GETTING THE DEAL THROUGH

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Merger Control

The international regulation of mergers and joint ventures in 75 jurisdictions worldwide

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John Davies
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Managing director
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Fax: +44 20 7229 6910

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United States

Ronan P Harty
Davis Polk & Wardwell LLP

Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

Section 7 of the Clayton Act, enacted in 1914 and amended in 1950, is the principal US antitrust statute governing mergers and acquisitions. Section 7 prohibits acquisitions of assets or stock where 'the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly'. Transactions may also be challenged under section 1 or 2 of the Sherman Act as unreasonable restraints of trade or as attempts at monopolisation. The Federal Trade Commission (the FTC) also has the authority under section 5 of the FTC Act to challenge a transaction as an 'unfair method of competition'.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) was enacted to give the federal agencies responsible for reviewing the antitrust implications of mergers and acquisitions – the Federal Trade Commission and the Antitrust Division of the Department of Justice (collectively, 'the antitrust agencies' or 'the agencies') – the opportunity to review the antitrust issues presented by certain acquisitions of assets or voting securities before those acquisitions are completed. Pursuant to congressional authorisation, the FTC, with the agreement of the Antitrust Division, has promulgated detailed and complex rules (the Rules) governing pre-merger notification under the HSR Act. Both the HSR Act and the Rules were amended significantly in February 2001, and the Rules again underwent significant revision in 2005.

The antitrust agencies also have jurisdiction to investigate and challenge transactions under the US antitrust laws, whether or not they have been notified under the HSR Act and whether or not they have been consummated.

The Antitrust Division has exclusive federal responsibility for enforcing the Sherman Act; the FTC is an independent administrative agency and has exclusive responsibility for enforcing the FTC Act and joint authority (with the Antitrust Division) over enforcement of the Clayton Act. Although both agencies have jurisdiction to enforce the antitrust laws, any given merger or acquisition will be examined by only one of the two bodies. Which agency will concern itself with any particular transaction is decided by informal discussions between the two agencies and can often be predicted (but not with certainty) on the basis of the agency's relative familiarity with the industry or companies involved.

Mergers and acquisitions can, under some circumstances, also be challenged by private parties and by state attorneys general. The risk of a challenge by private parties has been reduced somewhat by court decisions requiring that such challengers demonstrate a threat that they will be injured by the anti-competitive aspects of the transaction (rather than, for example, by the new firm's enhanced effectiveness as a competitor). In situations where a private party has standing to challenge a transaction, that party can seek the same remedies (including divestiture) that are available to the government, although a private party may be subject to certain equitable defences (such as laches and 'unclean hands'), which might protect a consummated transaction from attack.

2 What kinds of mergers are caught?

The HSR Act requires parties to file a formal notification with the Antitrust Division and the FTC – and to wait a specified number of days (30 days in most transactions) while the designated agency reviews the filings – before consummating certain acquisitions of 'assets' or 'voting securities'. Thus, the HSR Act can apply to any kind of transaction (be it an acquisition of a majority or minority interest, a joint venture, a merger or any other transaction that involves an acquisition of assets or voting securities).

Although the term 'assets' is not defined in the HSR Act, the agencies have taken the position that it should be given a broad interpretation similar to that which it has been given by the courts in interpreting section 7 of the Clayton Act. Under these principles, it is clear that acquisitions of assets – within the meaning of the HSR Act – will include acquisitions of both tangible and intangible assets. The acquisition of exclusive patent licences, for example, may require notification.

The Rules define 'voting securities' broadly to include, generally speaking, any security in a corporate entity that either currently entitles the holder to vote for the election of directors, or is convertible into such a security. The acquisition of securities that do not at present possess, or are not convertible into securities that will possess, such voting power is exempt from the HSR Act. Although they are defined as voting securities, the Rules exempt the acquisition of convertible securities, options and warrants at any time before they have been converted or exercised. It may, however, be necessary to make a filing before such securities can be converted (provided that the relevant jurisdictional tests are met at the time of conversion).

An acquisition of interests in a non-corporate entity (eg, LLCs and partnerships) that confers the right to either 50 per cent or more of the profits or, in the event of dissolution, 50 per cent or more of the assets of the entity is considered to be an acquisition of the underlying assets of the entity. In other words, the Rules do not treat non-corporate interests as 'voting securities,' regardless of the voting rights that those interests may have.

3 What types of joint ventures are caught?

If it involves an acquisition of non-corporate interests or voting securities, the formation of a for-profit joint venture may be subject to the HSR Act. (Generally, not-for-profit joint ventures are exempt, although in certain cases they may be reportable.) The Rules contain a special provision governing the formation of new corporations and corporate joint ventures (new companies). As a general matter, where two or more persons contribute to form a new company, and as a result receive voting securities of this new company, the Rules treat the contributing parties as acquiring persons, and the new company as the acquired person. In these cases, the Rules provide a special

jurisdictional test based on the size of all contributors and the size of the new company itself.

Additionally, if the acquisition is of interests in a joint venture that is formed as a non-corporate entity, only the acquiring person (if applicable) that will hold 50 per cent or more of the interests in the entity will be subject to HSR reporting obligations. If no acquiring person will hold 50 per cent or more following the acquisition, the non-corporate joint venture is not reportable.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The requirement to comply with the HSR Act is not limited to transactions that involve a change of control. As explained in greater detail below, any acquisition that results in the acquiring person holding more than $70.9 million worth of the voting securities of another company (as adjusted annually each February to reflect changes in GNP) may require a filing, even if that amount represents a very small percentage of the total outstanding stock of the target. (However, acquisitions of less than 50 per cent of a non-corporate entity are not reportable.)

