm competition in U.S. pharmaceutical markets and required Teva to divest the rights and assets related to 79 pharmaceutical products to 11 firms in order to gain antitrust approval for the deal. As explained in its Statement, the FTC also considered whether the proposed transaction would have anticompetitive effects beyond those occurring in individual product markets remedied by the required divestitures. For example, whether the transaction would lower incentives to develop or bring new generic drugs to market, as well as whether the proposed post-merger entity would gain an ability to anticompetitively bundle products. The FTC ultimately concluded that the evidence did not demonstrate



the proposed merger was likely to have these additional anticompetitive effects. The transaction closed in August 2016 following the required divestiture.

- *ON Semiconductor/Fairchild Semiconductor*: In October 2015, the FTC entered into a settlement with ON Semiconductor and Fairchild Semiconductor, two broadbase integrated circuits providers, under which the companies are required to sell ON's Ignition insulated-gate bipolar transistor business to Chicago-based manufacturer Littelfuse, Inc. within 10 days of the close of the transaction.
- *CentraCare Health/St. Cloud Medical Group*: In mid-2015, CentraCare announced its intention to acquire St. Cloud Medical Group (SCMG). The FTC alleged this acquisition would eliminate SCMG as a potential alternative in the St. Cloud area, which, according to the FTC, "likely would have increased CentraCare's bargaining power vis-à-vis commercial health plans, allowing it to raise reimbursement rates and secure more favorable terms". The parties agreed to allow a number of adult primary care, pediatric, and OB/GYN physicians to leave the health system and work for other local providers or establish a new practice in the area, and to provide certain financial incentives to a number of departing physicians.
- *Valeant/Paragon*: In a relatively rare post-consummation challenge, Valeant Pharmaceuticals, the parent of Bausch + Lomb, agreed to sell Paragon Holdings I, Inc. to settle FTC charges that its consummated May 2015 acquisition of Paragon reduced competition for the sale of FDA-approved buttons used for three types of gas-permeable (GP) lenses – general vision correction lenses; orthokeratology lenses, worn to reshape the cornea; and large-diameter scleral lenses, which cover the white of the eye and are used after eye surgery, for corneal transplants, and to treat eye disease. Under the terms of the settlement, Valeant agreed to sell Paragon in its entirety to a newly created entity and to divest the assets of Pelican Products LLC – a contact lens packaging company that Valeant acquired after its purchase of Paragon – which is the only producer of FDA-approved vials used for shipping some GP lenses.
- *Abbott/St. Jude Medical*: In April 2016, Abbott Laboratories agreed to acquire St. Jude Medical, Inc. in a \$25 billion acquisition. The FTC expressed concern that the proposed acquisition would harm competition in the U.S. markets for vascular closure devices, used to close holes in arteries from the insertion of catheters, and for "steerable" sheaths, used to guide catheters for treating heart arrhythmias. The FTC issued a consent order in January 2017 that required the parties to divest all rights and assets related to St. Jude's vascular closure device business and Abbott's steerable sheath business to Tokyo-based medical device maker Terumo Corporation.
- *Boehringer Ingelheim/Sanofi*: Boehringer Ingelheim proposed an asset swap with Sanofi, under which Boehringer Ingelheim acquired Sanofi's animal care subsidiary, Merial, valued at \$13.53 billion, and Sanofi obtained Boehringer Ingelheim's consumer health care business unit, valued at \$7.98 billion, as well as cash compensation of \$5.54 billion. The FTC claimed the swap would anticompetitively affect the U.S. markets for various vaccines for pets and certain parasite control products for cattle and sheep. In the settlement, the parties agreed to divest five types of animal health products in the United States, including the companion animal vaccines to Eli Lilly and the company's Elanco Animal Health division, and the parasite control products to Bayer AG.
- *Enbridge/Spectra*: Enbridge Inc. and Spectra Energy Corp announced their intention to merge in September 2016. The FTC complained that the merger "likely would reduce natural gas pipeline competition in three offshore natural gas-producing areas

in the Gulf of Mexico – Green Canyon, Walker Ridge and Keathley Canyon – leading to higher prices for natural gas pipeline transportation from those areas.” The FTC alleged that in portions of the affected areas, “the merging parties’ pipelines are the two pipelines located closest to certain wells and, as a result, [were] likely the lowest cost pipeline transportation options for those wells.” The FTC alleged the “exchange of information also may increase the likelihood of tacit or explicit anticompetitive coordination between the Walker Ridge Pipeline and the Discovery Pipeline” as a result of the merger. The parties agreed with the FTC to conditions aimed at preserving competition in those areas, including requiring Enbridge to establish firewalls to limit its access to non-public information about the Discovery Pipeline and to notify the FTC before acquiring an ownership interest in any natural gas pipeline operating in the Green Canyon, Walker Ridge and Keathley Canyon areas, or increasing the 40% ownership interest of Spectra affiliate DCP Midstream Partners, LP in the Discovery Pipeline.

