Merger Challenges Update

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Last September, we circulated a note **highlighting the four merger challenges** that the U.S. antitrust authorities were then pursuing. At the time, we noted that these matters underscored the antitrust authorities' vigorous enforcement agenda. Four months later, there have been significant developments in all four cases and this seems like a timely point for an update. As reflected below:

- in two cases, the government has prevailed at trial;
- in one case, the government and the parties settled with divestitures;
- in the final case, trial has been delayed to permit further settlement negotiations.

The two trial wins continue a recent string of victories for the U.S. antitrust agencies — and may well embolden them to bring more merger challenges in the future. The settlement and potential settlement demonstrate that the filing of a complaint by the government does not always spell doom for a proposed deal. In some cases, negotiations concerning a potential settlement continue after the filing of a complaint. It is still generally preferable, however, to negotiate a settlement prior to the commencement of litigation. After filing a complaint, the government may have less flexibility to settle — particularly as the allegations of the complaint may themselves exclude the possibility of certain types of resolutions.

Bazaarvoice/PowerReviews

In this matter, the DOJ challenged the consummated merger of Bazaarvoice and PowerReviews, two providers of online ratings and reviews. The merger had not been subject to advanced antitrust review under the HSR Act and had closed in June 2012. (While the value of the transaction was approximately $160 million, the target was not large enough to meet the "size of person" test under the HSR Act.)

After a four-week trial, the district court **issued a ruling** in favor of the DOJ on January 9, 2014. Relying heavily on the parties' own ordinary course documents, the court found that the two businesses were by far the leading competitors in the relevant market with over 50% combined market share. The parties' documents also suggested that the principal purpose of the transaction was to eliminate a competitor and alleviate price competition. The court rejected the parties' argument that entry by other competitors would prevent anticompetitive effects from arising — relying in part upon the parties' documents stating that entry barrier were high. The case underscores yet again the critical importance of ordinary course business documents in the merger review process.

The court has not yet ruled on remedies. The DOJ has requested a divestiture of assets to create a viable competitor. Crafting a remedy in this case will be particularly challenging given that the merger has been consummated for a year and a half, and the parties have apparently integrated their operations.

US Airways/American Airlines

In this matter, the DOJ sued to block the proposed merger of US Airways and American Airlines, alleging that the merger would leave only four major airlines controlling 80% of U.S. domestic flights. Rejecting a DOJ request for a March trial, the federal district court set a trial date of November 25 while encouraging the parties to negotiate further over a potential settlement.

The parties **reached a settlement** on November 12 requiring the airlines to divest a number of takeoff/landing slots at major U.S. airports. Although the divestitures are larger than in any previous airline merger settlement, some commentators have suggested that the final settlement is relatively

modest given the complaint's initial allegations. The parties have stated in the press that the divestitures will have no effect on the synergies and efficiencies that they project to achieve as a result of the deal. In its **press release**, the DOJ described the divestitures as "groundbreaking" and predicted that it would "dramatically enhance the ability of [low-cost carriers] to compete." Citing the success of the United/Continental divestiture settlement, DOJ Antitrust Chief Bill Baer **told reporters** that facilitating the growth of low-cost carriers like JetBlue would promote more competition than simply blocking the merger altogether.

Ardagh Group/Saint-Gobain Containers

In this matter, the FTC filed **an administrative complaint** seeking to block the proposed merger of Ardagh and Saint-Gobain, the second- and third-largest glass container manufacturers in the U.S. The FTC alleges that the deal will result in only two firms (the merged firm and Owens-Illinois) controlling more than 75% of the U.S. market for "glass containers for beer and spirits." In the preliminary injunction proceeding, Ardagh argued that it was willing to divest two of its own plants and two St. Gobain plants, and that its proposal satisfied any competitive concerns. The FTC disagreed, and the federal district court declined to "litigate the fix" in the absence of a divestiture agreement with an identified buyer.

Subsequently, Ardagh has committed not to close the merger, pending resolution of the litigation, and has renewed settlement discussions with the FTC. Ardagh has offered to divest six of the eight plants it acquired from Anchor Glass in 2012, and the FTC has expressed **tentative support** for this offer pending further study. The administrative trial is stayed until March 18, 2014 to give the parties time to finalize a settlement agreement.

St. Luke's Health System/Saltzer Medical Group

In this matter, the FTC challenged the ongoing merger of St. Luke's Health System and Saltzer Medical Group. The FTC alleged that the merger would give St. Luke's an 80% share of primary care physicians in Nampa, Idaho. The defendants argued that the relevant geographic market is larger than Nampa, and that the merger allows them to provide better service (including a new $200 million electronic medical records system).

A trial was held in November 2013. On January 24, 2014, the district court **ruled in favor** of the FTC, continuing a streak of recent healthcare victories for the agency. Although the court agreed that the merger would have positive effects on patient care, it nevertheless ordered the parties to unwind the merger. The court ruled that the merger would give St. Luke's a dominant market position and that health care costs were thus "highly likely" to rise. The court's full opinion has not yet been published in order to permit the parties an opportunity to request redactions.

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