The HSR Rules do include a definition of 'control'. However, this definition is used primarily to determine which companies should be included within the 'acquiring' or 'acquired' persons (see below). The basic principles used in determining if control exists are as follows:

- controlling a corporate entity means either holding 50 per cent or more of its outstanding voting securities, or having the contractual power presently to designate 50 per cent or more of its directors;
- controlling a partnership, LLC, or other non-corporate entity means having the right to either 50 per cent or more of its profits or, in the event of its dissolution, 50 per cent or more of its assets;
- a natural person will never be deemed to be controlled by any other entity or person; and
- controlling a trust means having the contractual power to appoint 50 per cent or more of the trustees.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The initial determination of whether the notification requirements of the HSR Act may be applicable to a particular acquisition of assets or voting securities focuses upon the following jurisdictional issues:

- whether either the acquiring or acquired persons are engaged in US commerce or in any activity affecting US commerce (the commerce test);
- the amount of voting securities or assets which will be held as a result of the acquisition (the size-of-the-transaction test); the dollar thresholds are adjusted annually to reflect changes in the GNP;
- where the size of the transaction is $283.6 million (as adjusted annually) or less but greater than $70.9 million (as adjusted annually), the magnitude of the worldwide sales and assets of the acquiring and acquired persons (the size-of-the-parties test) (as noted, the dollar thresholds are adjusted annually); and
- whether any exemptions apply to the transaction.

The commerce test

This requires that either the acquiring or acquired party be engaged in US commerce or in any activity affecting US commerce.

The size-of-the-transaction test

The size-of-transaction test looks at the assets or voting securities that will be held by the acquiring person as a result of a proposed acquisition. In other words, any voting securities or, in some cases, assets held by the acquiring person prior to the transaction, together with those assets or voting securities to be acquired in the acquisition in question, must be considered. Likewise, the acquisition of non-corporate interests of an entity must be aggregated with any interests currently held by the acquiring person in that same entity to determine whether or not the acquiring person holds 50 per cent or more of the entity, thus potentially requiring HSR notification.

An HSR filing is not required in connection with any particular acquisition unless it will result in the acquiring person holding assets or voting securities having an aggregate total value in excess of $70.9 million (as adjusted annually). In most cases, this threshold is cumulative. For example, if an acquirer already owns $50 million of voting securities of an issuer, and seeks to acquire $30 million in voting securities of that same issuer, the $30 million acquisition will result in the acquirer 'holding' voting securities of $80 million.

However, while the acquisition of a 50 per cent or more interest in a non-corporate entity is considered an acquisition of the assets of the entity, the value of the interest is not the value of 100 per cent of the underlying assets, but rather only of the percentage interest held as a result of the acquisition.

The size-of-the-parties test

The size-of-the-parties test does not apply to transactions resulting in holdings valued in excess of $283.6 million (as adjusted annually). For all smaller transactions, the test remains in effect.

The size-of-the-parties test looks at the size of both the acquiring and acquired person and, generally speaking, is satisfied if one party (including all entities in its corporate family) has worldwide sales or assets of $14.2 million or more (as adjusted annually), and the other has worldwide sales or assets of $141.8 million or more (as adjusted annually). Sales and assets, as a general rule, are defined as those set forth in an entity's last regularly prepared income statement and balance sheet.

It is important to note that 'acquiring person' and 'acquired person' are terms of art under the HSR Act and the Rules. To summarise a complex definition, these terms include not only the entity making the acquisition and the entity being acquired, but also the entire corporate family of which each is a part. Thus, assuming that an entity's assets or sales, or both, are $141.8 million or more, a purchase or sale of assets or voting securities by any subsidiary of that entity would satisfy the size-of-the-parties requirement under the HSR Act if the other party to the transaction was part of a corporate family that had assets or sales of $14.2 million or more (as adjusted annually).

Exemptions

Once it is determined that a proposed transaction meets the jurisdictional tests described above, the next step in determining if a pre-merger notification filing is required is examining whether the transaction qualifies for any of the exemptions set forth in the HSR Act or the Rules.

There are a variety of such exemptions, each of which excuses certain categories of transactions from the notification and waiting requirements of the HSR Act. For example, the notification requirements do not apply to:

- the acquisition of non-voting securities;
- certain acquisitions of voting securities 'solely for the purpose of investment';
- the acquisition of goods or realty in the ordinary course of business;
- certain acquisitions that require the prior approval of another federal agency;
- stock dividends and splits;
- certain acquisitions by securities underwriters, creditors, insurers and institutional investors; and
- certain financing transactions where the acquiring person contributes only cash to a non-corporate entity and will no longer control the entity after it realises its preferred return.

The FTC has also adopted a specific set of exemptions applicable to transactions involving non-US companies in which the US sales or assets involved are both below certain thresholds (as adjusted annually). These are described in detail in question 8.

The application of each of these exemptions will, of course, depend upon the particular circumstances of the transaction, and upon the limits and conditions to those exemptions set forth in the HSR Act and the Rules.

Finally, as noted above, transactions that fall below the HSR thresholds or are otherwise exempt from HSR reporting can still be investigated and challenged, even after they are consummated. The most recent challenges are described in greater detail in response to question 24.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If the threshold requirements described above are met and no exemption is available (such as those described above), filing under the HSR Act is mandatory; that is, the proposed transaction cannot be consummated until the filing is completed and applicable waiting periods, discussed below, have expired. There is no scheme for voluntary filings as such, but parties to non-reportable transactions can bring their transaction to the attention of the agencies.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

In certain circumstances, the acquisition of foreign assets or voting securities of a foreign company is exempt from the pre-merger notification requirements of the HSR Act. The Rules reflect the agencies' views that certain foreign acquisitions may affect competition in the US, but that pre-merger notification should not be required if there is insufficient nexus with US commerce.

Acquisitions of foreign assets

The HSR Rules provide that acquisitions of foreign assets by US and non-US companies shall be exempt from the HSR Act unless the foreign assets that would be held as a result of the acquisition generated sales in or into the US exceeding $70.9 million during the acquired person's most recent fiscal year. Even if the acquisition exceeds this threshold (as adjusted annually), the acquisition will nonetheless be exempt if:

- both the acquiring and acquired persons are foreign;
- the aggregate sales in or into the US in the most recent completed fiscal year and the aggregate total assets in the US of the acquiring person and the acquired person are both less than $156.0 million; and
- the assets that will be held as a result of the transaction are valued at $283.6 million or less.

Acquisitions of voting securities of a non-US issuer

With respect to acquisitions of a foreign issuer by a US person, the Rules provide that such an acquisition shall be exempt from the HSR Act unless the foreign issuer (together with any entities it controls) either holds assets in the US valued over $70.9 million, or made aggregate sales in or into the US of over $70.9 million in the most recent fiscal year. The Rules also make clear that if interests in several foreign issuers are being acquired from a common parent company, the assets and sales of all of the target companies must be aggregated in order to determine whether either of the $70.9 million thresholds described above (as adjusted annually) is exceeded.