- *DaVita/Renal Ventures*: In August 2015, DaVita, Inc., the second-largest provider of outpatient dialysis services in the United States, agreed to acquire its competitor, Renal Ventures Management, LLC, the seventh-largest provider, for \$358 million. The FTC alleged that the acquisition would lead to “reduced quality and higher prices for dialysis patients” in the New Jersey markets of Brick, Clifton, Somerville, Succasunna and Trenton, and in the Dallas-area markets of Denton and Frisco, where the parties compete pre-merger. The parties agreed to a settlement, under which DaVita Inc. divested seven dialysis clinics in suburban and urban areas of New Jersey and Dallas, to PDA-GMF Holdco, LLC, a joint venture between Physicians Dialysis and GMF Capital LLC. DaVita, Inc. also agreed to abstain from contracting with the medical directors of the seven clinics for three years, and to provide transition services for up to 24 months.
- *China National Chemical Corporation (ChemChina)/Syngenta*: China National Chemical Corporation (ChemChina) and Swiss global agricultural company Syngenta AG announced their agreement under which Syngenta, a Swiss seed and pesticides company, would be acquired by ChemChina for \$43 billion in February 2016. In order to settle FTC charges that the acquisition was anticompetitive, the parties agreed to divest three types of pesticide to California-based agrochemical company AMVAC: (1) the herbicide paraquat, used to clear fields prior to the growing season; (2) the insecticide abamectin, which protects primarily citrus and tree nut crops by killing mites, psyllid, and leafminers; and (3) the fungicide chlorothalonil, used mainly to protect peanuts and potatoes. Syngenta owns the branded version of all three products at issue, which the FTC complained gave it significant market shares in the United States. The FTC’s complaint alleges that the merger as originally proposed would eliminate the direct competition that exists today between ChemChina generics subsidiary ADAMA and Syngenta’s branded products, increasing the likelihood that U.S. customers buying the three divested pesticides would be forced to pay higher prices or accept reduced service for these products.
- *Sherwin-Williams/Valspar*: Sherwin-Williams and Valspar announced on March 20, 2016, that they had entered into a definitive agreement under which Sherwin-Williams would acquire Valspar in a transaction valued at approximately \$11.3 billion. The FTC said the transaction combined two of the top three industrial wood coatings manufacturers. In May 2017, the Sherwin-Williams Company agreed to settle FTC charges, by selling Valspar’s North America Industrial Wood Coatings Business to Axalta Coating Systems Ltd.

At least one merger over the past year was abandoned after the FTC filed suit to block the transaction:

- *Superior/Canexus*: The FTC issued an administrative complaint and authorised staff to seek a preliminary injunction in federal court to block the proposed \$982 million merger of Canadian chemical suppliers Superior Plus Corp. and Canexus Corp. The FTC alleged that the proposed merger would violate the antitrust laws by significantly reducing competition in the North American market for sodium chlorate – a chemical, largely commoditised, used to bleach wood pulp that is then processed into paper, tissue, diaper liners, and other products, since Superior and Canexus were two of the three major producers of sodium chlorate in North America. The FTC complained that, were the merger to take place, the combined entity and its rival AkzoNobel would control approximately 80% of the total sodium chlorate production capacity in North America, and as such was “likely to lead to anticompetitive reductions in output and higher prices.” The FTC further alleged that the acquisition would “also increase the likelihood of coordination in an already vulnerable market.” On June 30, three days after the complaint was filed, the parties abandoned their plans to merge.

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

#### HSR rules and thresholds

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

HSR Jurisdictional Thresholds (effective as of February 27, 2017)	
Size of Transaction Value	Notification Required
At or less than \$80.8m	No.
In excess of \$80.8m but not in excess of \$323.0m	Yes, if size of person threshold is met and no exemption applies: <ul style="list-style-type: none"> <li>• if the acquiring person has assets or annual net sales of \$161.5m and the acquired person has \$16.2m in (i) total assets or annual net sales from manufacturing, or (ii) total assets if not engaged in manufacturing; or</li> <li>• the acquiring person has \$16.2m in total assets or annual net sales and the acquired person has \$161.5m in total assets or annual net sales.</li> </ul>
In excess of \$323.0m	Yes, unless an exemption applies.

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

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

### HSR enforcement actions

The Antitrust Agencies may seek civil penalties against companies and individuals for violations of the HSR Act's premerger notification and waiting requirements. During the past year, the FTC increased the civil penalty for a HSR violation from \$16,000 a day while in violation of the HSR Act to \$40,654 a day. The Agencies brought five enforcement actions under the HSR Act over the past year.

- *United States v. Caledonia Investments plc*: On August 10, 2016, investment trust Caledonia Investments plc agreed to pay \$480,000 in civil penalties to settle FTC allegations that Caledonia violated the HSR Act when it acquired 3,650 shares of Bristow Group voting securities as the result of the vesting of restricted stock units. Caledonia submitted an HSR filing in connection with an earlier acquisition of Bristow voting securities valued in excess of the \$50 million threshold, as adjusted (\$63.1 million at that time). The "five-year" exemption in the HSR rules permitted Caledonia to acquire additional shares of voting securities of Bristow until June 13, 2013, as long as the acquisition did not result in Caledonia holding Bristow voting securities valued at or in excess of \$100 million threshold, as adjusted. The FTC alleged that Caledonia violated the HSR Act following the vesting of the restricted stock units (RSUs) on February 3, 2014, which resulted in Caledonia holding Bristow shares valued at approximately \$111 million. While this amount was less than the \$100 million threshold, as adjusted (\$141.8 million at that time), the acquisition occurred after the expiration of the five-year exemption period.
- *United States v. Fayez Sarofim*: On October 27, 2016, Fayez Sarofim agreed to pay \$720,000 to settle FTC allegations that he violated the HSR Act in connection with open market purchases of voting securities of Kinder Morgan in 2001, 2007, and 2012 and Kemper in 2007. The FTC alleged that Mr. Sarofim improperly relied on the investment-only exemption because he was a member of the board of directors of Kinder Morgan and Kemper at the time of these acquisitions. To the best of our knowledge, the Sarofim action is the first time that the Antitrust Agencies have sought civil penalties for an inadvertent, first-time, and promptly-reported HSR violation.
- *United States v. Ahmet H. Okumus*: On January 17, 2017, Ahmet Okumus agreed to pay \$180,000 to resolve an FTC complaint alleging that he violated the HSR Act in connection with the acquisition of 236,589 shares of Web.com voting securities on June 27, 2016. Mr. Okumus has previously submitted a corrective HSR filing at the \$50 million threshold, as adjusted, in connection with a prior acquisition.<sup>12</sup> Mr. Okumus had five years from the date of the expiration of the waiting period for the corrective filing to acquire shares of Web.com voting securities up to the \$100 million threshold, as adjusted. Mr. Okumus' June 27, 2016 acquisition resulted in him holding approximately \$156.6 million of Web.com voting securities, which was in excess of \$156.3 million (i.e., the as adjusted \$100 million notification threshold in effect at the time).
- *United States v. Mitchell P. Rales*: On January 17, 2017, Mitchell Rales agreed to pay \$720,000 in civil penalties to settle the FTC's allegations that he violated the HSR Act in connection with (i) his wife's acquisition of 25,000 shares of Colfax voting securities that resulted in him holding in excess of the \$500 million threshold, as adjusted, and (ii) his acquisition of 6,000 shares of Danaher voting securities that resulted in him holding in excess of the \$500 million threshold, as adjusted.

- *United States v. Duke Energy Corporation*: On January 18, 2017, Duke Energy agreed to pay \$600,000 in civil penalties to settle the DOJ's gun-jumping allegations in connection with Duke's proposed acquisition of Osprey Energy Center. In August 2014, Duke entered into a purchase agreement with Calpine to purchase Osprey Energy Center. Duke concurrently entered into a tolling arrangement with Osprey whereby Duke assumed control of fuel purchase and delivery for the plant, determined the amount of energy generated by the plant and where the energy would be delivered, and retained the profit or loss from the difference between the cost of gas and the price of electricity. The DOJ noted that "a tolling agreement alone does not necessarily confer beneficial ownership," recognising that they are relatively common in the electricity industry and that "control over output and the shift of risk and benefit to the buyer over the term are typical features of such agreements." However, because the tolling agreement between Duke and Osprey was "part and parcel" of the agreement to acquire the plant and had "no independent rationale independent from the acquisition," the DOJ alleged that the tolling arrangement amounted to beneficial ownership of the plant by Duke prior to expiration of the HSR waiting period.