With respect to acquisitions of voting securities of a foreign issuer by a foreign person, the Rules provide that such an acquisition shall be exempt unless it confers on the acquiring person control of the target issuer (ie, it is an acquisition that will give the acquiring person 50 per cent or more of the voting stock of the target) and the target, again, either holds assets in the US valued at more than $70.9 million, or made aggregate sales in or into the US of more than $70.9 million in the most recent fiscal year. As with acquisitions by US persons, if controlling interests in multiple foreign companies are being acquired from the same parent company, the US assets and sales of all of the target companies must be aggregated to determine whether either of the $70.9 million thresholds (as adjusted annually) is exceeded. Even if either of the $70.9 million thresholds described above (as adjusted annually) is exceeded, the transaction will nonetheless be exempt where:

- both the acquiring and the acquired persons are foreign;
- the aggregate sales in or into the US in the most recent completed fiscal year and the aggregate total assets in the US of the acquiring person and the acquired person are both less than $156.0 million; and
- the value of the voting securities that will be held as a result of the transaction is $283.6 million or less.

Finally, if both foreign assets and foreign voting securities are being acquired from the same acquired person, the US sales attributed to both the assets and to the foreign issuer must be aggregated to determine whether the $70.9 million threshold (as adjusted annually) is exceeded.

The Rules also provide an exemption from the requirements of the HSR Act for acquisitions of foreign assets or voting securities where the parent of the buyer or seller is the government of that same foreign jurisdiction.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Certain industries (including banking, telecommunications and media, transport and energy) have special legislation governing mergers and acquisitions. In these industries, approval of other federal agencies may be required for certain transactions. Transactions in some industries may require review by both the antitrust agencies and the agency more specifically charged with overseeing the industry (for example, the Federal Communications Commission for telecommunications mergers). Other industries have certain restrictions on foreign ownership of US assets. Finally, transactions that have national security implications may also require special notification and approval by the Committee on Foreign Investment in the United States (CFIUS) (organised within the US Department of Treasury).

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific deadline for making a filing under the HSR Act. The parties can submit their filings at any time after the execution of a letter of intent (which can be non-binding) or a definitive agreement. However, it is crucial to note that if a transaction is covered by the HSR Act, it cannot be consummated until all required filings have been made and the applicable waiting periods have been observed. Additionally, even after filings are submitted, it is a violation of the Act for an acquiring party to take steps that have the effect of transferring beneficial ownership of the target business to the acquirer prior to the expiry of the waiting period. Failure to comply with the HSR Act can result in a fine of up to $16,000 per day and the agencies may seek to unwind a transaction that has been consummated in violation of the HSR Act.

In general, the level of compliance with the HSR Act has been extremely high. In those instances in which a required filing has not been made, or the waiting period not observed, the agencies have not hesitated to seek significant penalties. The agencies have obtained fines in nine matters during the last seven fiscal years, ranging from $250,000 to $1.4 million.

10 Who is responsible for filing and are filing fees required?

If a transaction is subject to the filing requirements of the HSR Act, parties to the transaction must make separate filings with the antitrust agencies. All acquiring persons that are required to file must pay a filing fee that is calculated according to the total value of the securities or assets to be held as a result of the transaction. The parties may agree to split the fee or even have the acquired person pay the fee. Transactions valued at less than $141.8 million are subject to a filing fee of $45,000. Transactions valued at $141.8 million or more but less than $709.1 million are subject to a filing fee of $125,000. Transactions valued at $709.1 million or more are subject to a filing fee of $280,000. This fee must be submitted at the time the notification form is filed, or the waiting period will not begin.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

If a transaction is subject to the HSR Act, and a filing is thus required, the acquisition must be delayed for a 30-day period (or, in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b), a 15-day period) while the agencies review it. If the agencies take no action, the transaction may be consummated when the waiting period has expired. The agencies do not issue a formal decision clearing a transaction.

To the extent that a merger is subject to the HSR Act, the initial waiting period generally begins as soon as both parties to the transaction have made the requisite filing with the antitrust agencies. In cases involving tender offers and other acquisitions of voting securities from third parties, the waiting period begins as soon as the acquiring person has made the requisite filing, although the acquired party must file within a prescribed time.

If any deadline for governmental action falls on a weekend or a legal public holiday, the deadline is automatically extended to the next business day.

Early termination of the waiting period

The parties may request that the antitrust agencies terminate the waiting period before it has run its full course, and the agencies may, at their discretion, grant such requests. It should be noted that when early termination is granted, the agencies are required to publish notice of their action in the Federal Register. This notification only identifies the acquiring person, the acquired person, and the acquired entity. None of the confidential business information filed by the parties is disclosed.

Extension of the waiting period

The agency responsible for reviewing a particular transaction may, before the end of the initial 30-day waiting period, issue what is generally referred to as a 'second request' seeking additional information from the parties to a transaction (see question 18). The issuance of a second request extends the waiting period to the 30th day (or, in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b), the 10th day) after the date of substantial compliance with the request for additional information. The procedural aspects of a second request are discussed further below.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

A transaction subject to the HSR Act may not close prior to the expiry or early termination of the applicable waiting period or periods. Failure to comply can result in a fine of up to $16,000 per day and the agencies may seek to unwind a transaction that has been consummated in violation of the Act. As noted in question 9, the agencies have imposed fines for failure to file and observe the waiting period.

Most recently, in September 2012, Biglari Holdings, Inc (Biglari), a publicly traded diversified US holding company, was fined $850,000 for failure to file and observe the waiting period prior to closing certain acquisitions of shares of Cracker Barrel Old Country Store, Inc (Cracker Barrel) in June 2011. The FTC alleged that Biglari's incremental acquisitions of Cracker Barrel stock resulted in Biglari's aggregate holdings of Cracker Barrel exceeding the minimum (then $66 million), and no exemption from submitting a filing, such as for an acquisition 'solely for the purpose of investment', was available (because the conduct of officers of Biglari around the time of the acquisition indicated an intent to influence management and propose business strategy).