### **Key industry sectors reviewed**

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

During the past year, the DOJ has challenged mergers in a variety of industries, including agricultural planting technology, airlines, banking, beer, explosive trace detection, freight car components, health insurance, media, communications, and advertising, milk, radioactive waste disposal, and semiconductor equipment. Four of the DOJ's challenges over the past year involved the media, communications, and advertising sector, including billboards, broadcast television programming and spot advertising, first-run commercial movies and cinema advertising, and media contract databases.

Seven (almost half) of the FTC's merger challenges during the past year involved healthcare products and services, including two pharmaceutical mergers, one animal health products merger, one medical device merger, one physicians' services merger, one outpatient dialysis services merger, and one merger of manufacturers of polymer discs used to make gas permeable lenses. The FTC also challenged mergers involving groceries, industrial wood coatings, natural gas pipeline transportation, pesticides, Portland cement, semiconductors for automotive ignition systems, suppliers of aluminium beverage cans, and suppliers of sodium chlorate.

### **Key economic appraisal techniques applied**

Economists and economic analysis play a very important role in U.S. merger review. The FTC's Bureau of Economics and DOJ's Economic Analysis Group have dozens of Ph.D. economists, research analysts, and financial analysts that work in teams with the Agencies' staff attorneys to analyse mergers. The Agencies' economists rely on a variety of economic tools to analyse the competitive effects of a merger. More conventional analytical methods, like the number of firms in a market and market concentration metrics (e.g., market shares

and Herfindahl-Hirschman Index (HHI) calculations), are still used by the Agencies. But these tools are often just the starting point in assessing the potential competitive effects of a merger and have limited ability in analysing a merger involving differentiated products.

Today, Agency economists are relying on more sophisticated analytical methods to assess the unilateral effects of potentially problematic transactions, such as critical loss analysis utilising diversion ratios, merger simulations, and upward pricing pressure analysis utilising the Gross Upward Pricing Pressure Index (GUPPI). However, these methods require the economist to make a number of assumptions; thus, the ability of the model to accurately predict the effects of a merger is largely dependent upon the validity of the underlying assumptions. Moreover, these models require data; the more data, the more likely the models will better predict the competitive effects of a merger.

Although the Agencies have increasingly relied upon modern economic tools in their analyses of proposed mergers, they have not abandoned the more conventional economic tools and other forms of evidence when litigating mergers, including market shares, HHIs, testimony from relevant witnesses, and company documents.<sup>13</sup>

### **Approach to remedies**

On February 3, 2017, the FTC released a report of staff's examination of the FTC's merger remedies between 2006 and 2012. The 2017 study updated and expanded upon the FTC's divestiture study it issued in 1999. As a result of the 1999 study, the FTC implemented several changes to its divestiture process, including shortening the divestiture period, requiring upfront buyers in cases where the divestiture comprised less than an on-going business, and more frequently requiring monitors, particularly in technology and pharmaceutical mergers. The 2017 report examined 89 orders issued by the FTC between 2006 and 2012, which it divided into three groups by type of merger.

For 50 of the orders, staff used a case study method similar to the 1999 study and then supplemented its findings by interviewing market participants and analysing data obtained from significant competitors. Staff observed the following:

- More than 80% of the orders successfully maintained or restored competition.
- All divestitures involving an ongoing business succeeded.
- Approximately 70% of divestitures involving limited asset packages in horizontal, non-consummated mergers succeeded.
- Whether a divestiture involved an upfront buyer or post-order buyer did not affect the result.

The FTC found that the more limited the scope of the asset package, the greater the probability the divestiture would not succeed. Divestitures of limited asset packages succeeded when the buyer had similar operations, was knowledgeable about similar manufacturing facilities, or had a complementary product line. With respect to consummated mergers, the Commission reached the conclusion that these mergers can be successfully remedied under limited circumstances. A consummated merger that included little integration of post-merger assets and the ability to alter contracts to facilitate buyer entry was more likely to be successful. When assets are commingled in a consummated merger, the remedy often failed.

For 15 of the orders involving supermarkets, drug stores, funeral homes, dialysis clinics, and other health care facilities mergers, staff examined questionnaire responses from FTC-approved buyers. Of the 43 buyers of divested assets, 34 continued to operate the divested

assets. Of the nine buyers that could not own or operate the divested assets, five were sold to independent third-parties that continued to operate the assets as required by the divestiture order.

For 24 of the orders involving the pharmaceutical industry, staff examined internal information as well as publicly available data. Staff analysed this industry based on the type of product – whether the drug is sold in tablet or capsule form versus being sold in oral solid form which requires specialised production facilities. The goal of a divestiture in the pharmaceutical industry is to allow the new firm to bring the product to market. In all 32 products the Commission looked at, there was a successful transfer. The Commission usually requires divestiture when dealing with easy-to-divest products such as generic drugs.

The study confirmed that the FTC’s remedies are generally effective. However, it identified areas of improvement with regard to successfully implementing divestiture as a remedy, including: asking additional targeted questions about remedy proposals when divesting limited asset packages; asking more focused questions about financing; more carefully monitoring the due diligence process; and more closely scrutinising buyers’ back-office needs. The study also found that buyers of divested assets were often reluctant to raise concerns with staff and independent monitors. Finally, the report set forth “best practices” for remedies, but noted that these best practices are simply a refinement of its current approach, and there will not be significant changes from the Commission’s current practices.

## **Policy developments and reform proposals**

### FTC Process Reform Initiatives

On April 17, 2017, the FTC announced that it is undertaking reform initiatives “to identify and implement steps to streamline FTC’s procedural processes,”<sup>14</sup> with “the broad goal [of regulatory] efficiency and the minimisation of burdens on companies asked to provide information.”<sup>15</sup> These initiatives followed statements in January from then-Commissioner Ohlhausen about engaging leadership at the FTC’s Bureaus “to address possible overbreadth of discovery,” including in the merger investigation process.<sup>16</sup>

With respect to merger review, the initiatives include: (1) establishing a working group within the Bureau of Competition “to streamline demands for information in investigations to eliminate unnecessary costs to companies and individuals who receive them,” and (2) a review of dockets to close investigations, where appropriate.<sup>17</sup>

In terms of streamlining investigations, Acting Director of the Bureau of Competition, Abbott “Tad” Lipsky has stated that “the reform seeks to make information demands no broader than the key analytical needs of the staffs at the bureaus of competition and economics.”<sup>18</sup> He stressed that information requests should be tailored “to specific theories of harm that make ‘good economic sense.’”

In terms of review of ongoing investigations, Acting Director Lipsky noted that “an ‘iterative look’ at what’s happening in investigations will likely come out of the reform.” He stated that “rather than letting investigations continue for weeks or months based on an initial understanding, the agency should come back frequently to address whether the issues are the same, information requests can be trimmed or whether information is needed in additional areas.”<sup>19</sup>

Both Acting Chairman Ohlhausen and Acting Director Lipsky stressed the importance of economics in merger enforcement. In January, Acting Chairman Ohlhausen criticised the

majority Commission in the prior administration for “disregarding sound economics” in its antitrust enforcement.<sup>20</sup> “Although well intentioned,” Acting Chairman Ohlhausen claimed that the FTC under Obama “imposed unnecessary costs on businesses, and substituted rigorous analysis of competitive effects for conclusory assertions of ‘unfair competition.’”<sup>21</sup> She has called for enforcement supported by “testable empirical facts” and “sound economic theory” rather than “speculative harms.”<sup>22</sup>

While the DOJ has not announced process reforms, President Trump’s nominee for Assistant Attorney General for the Antitrust Division, Makan Delrahim, also stressed the importance of factual “evidence and economic analysis” in antitrust enforcement and not using federal laws “as a fishing expedition by the government.”<sup>23</sup>

### SMARTER Act

The Standard Merger and Acquisition Reviews Through Equal Rules Act of 2017 (“SMARTER Act”) attempts to standardise the process used by the antitrust agencies to challenge a proposed merger or acquisition.<sup>24</sup> The SMARTER Act has two main objectives.<sup>25</sup> The first objective is to equalise the DOJ and FTC standards for obtaining a preliminary injunction of a proposed merger.<sup>26</sup> Currently, under Section 15 of the Clayton Act,<sup>27</sup> a traditional equitable standard applies to the DOJ when it seeks a preliminary injunction against a proposed transaction, meaning that it must show there is a “substantial likelihood” the transaction violates Section 7 of the Clayton Act.<sup>28</sup> Conversely, the FTC operates under a “public interest” standard where a preliminary injunction may be granted to the agency if the FTC shows that “considering the Commission’s likelihood of ultimate success, such action would be in the public interest.”<sup>29</sup> The public interest standard is generally considered more lenient than the DOJ’s “traditional equitable standard.”<sup>30</sup> While parties file notice of the proposed deal with both agencies, only one agency actually reviews the merger. The SMARTER Act seeks to eliminate the uncertainty parties face as to which agency they will draw and, consequently, which standard they will fall under.