Merging parties may also be fined for 'gun jumping' – taking steps that have the effect of transferring beneficial ownership of the target business prior to the expiry or early termination of the applicable waiting period or periods. In the most recent example of such an enforcement action, the Antitrust Division, in January of 2010, fined Smithfield Foods and Premium Standard Farms for an alleged gun-jumping violation where Smithfield entered into a merger agreement with Premium Standard and reserved for itself the right to review certain contracts of Premium Standard. The Antitrust Division claimed that the parties violated the HSR Act when Premium Standard submitted three large, multi-year contracts to Smithfield for approval, alleging that this action was sufficient to show that the acquirer had taken 'operational control' of the target prior to the expiry of the HSR Act waiting period. The parties agreed to pay a $900,000 fine.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Unless an exemption applies, sanctions are applied in cases involving closing before clearance in foreign-to-foreign mergers in the same manner as the sanctions are applied to domestic transactions. For example, in 1997, Mahle GmbH (Mahle), a German piston manufacturer, and Metal Leve, SA (Metal Leve), a Brazilian competitor, were each fined $2.8 million for failure to file and observe the HSR waiting period prior to closing an acquisition by Mahle of 50.1 per cent of Metal Leve. Both companies manufactured diesel engine parts through US subsidiaries.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no special remedy rules or practices applicable to foreign-to-foreign mergers. If the transaction gives rise to competitive issues in the United States, those issues must be resolved before the transaction can proceed.

15 Are there any special merger control rules applicable to public takeover bids?

The Rules contain provisions that are applicable only to tender offers. As noted in question 11 in the discussion of the waiting periods, if the transaction in question is a cash tender offer (or a transfer in bankruptcy covered by 11 USC section 363(b)), the statutory initial waiting period is 15 days (instead of the usual 30 days). If a second request is issued in such a transaction, the waiting period is extended until the 10th day (instead of the usual 30 days) after the date on which the acquiring person substantially complies with the request. Also, for any tender offer, failure to substantially comply with a second request by the acquired person does not extend the waiting period. Further, in cases involving tender offers or other acquisitions of voting securities from third parties, the waiting period begins when the acquiring person files. All other aspects of the HSR Act are equally applicable to public and non-public transactions.

16 What is the level of detail required in the preparation of a filing?

The Notification and Report Form (the Form) that must be submitted to comply with the HSR Act requires the filing party to provide basic information about its US revenues, corporate organisation and certain minority shareholdings of entities engaged in an industry similar to the target's operations on a worldwide basis, and the structure of the transaction, as well as a variety of business documents. In particular, the parties are required to submit: all studies, surveys, analyses and reports which were prepared by or for any officers or directors (of any entity within the filing party) for the purpose of evaluating or analysing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.

The antitrust agencies consider these documents highly relevant to their initial evaluation of the antitrust implications of a transaction. The agencies also require submission of certain documents analysing synergies or efficiencies to be achieved in the transaction. Private equity and other investment funds making acquisitions must also include certain activities of 'associates' and their portfolios that are not 'controlled' (see the definition of control in question 4) by the acquirer but are engaged in an industry similar to the target's operations. (Refer to the FTC's website, www.ftc.gov/bc/hsr/index.shtm, for the latest updates on Form requirements.)

Unlike, for example, the European Union's form CO, completion of the Form does not require any discussion or description of the relevant markets or the competitive conditions in those markets. Preparation of the Form can take a number of days to a number of weeks, depending principally on whether the company has submitted a filing in the recent past and on how the company organises its data. To facilitate the process, the agencies recently amended their procedures to allow electronic submissions.

17 What is the timetable for clearance and can it be speeded up?

As noted, if a transaction is subject to the HSR Act, the closing of the transaction must be delayed for an initial 30-day waiting period (or, in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b), a 15-day period) following the filing of the Form. The parties may request that the antitrust agencies terminate the waiting period before it has run its full course, and the agencies may, at their discretion, grant such requests. If the agency decides to issue a second request, the applicable waiting period will be extended until the 30th day (or the 10th day in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b)) following substantial compliance with the requests for information and documents arising from the second-phase investigation.

Although they have not taken a public position on expediting requests for early termination as a result of economic circumstances, the antitrust agencies have been sensitive to the need to complete investigations of mergers involving distressed firms promptly. The agencies generally grant requests for early termination swiftly for transactions clearly raising no competitive concerns.

18 What are the typical steps and different phases of the investigation?

Once the parties to a transaction file their forms, the FTC will initially review the forms to ensure that they are complete and comport with the transmittal rules. Then, the two antitrust agencies decide between themselves which one of them will review the transaction beyond the filings themselves and publicly available information. If either the FTC or the Antitrust Division wants to conduct such further review of the transaction, it notifies the other agency and obtains 'clearance'. If both agencies want to investigate the merger, the matter is assigned through an internal liaison process. Often, one of the agencies will have greater expertise than the other with respect to a particular industry or company.

Once a transaction has been assigned to a particular agency, a staff attorney will normally contact the parties' lawyers to ask for additional information. Responding to such a request is not mandatory during the initial waiting period, but a failure to respond may leave the agency with important issues unresolved that may result in the issuance of a formal second request. The FTC has published guidelines listing the types of information and documents that may be useful to provide during the initial waiting period (available on the FTC's website at www.ftc.gov/bc/hsr/hsrguidance.shtm).

Often, the information provided to the agency during the initial waiting period will be sufficient to allow the agency to terminate its investigation. It is not uncommon for the parties to submit some form of letter or 'position paper' to the agency during the initial waiting period, addressing the questions of the agency and explaining in detail why the transaction will not substantially lessen competition or create a monopoly. It is also very common for the agency to contact the parties' customers and competitors to obtain additional information regarding the industry, and to interview executives from the merging firms.

For those mergers that continue to raise significant antitrust issues at the end of the initial waiting period, the procedure available to the agencies is to issue a 'request for additional information and documentary material' or, as it is more commonly referred to, a 'second request'.

A second request is a detailed set of interrogatories and document demands designed to provide the agency responsible for reviewing the transaction with information on issues such as market structure, entry conditions, competition, marketing strategies, and the rationale of the acquisition under review.

Compliance with a second request may be a burdensome and time-consuming task, requiring the parties to a transaction to produce substantial volumes of documents and to answer detailed questions. The burden may be particularly great in cases involving parties located outside the United States, because the rules require all documents submitted in response to a second request to be translated into English.