The second objective of the SMARTER Act is to eliminate the FTC’s ability to utilise administrative adjudication to challenge a proposed transaction when it asks a court for a preliminary injunction.<sup>31</sup> The SMARTER Act would require the FTC to litigate challenged mergers in federal court.<sup>32</sup> Currently, the FTC’s usual approach is to seek preliminary injunctive relief to stall the transaction while the agency conducts its own administrative proceedings (Part III litigation) challenging the merits of the transaction.<sup>33</sup> The SMARTER Act would amend the FTC Act to specifically exclude proposed mergers and other transactions from the administrative proceedings the FTC may conduct under 15 U.S.C. §45 to evaluate an “unfair method of competition.”<sup>34</sup> The Act would not affect FTC challenges to consummated mergers or other antitrust issues.<sup>35</sup>

Two previous versions of the bill passed in the House, but failed to pass in the Senate.<sup>36</sup> It was also believed that President Obama was not likely to sign the bill. Now that the Republican Party controls the Presidency, House, and Senate, the bill’s passage is much more likely. Additionally, the SMARTER Act now has two Democratic co-sponsors and Acting FTC Chairman Maureen Ohlhausen has spoken in favour of equalising the DOJ and FTC preliminary injunction standards for challenging proposed mergers and acquisitions in federal court.<sup>37</sup>

### **Acknowledgment**

The authors acknowledge the assistance of Jacqueline Liu and Evan Hicks in preparing this chapter.



## Endnotes

1. The US government fiscal year runs from October 1 to September 30 of the following calendar year.
2. The averages exclude fiscal years where there was administration overlap – i.e., fiscal year 2001 which covered the terms of President Bill Clinton and President George W. Bush and fiscal year 2009 which covered the terms of President Bush and President Obama.
3. Hart-Scott-Rodino Annual Reports for fiscal years ended 2015, 2014, 2013, 2012, 2011, 2010, 2009, 2008, and 2007, *available at* [www.ftc.gov/bc/anncompreports.shtm](http://www.ftc.gov/bc/anncompreports.shtm); Department of Justice, Antitrust Division, Workload Statistics, FY 2007-2016 *available at* <https://www.justice.gov/atr/file/788426/download>; FTC Competition Enforcement Database, *available at* <https://www.ftc.gov/competition-enforcement-database>.
4. The Hart-Scott-Rodino Annual Report for fiscal year 2016 has not been released. Therefore, information concerning the total number of Second Requests and adjusted transactions used to calculation percentages is not publicly available.
5. Percentages are based on adjusted transactions because they exclude transactions that are not subject to the merger review procedures of the HSR Act.
6. The percentage of challenged transactions may be overstated or understated in certain years because not all challenged mergers required notification to the Antitrust Agencies and some challenges were recorded in a fiscal year subsequent to notification.
7. Maureen K. Ohlhausen, Antitrust Policy for a New Administration, January 24, 2017, *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/1051993/antitrust\\_policy\\_for\\_a\\_new\\_administration.pdf](https://www.ftc.gov/system/files/documents/public_statements/1051993/antitrust_policy_for_a_new_administration.pdf).
8. David McLaughlin, “Trump Hasn’t Interfered on AT&T-Time Warner Probe, Delrahim Says,” Bloomberg (May 23, 2017), *available at* <https://www.bloomberg.com/news/articles/2017-05-23/trump-hasn-t-interfered-on-at-t-time-warner-probe-delrahim-says>.
9. Harper Neidig, “Trump’s pick to lead antitrust division raises concerns over vertical mergers,” The Hill (May 30, 2017), *available at* <http://thehill.com/policy/technology/335617-trumps-pick-to-lead-antitrust-division-says-some-vertical-mergers-raise>.
10. *Id.*
11. Federal Trade Commission: Fiscal Year 2018 Congressional Budget Justification (May 22, 2017), at pp. 19, 85.
12. In its complaint, the FTC alleges that Mr. Okumus improperly relied upon on the investment-only exemption with respect to the 2014 acquisition because he held in excess of 10% of Web.com’s voting securities.
13. Joshua D. Wright & Theodore Serra, “FTC Alums: Retail Mergers Reflect New Approaches At FTC,” Law360 (Aug. 24, 2016), *available at* [law360.com/articles/806783/ftc-alums-retail-mergers-reflect-new-approaches-at-ftc](http://law360.com/articles/806783/ftc-alums-retail-mergers-reflect-new-approaches-at-ftc).
14. Remarks of Acting Chairman Maureen K. Ohlhausen, The FTC at 100 [Days] (May 3, 2017), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/1213893/ohlhausen\\_-\\_ftc\\_at\\_100\\_days\\_5-3-17.pdf](https://www.ftc.gov/system/files/documents/public_statements/1213893/ohlhausen_-_ftc_at_100_days_5-3-17.pdf).
15. Pallavi Guniganti, “Lipsky outlines principles for US FTC reforms,” Global Competition Review (April 19, 2017), *available at* [http://globalcompetitionreview.com/article/1139801/lipsky-outlines-principles-for-us-ftc-reforms?utm\\_source=Law%20](http://globalcompetitionreview.com/article/1139801/lipsky-outlines-principles-for-us-ftc-reforms?utm_source=Law%20)