However, the agencies have implemented a number of reforms to the second request process designed to reduce the burdens associated with compliance by, among other things, limiting the scope of initial document requests and the number of company personnel whose files must initially be searched. Parties often negotiate with the reviewing agency to attempt to further limit the scope of material requested.

Either during the period of compliance, or following the submission of the complete response, it is not uncommon for the agency reviewing the transaction to take the sworn testimony of senior executives of the parties to the transaction. These oral examinations, or depositions, can cover a wide range of issues and are usually designed to explore the rationale for the transaction, entry issues, competitive conditions and other strategic issues. The depositions can be useful vehicles for the parties to put forward their views on the likely competitive impact of the transaction.

Following the parties' compliance with the second request (which can take a number of months), the agency responsible for reviewing the particular transaction must decide whether to let the transaction proceed, or whether to seek a court order enjoining the transaction, or take other enforcement action for alleged violation of the antitrust laws. Alternatively, the parties and the responsible agency may enter into a 'consent agreement' – a form of settlement that is designed to address the anti-competitive effect that the agency believes may result if the transaction proceeds as planned. If the agency in question takes no action, the parties are free to consummate the transaction at the end of the second 30-day waiting period.

Substantive assessment

19 What is the substantive test for clearance?

As noted earlier, the Clayton Act prohibits acquisitions the effect of which 'may be substantially to lessen competition or to tend to create a monopoly'. As a general matter, in merger cases, the US federal courts have largely adopted the analytical methodology set out in the Horizontal Merger Guidelines issued by the antitrust agencies. The previous Guidelines were first released in 1992 to guide the antitrust agencies' determination whether to challenge a horizontal merger and describe their approach to counsel and the business community. The current, revised set was published on 19 August 2010 (www.ftc.gov/os/2010/08/100819hmg.pdf).

The unifying theme of these Guidelines is that a merger should not be permitted if it will create or enhance market power or facilitate its exercise. The agencies assess market power by analysing whether the merged entity 'is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.'

Under the Guidelines, the likelihood that a proposed transaction will create or enhance 'market power' or facilitate its exercise may be established either by direct evidence of likely anti-competitive effects (or actual anti-competitive effects in cases of consummated transactions) or alternatively by circumstantial evidence.

Although the Guidelines have no force of law, they are highly influential in the antitrust agencies' future determinations whether to challenge horizontal mergers. The 2010 Guidelines, in particular, downplay the importance of market definition in the horizontal merger analysis, and place a greater emphasis on alternative measurements of anti-competitive effects. Because most horizontal merger investigations in the US are resolved at the agency level, rather than challenged in court, the revised Guidelines provide important insight into how best to address agency concerns.

20 Is there a special substantive test for joint ventures?

Joint ventures involving competitors that completely eliminate competition between the parties and that are intended to exist for at least 10 years are analysed in the same way as all other mergers or acquisitions. Other competitor collaborations are analysed by the agencies pursuant to a framework described in the agencies' 2000 'Antitrust Guidelines for Collaborations Among Competitors'.

21 What are the 'theories of harm' that the authorities will investigate?

Market share analysis is only one method of antitrust analysis in the US. The responsible agency, if it believes that the transaction may raise competitive concerns, will examine all aspects of competition in the relevant markets. In recent years, the agencies have been particularly concerned about transactions that have combined competitors that sell products or services that are especially close substitutes for each other, which could give rise to unilateral effects, as well as the possibility of coordinated effects. (See the agencies' 2010 Horizontal Merger Guidelines for a more detailed discussion of unilateral and coordinated effects.)

Elimination of potential competition – where one of the merging firms is about to enter the relevant market – has also been a concern, particularly in pharmaceutical mergers. Vertical concerns are less common, but a number of transactions have been subject to the consent decrees, which the agencies based on vertical theories (see the 2011 *Comcast/NBC Universal* joint venture, where the Antitrust Division and the Federal Communications Commission imposed several undertakings, and Google's acquisition of ITA Software, which are further described in question 25). Finally, conglomerate theories or 'portfolio effects' have not, as such, been a genuine source of concern to the antitrust agencies in recent times.

22 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

The antitrust agencies can seek to enjoin only transactions that violate certain substantive antitrust statutes (section 7 of the Clayton Act, section 5 of the FTC Act, and sections 1 and 2 of the Sherman Act). The agencies have often pointed out that they do not and cannot take non-competition-related factors into account in analysing a merger.

23 To what extent does the authority take into account economic efficiencies in the review process?

The Horizontal Merger Guidelines clarify how the antitrust agencies analyse and evaluate claims that mergers will result in efficiencies and lower prices. The FTC chairman was quoted in 1997 as saying that presentation of efficiencies from a merger 'won't change the result in a large number of cases, [rather they will have] the greatest impact in a transaction where the potential anti-competitive problem is modest and the efficiencies that would be created are great'.

The Guidelines' discussion of economic efficiencies can be summarised as follows:

- they explain the relevance of efficiencies in merger analysis;
- they indicate that the agencies will only consider those efficiencies that are 'merger-specific', that is, efficiencies that could not be achieved by the parties in the absence of the merger;
- they make it clear the parties to a merger will have to substantiate any efficiency claims by 'reasonable means'. Efficiency claims will not be considered if they are vague or speculative; and
- they clarify the types of efficiencies that are more likely to be accepted by the agencies. For example, reductions in production costs that are achieved through a consolidation of underutilised manufacturing facilities are more likely to receive favourable consideration than are efficiencies relating to procurement, management or capital costs.

In sum, the Guidelines' discussion of efficiencies provides a useful clarification on the issue and makes explicit the actual practice of the agencies in recent years. The Guidelines do not necessarily, however, hold out the promise that merging parties are likely to encounter less vigorous merger enforcement in the United States as a result of presenting robust evidence of merger efficiencies.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The antitrust agencies have the power to subpoena documents and information in a merger investigation. In addition, the agencies have the authority to seek an injunction in federal court prohibiting completion of a proposed transaction. The FTC may also bring an administrative proceeding to determine the legality of a merger or other transaction. The agencies do not have the authority to preliminarily enjoin a transaction themselves; but if a court preliminarily enjoins a transaction, both agencies may seek a permanent injunction from the court. In addition, the FTC may issue an order, following administrative trial, permanently enjoining the transaction. As a practical matter, however, parties usually abandon a transaction if a preliminary injunction is issued. As noted, mergers and acquisitions can, under some circumstances, also be challenged by state attorneys general and private parties.