- [Business%20Research&utm\\_medium=email&utm\\_campaign=8213503\\_GCR%20Headlines%2019%2F04%2F2017&dm\\_i=1KSF,4W1KV,9GQ1UK,IIMEQ,1.](#)
16. Remarks of Commissioner Maureen K. Ohlhausen “Antitrust Policy for a New Administration,” (January 24, 2017), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/1051993/antitrust\\_policy\\_for\\_a\\_new\\_administration.pdf](https://www.ftc.gov/system/files/documents/public_statements/1051993/antitrust_policy_for_a_new_administration.pdf).
  17. FTC Press Release, “Process Reform Initiatives are Already Underway at the Federal Trade Commission” (Apr. 17, 2017), *available at* <https://www.ftc.gov/news-events/press-releases/2017/04/process-reform-initiatives-are-already-underway-federal-trade>.
  18. Pallavi Guniganti, “Lipsky outlines principles for US FTC reforms,” *Global Competition Review* (April 19, 2017), *available at* [http://globalcompetitionreview.com/article/1139801/lipsky-outlines-principles-for-us-ftc-reforms?utm\\_source=Law%20Business%20Research&utm\\_medium=email&utm\\_campaign=8213503\\_GCR%20Headlines%2019%2F04%2F2017&dm\\_i=1KSF,4W1KV,9GQ1UK,IIMEQ,1](http://globalcompetitionreview.com/article/1139801/lipsky-outlines-principles-for-us-ftc-reforms?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=8213503_GCR%20Headlines%2019%2F04%2F2017&dm_i=1KSF,4W1KV,9GQ1UK,IIMEQ,1).
  19. Pallavi Guniganti, “Lipsky outlines principles for US FTC reforms,” *Global Competition Review* (April 19, 2017), *available at* [http://globalcompetitionreview.com/article/1139801/lipsky-outlines-principles-for-us-ftc-reforms?utm\\_source=Law%20Business%20Research&utm\\_medium=email&utm\\_campaign=8213503\\_GCR%20Headlines%2019%2F04%2F2017&dm\\_i=1KSF,4W1KV,9GQ1UK,IIMEQ,1](http://globalcompetitionreview.com/article/1139801/lipsky-outlines-principles-for-us-ftc-reforms?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=8213503_GCR%20Headlines%2019%2F04%2F2017&dm_i=1KSF,4W1KV,9GQ1UK,IIMEQ,1).
  20. Remarks of Commissioner Maureen K. Ohlhausen “Antitrust Policy for a New Administration,” (January 24, 2017), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/1051993/antitrust\\_policy\\_for\\_a\\_new\\_administration.pdf](https://www.ftc.gov/system/files/documents/public_statements/1051993/antitrust_policy_for_a_new_administration.pdf).
  21. Remarks of Commissioner Maureen K. Ohlhausen “Antitrust Policy for a New Administration,” (January 24, 2017), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/1051993/antitrust\\_policy\\_for\\_a\\_new\\_administration.pdf](https://www.ftc.gov/system/files/documents/public_statements/1051993/antitrust_policy_for_a_new_administration.pdf).
  22. Remarks of Acting Chairman Maureen K. Ohlhausen, *The FTC at 100 [Days]* (May 3, 2017), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/1213893/ohlhausen\\_-\\_ftc\\_at\\_100\\_days\\_5-3-17.pdf](https://www.ftc.gov/system/files/documents/public_statements/1213893/ohlhausen_-_ftc_at_100_days_5-3-17.pdf).
  23. Cecilia Kang, “How Trump’s Pick for Top Antitrust Cop May Shape Competition,” *New York Times* (Apr. 25, 2017), *available at* [https://www.nytimes.com/2017/04/25/technology/how-trumps-pick-for-top-antitrust-cop-may-shape-competition.html?\\_r=1](https://www.nytimes.com/2017/04/25/technology/how-trumps-pick-for-top-antitrust-cop-may-shape-competition.html?_r=1).
  24. Standard Merger and Acquisition Reviews Through Equal Rules Act of 2017, H.R. 659, 115th Cong. § 1 (1st Sess. 2017).
  25. *Id.*
  26. *Id.* at §§2-3; Jeffrey May, *The SMARTER Act and Its Impact on Federal Merger Enforcement*, ANTITRUSTCONNECTBLOG (Nov. 30, 2015), *available at* <http://antitrustconnect.com/2015/11/30/the-smarter-act-and-its-impact-on-federal-merger-enforcement/>.
  27. Clayton Act, 15 U.S.C. §25.
  28. May, *supra* note 26.
  29. 15 U.S.C. §53.
  30. May, *supra* note 26; *but see* The American Antitrust Institute, *Antitrust Enforcement*