If the responsible agency believes that all relevant information has not been provided in the parties' filings or in the parties' response to a request for additional information, the applicable waiting period will not commence until all information has been provided. The FTC has recently challenged the sufficiency of an acquirer's responses to a second request (which led to a temporary settlement with the agency but, ultimately, abandonment of the transaction).

Failure to comply with any provision of the HSR Act may result in a fine of up to $16,000 for each day during which the person is in violation of the HSR Act. The agencies have imposed very substantial fines (up to $5 million) on parties for completing transactions without observing the requirements of the HSR Act. The agencies may also seek injunctive relief to prevent a violation of the HSR Act.

In addition, if a transaction has been completed in violation of the HSR Act and is believed to violate the antitrust laws, the agencies may seek to undo the transaction through an action in the district court. This would be more likely where the agency believes the acquisition also violated the substantive merger laws.

Finally, as noted in question 5, the antitrust agencies have jurisdiction to investigate and challenge transactions that fall below the HSR Act notification thresholds, even after they are consummated. They have challenged 13 such transactions since December 2008, in industries including pharmaceuticals, medical diagnostics, medical devices, chemical additives (oxidates), educational marketing databases, voting machines, and food processing.

In April 2013, the FTC filed a complaint against Graco, Inc and a simultaneous consent decree based on two acquisitions Graco made of competitors in the 'fast set equipment' (FSE) market in 2005 and 2008 (neither deal required an HSR filing). In prior challenges to consummated mergers, the agencies have usually required the divestiture of assets sufficient to replicate the competitor that was acquired. However, these options were not available in the Graco matter because the acquired companies had been fully integrated into Graco's operations, and separation was no longer possible. This prompted the FTC to adopt a settlement that incorporates some novel elements. In particular, Graco agreed to settle a private litigation it had brought against another competitor and license certain technology to that competitor. In addition, Graco is prohibited from retaliating against distributors that carry competing FSE products or from entering into exclusive contracts with its distributors or from offering to its distributors 'loyalty discounts' above certain levels.

In January 2013, the DOJ filed suit against Bazaarvoice, Inc, challenging its June 2012 acquisition of PowerReviews in a transaction that was not reportable under the HSR Act. The complaint alleged that Bazaarvoice engaged in the transaction in order to eliminate its primary rival and cited numerous internal hot documents. The agencies seek divestiture of enough assets to create a separate, distinct and viable business equivalent to the acquired entity.

In October 2012, the FTC filed a complaint and simultaneous consent order in the matter of Magnesium Elektron North America, Inc (MEL). The complaint alleged that MEL's non-reportable $15 million acquisition of Revere Graphics Worldwide, Inc (Revere) in 2007 resulted in a merger-to-monopoly because the two companies had been the only two suppliers in the market for magnesium plates for photo engraving. The consent decree required MEL to divest the Revere photo engraving products acquired through the transaction.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If the agency responsible for a given transaction determines that the transaction may harm competition in a relevant market, the parties and the agency may attempt to negotiate some modification to the transaction or settlement that resolves the competitive concerns expressed by the agency. The most common form of such a settlement is a consent order, pursuant to which the acquiring company agrees to divest a certain portion of its existing assets or a portion of the assets it will acquire.

In the context of certain acquisitions, the antitrust agencies have indicated that, before they will enter into a consent order, the parties must identify an acceptable buyer for the businesses that are to be sold and must enter into a definitive divestiture agreement with such a buyer (with the buyer being approved by the responsible agency). Furthermore, consent orders require that the divestiture be completed within a fixed period of time. If the divestiture is not completed within this period, a trustee can be appointed to complete the divestiture.

Behavioural remedies may also be imposed, though they have been uncommon in practice. However, the imposition of such remedies, which are often uniquely tailored to the merger concerned and require detailed prospective monitoring, has been on the rise where mergers may present vertical foreclosure issues.

In January 2010, the Antitrust Division imposed, as a condition of the merger between Ticketmaster and Live Nation, which combined the country's primary ticketing service provider and largest concert promoter, certain 'anti-retaliation' restrictions, prohibiting the merged firm from retaliating against any concert venue owner that chooses another firm's ticketing or promotional services. The conditions included allowing former Ticketmaster clients to retain a copy of ticketing data generated while a Ticketmaster client. The Antitrust Division also imposed a 'firewall' preventing the merged firm from using information obtained from its ticketing business in its promotions and artist management businesses. The Antitrust Division's settlement lasts for 10 years. In February 2010, the FTC imposed a similar firewall as a condition of PepsiCo's acquisition of its two largest independent bottlers and distributors, restricting its access to confidential business information of rival Dr Pepper Snapple Group. The two acquired firms also distribute Dr Pepper Snapple carbonated soft drinks. In January of 2011, the Antitrust Division required that Comcast and General Electric's NBC Universal business (NBCU), as a condition of a joint venture between Comcast and NBCU, provide online video distributors (OVDs) with access to their video programming on terms comparable to those given to traditional multichannel video programming distributors. Conditions also included prohibitions on restrictive licensing practices, which serve to limit distribution of content to OVDs, and retaliation against any other content provider for providing programming to an OVD. Most recently, in April 2011, the Antitrust Division allowed Google's acquisition of ITA Software to proceed on condition that Google continue to license and improve ITA's software product, on which a large number of online travel intermediaries rely. Google's acquisition of ITA was considered to be its first step toward entering the online travel search market, and the Antitrust Division expressed concern that Google's ownership of ITA's software would give the former the incentive to foreclose competitors' access to ITA or significantly degrade the quality of the software available to them. (See 'Update and trends' for more detail on these recent settlements.)

The Antitrust Division, on 17 June 2011, released a revised version of the Antitrust Division's Policy Guide to Merger Remedies, which is intended to provide guidance to Antitrust Division staff in their work analysing proposed remedies for mergers, including structural (divestment) remedies, conduct (behavioural) remedies, and 'hybrid' or combination remedies. The Policy Guide is available at www.justice.gov/atr/public/guidelines/272350.pdf.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

In fashioning an acceptable divestiture, the agencies' goals are to eliminate the competitive problems raised by the transaction, find a buyer that can effectively and rapidly 'step into the competitive shoes' of the divesting party, and ensure that the buyer has all of the assets necessary to enable it to be an effective competitor. In this regard, the Federal Trade Commission has published a helpful guide to its divestiture process entitled 'Frequently Asked Questions About Merger Consent Order Provisions' (www.ftc.gov/bc/mergerfaq.htm) and a Statement of the Bureau of Competition on Negotiating Merger Remedies (www.ftc.gov/bc/bestpractices/bestpractices.shtm). The Department of Justice has also issued its Policy Guide to Merger Remedies (www.usdoj.gov/atr/public/guidelines/205108.htm).

Update and trends

HSR Premerger Notification Amendments

In August 2012, the FTC published a notice of proposed rulemaking, setting forth proposed amendments to the HSR Rules aimed at clarifying – and effectively expanding – the scope of transactions involving the transfer of rights to a patent in the pharmaceutical, biologics, and medicine manufacturing industries that may be subject to the notification and waiting period requirements of the HSR Act.

While patents have always been viewed as 'assets' for HSR reporting purposes, it has not always been clear when an exclusive patent licence qualifies as an acquisition of an asset for HSR filing purposes. The FTC's Premerger Notification Office (PNO) previously analysed intellectual property transactions of this type by focusing on whether the exclusive rights to 'make, use and sell' under a patent were being transferred. Only when the full bundle of rights was transferred did the PNO view the transaction as a transfer of an 'asset' potentially reportable under the HSR Act. Specifically, if a licensor retained the right to manufacture a product or compound, even if exclusively for the licensee, the PNO viewed the transaction as akin to a non-reportable distribution agreement rather than an asset acquisition.

The proposed amendments change this view and would require reporting under the HSR Act of exclusive patent rights transfers, even when the licensor retains certain manufacturing and/or co-development, co-promotion, and co-marketing rights. As proposed, the transfer of patent rights will constitute an asset acquisition potentially reportable under the HSR Act if 'all commercially significant rights' to a patent 'for any therapeutic area (or specific indication within a therapeutic area)' are transferred. The proposed amendments make clear that 'all commercially significant rights' are transferred even when the patent holder retains what is further defined as 'limited manufacturing rights' and/or 'co-rights'. It is unclear when or if these proposed amendments to the HSR Rules will become effective.

In June 2013, following a period of public comment, the FTC published rules that formalise the long-standing position of the FTC's PNO regarding the withdrawal of an HSR filing, as well as the withdrawal and re-filing of an HSR filing without paying an additional fee. The withdraw and re-file procedure, entirely under the control of HSR filers, allows additional time to review a transaction during the initial waiting period, thus potentially avoiding a costly second request. This procedure had been used informally for 30 years. The new rules also establish a procedure for the automatic withdrawal of an HSR filing when filings are made with the US Securities and Exchange Commission (SEC) announcing that a transaction has been terminated. The new rule aligns the treatment of abandoned transactions by the FTC and the Department of Justice with the requirements of the SEC regarding public announcements of the termination of a transaction.

Litigation

In 2013, the Antitrust Division filed suit to prevent the consummation of Anheuser-Busch InBev's (ABI) proposed acquisition of Grupo Modelo (Modelo). On 28 June 2012, ABI agreed to acquire Modelo for $20.1 billion. ABI and Modelo were the largest and third-largest beer firms in the United States, respectively, together controlling about 46 per cent of United States beer sales. MillerCoors is the nation's second-largest beer company, accounting for approximately 29 per cent of sales.

On 31 January 2013, the DOJ filed suit to enjoin the transaction. According to the complaint, the proposed merger would raise beer prices for consumers and result in less innovation. The complaint alleged that the US beer market is highly concentrated and that the largest brewers (including ABI and MillerCoors) increased prices through strategic interaction with each other, with ABI generally acting as the price leader, implementing annual price increases with MillerCoors and other brewers typically joining in the price increases, with the exception of Modelo. Modelo's aggressive pricing acted a price restraint on ABI, and for that reason, the DOJ viewed Modelo as an important competitor.

The complaint rejected ABI's proposed remedy (the sale of Modelo's 50 per cent interest its US distributor, Crown Imports) as inadequate. According to the complaint, the proposed acquisition of Modelo and the proposed remedy would eliminate a sophisticated competitor and replace it with an importer with no brands or brewing facilities, dependent on ABI to supply it with Corona and other Modelo beers.

Following commencement of the litigation, on 14 February 2013, ABI and Modelo announced a revised transaction attempting to remedy the DOJ's concerns. On 19 April 2013, the parties entered into a consent decree, which required the companies to divest Modelo's entire US business to Constellation (which owns the other 50 per cent of Crown Imports). Specifically, the settlement required ABI and Modelo to divest to Constellation the Piedras Negras brewery, perpetual and exclusive licences of the Modelo brand beers for distribution and sale in the United States, and Modelo's current 50 per cent interest in Crown Imports. Constellation, which was also a party to the consent decree, committed to expand the capacity of Piedras Negras in order to meet current and future demand for the Modelo brands, and that commitment was a condition of the proposed settlement.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

As stated above, the range of remedies are the same for domestic and foreign transactions. In most transactions, remedies involve the divestiture of certain assets, a business line or intellectual property (or a combination thereof) of one of the parties that overlaps in the geographic or product market of the other party. Sometimes, one party is required to license certain intellectual property to a third-party competitor (or potential competitor). The agencies do not discriminate between foreign-to-foreign mergers and those involving domestic undertakings when imposing remedies, so long as the requisite anti-competitive effect in the United States is found.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The HSR review process does not result in affirmative 'clearance' or 'approval' of a transaction or any ancillary arrangements. Instead, if the agencies decide not to challenge a transaction, the applicable waiting period expires and the parties are free to close the transaction. The agencies retain the legal right to challenge the transaction or any ancillary arrangements in the future, although, as a practical matter, this is not very likely.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

Complainants (customers, competitors or others) have no formal rights to participate in the HSR process. Nonetheless, as a practical matter, the agencies are very likely to contact a broad group of interested parties if a transaction presents possible competitive issues. The agencies often rely on information provided by such parties (particularly from customers) in deciding whether or not to challenge a particular transaction. Both agencies' procedures, however, provide for third-party participation before a settlement is made final: at the FTC there is a period for public comment, and the Department of Justice must follow the procedures of the Tunney Act providing notice and an opportunity to file views. Under certain limited circumstances, private individuals, as well as foreign and state governments, may sue in federal court for damages or injunctive relief based on violations of the Clayton Act or the Sherman Act.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Pursuant to the HSR Act, the information contained in the Form, as well as the fact that the Form has been filed, is confidential and

may be disclosed only to Congress or pursuant to an administrative or judicial proceeding. The same is true of information submitted in response to a second request.