*Data Shows SMARTER Act is Not So Smart*, available at [http://www.antitrustinstitute.org/sites/default/files/Smarter%20Act\\_AAI.11.5.15.pdf](http://www.antitrustinstitute.org/sites/default/files/Smarter%20Act_AAI.11.5.15.pdf) (arguing that the difference in the standards is more theoretical than practical and that, according to their data, the DOJ's standard resulted in lower odds of challenges and second looks under the Hard Scott Rodino Act).

31. May, *supra* note 26.
32. Daniel A. Friedman & Melissa R. Ginsburg, "Smarter" Act Advances in Congress: Will it Become Law?, ANTITRUSTUPDATEBLOG (Apr. 13, 2017), <https://www.antitrustupdateblog.com/smarter-act-advances-in-congress-will-it-become-law/>.
33. May, *supra* note 26.
34. *Id.*
35. *Id.*
36. Friedman, *supra* note 32.
37. *Id.*

**Christopher A. Williams****Tel: +1 202 973 8895 / Email: [cwilliams@wsgr.com](mailto:cwilliams@wsgr.com)**

Chris Williams is a senior associate in the Washington, DC office of Wilson Sonsini Goodrich & Rosati, where he is a member of the firm's antitrust practice. His practice centres on antitrust regulation of mergers from pre-merger counselling through investigations by the Federal Trade Commission and Department of Justice. He also has experience working closely with country counsel on the review of mergers by foreign competition authorities and with antitrust civil litigation, government investigations, and business counselling. Chris has represented clients in a wide range of industries, including information technology, electronics and computer hardware, semiconductors, telecommunications, healthcare, life sciences, pharmaceuticals, groceries, chemicals, and energy and utilities.

**Roisin E. Comerford****Tel: +1 202 973 8895 / Email: [rcomerford@wsgr.com](mailto:rcomerford@wsgr.com)**

Roisin Comerford is an associate in the Washington, D.C., office of Wilson Sonsini Goodrich & Rosati. She is a member of the firm's antitrust team, and her work encompasses all aspects of the practice, including litigation, government investigations, counseling, and mergers and acquisitions. She has represented clients in a wide range of industries, including information technology, electronics and computer hardware, semiconductors, telecommunications, healthcare, life sciences, pharmaceuticals, and energy and utilities.

**Paul S. Jin****Tel: +1 202 973 8858 / Email: [pjin@wsgr.com](mailto:pjin@wsgr.com)**

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

## Wilson Sonsini Goodrich & Rosati PC

1700 K Street, N.W., Fifth Floor, Washington, DC 20006-3817, USA

Tel: +1 202 973 8800 / URL: [www.wsgr.com](http://www.wsgr.com)

[www.globallegalinsights.com](http://www.globallegalinsights.com)

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

- **Banking Regulation**
- **Bribery & Corruption**
- **Cartels**
- **Commercial Real Estate**
- **Corporate Tax**
- **Employment & Labour Law**
- **Energy**
- **Fund Finance**
- **Initial Public Offerings**
- **International Arbitration**
- **Litigation & Dispute Resolution**
- **Mergers & Acquisitions**



Strategic partner