As noted above, however, if early termination is requested and granted, notice of the fact of early termination will be published in the Federal Register and on the website of the FTC. In addition, if the responsible agency interviews third parties in connection with the transaction, the practical impact may be to make public the existence of the transaction.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The United States' international cooperation efforts continue to increase. The United States has entered into various cooperation agreements with jurisdictions such as Australia, Brazil, Canada, Israel, Japan, Mexico, Chile, and the European Union that allow competition authorities to share certain information relating to antitrust investigations. International enforcement efforts may be further assisted by the International Antitrust Enforcement Assistance Act of 1994 (IAEAA), which authorises the Antitrust Division and FTC to enter into written agreements with foreign antitrust enforcement authorities in order to exchange otherwise confidential investigative information in situations where such exchange is in the public interest. The IAEAA also authorises the domestic enforcement agencies to collect evidence in the United States on behalf of foreign antitrust authorities. The United States is party to an antitrust-specific mutual legal assistance agreement with Australia, authorised by the IAEAA. Cooperation can also occur without an agreement.

In addition, the United States has entered into memoranda of understanding with Russia, China and India to facilitate exchange of policy developments and best practices and provides for cooperation on competition law enforcement matters as appropriate.

When dealing with merger reviews with international dimensions, parties or third parties may provide the agencies with waivers of confidentiality to enable cooperating agencies to discuss confidential information and analyses.

Judicial review

32 What are the opportunities for appeal or judicial review?

If the agency responsible for reviewing a transaction determines that the transaction would violate the US antitrust laws, and if an acceptable consent arrangement cannot be negotiated, the agency may apply to a federal court for a preliminary injunction blocking the acquisition. The agencies are not required, however, to seek preliminary relief. Failure to seek such relief does not preclude the agency's challenge at a later time (see questions 24 and 28).

To obtain a preliminary injunction, the agency has to persuade a court that it has a 'probability of success on the merits' of its antitrust claims. The merits will be adjudicated in a subsequent trial before the court or in an FTC administrative proceeding. The preliminary injunction action may be essentially a 'mini-trial', during which the agency and the parties submit evidence to the court on the antitrust issues. In some instances, the trial on the merits and the preliminary injunction motion have been combined in an action for permanent injunction.

If the responsible agency obtains an injunction from the district court prohibiting the transaction, the parties may appeal to the court of appeals for the circuit in which the district court is located. If the court of appeals denies the appeal, the parties may petition the Supreme Court to hear the case. It is rare for the Supreme Court to accept such an appeal.

However, the Supreme Court recently reviewed a ruling concerning an acquisition of a hospital in Albany, Georgia (*Federal Trade Commission v Phoebe Putney Health System, Inc*). In April 2011, the FTC filed a complaint in federal district court seeking to block the acquisition, which would result in a combination of the only two hospitals in Albany, alleging that the acquisition would reduce competition and allow the combined entity to raise prices for certain hospital services. The district court dismissed the FTC's complaint on state action grounds, and that judgment was affirmed on appeal. In 2013, the Supreme Court sided with the FTC and reversed the lower courts' decisions. The case was remanded and a temporary restraining order and preliminary injunction were issued pending the FTC's administrative trial.

33 What is the usual time frame for appeal or judicial review?

The usual time frame for a resolution of an agency's application for an injunction to block an acquisition is approximately three to six months. An appeal to a court of appeals of an injunction blocking the transaction may be heard within a few months of the grant of that injunction. As noted above, it is rare for the Supreme Court to accept an appeal of a court of appeals decision.

Davis Polk

Arthur F Golden **arthur.golden@davispolk.com**
Ronan P Harty **ronan.harty@davispolk.com**
Joel M Cohen **joel.cohen@davispolk.com**
Arthur J Burke **arthur.burke@davispolk.com**
Christopher B Hockett **chris.hockett@davispolk.com**
Michael N Sohn **michael.sohn@davispolk.com**
Stephen M Pepper **stephen.pepper@davispolk.com**

450 Lexington Avenue
New York
NY 10017
United States

Tel: +1 212 450 4000
Fax: +1 212 450 3800
www.davispolk.com

Enforcement practice and future developments

34 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

The agencies have been active in their enforcement of the merger laws in recent years. Numerous transactions have resulted in divestiture agreements or court challenges. These have included domestic and foreign transactions. In addition, the agencies have become more active in making informal inquiries to the parties for further information during the initial HSR Act waiting period.

35 What are the current enforcement concerns of the authorities?

The agencies have required divestitures or other conditions, or both, through settlements, in a number of cases in recent years involving technology, pharmaceuticals, medical devices and clinics, telecommunications services, energy, media, food processing, supermarkets, agriculture, and scientific research and measurement devices. It appears that technology, telecommunications and media, and products and services related to the health-care industry will, in particular, continue to be enforcement priorities.

36 Are there current proposals to change the legislation?

The most recent significant amendments to the HSR Rules were in 2005 when the FTC amended the rules regarding the application of the HSR Act to non-corporate entities (partnerships, LLCs, etc). Dollar thresholds in the HSR Act and the Rules are adjusted annually to reflect changes in the GNP. In July 2011, the FTC released significant amendments to the Form, which streamline several items within the Form. The agencies have more recently proposed some additional changes to the HSR Rules, the most significant of which would apply to licensing transactions in the pharmaceutical industry and are summarised in the 'Update and trends' section. Refer to the FTC's website, www.ftc.gov/bc/hsr/index.shtm, to confirm the currently applicable thresholds and for notice of any potential changes to rules.

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