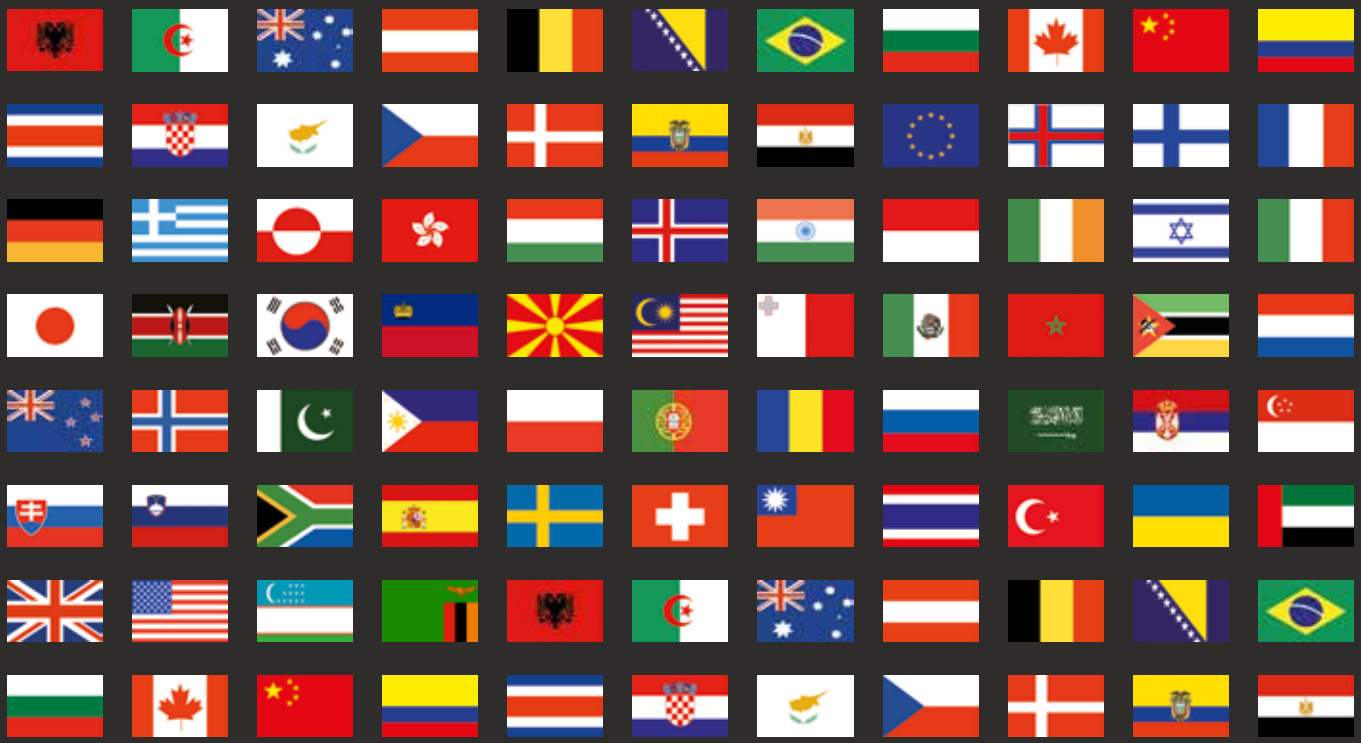
Merger Control

The international regulation of mergers and joint ventures in 71 jurisdictions worldwide

Consulting editor
John Davies



2019

GETTING THE DEAL THROUGH

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Merger Control 2019

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Freshfields Bruckhaus Deringer

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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Twenty-third edition

Getting the Deal Through is delighted to publish the twenty-third edition of *Merger Control*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Costa Rica, Egypt and Malaysia.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the consulting editor, John Davies of Freshfields Bruckhaus Deringer, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
August 2018

United States

Ronan P Harty and Mary K Marks
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, non-corporate interests 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 and 2011. The antitrust agencies also have jurisdiction to investigate and challenge transactions under the US antitrust laws noted above, 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 the private party challenger will be injured by the anticompetitive 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, non-corporate interests or voting securities. 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, non-corporate interests 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 corporate 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 are 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, an LLC or partnership) 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 formation of 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

voting securities of another company valued in excess of $84.4 million (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 voting securities of the target. (However, acquisitions of less than 50 per cent of a non-corporate entity are not reportable, and there is a limited exemption for up to 10 per cent of a corporation's voting securities.)

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 remove and replace 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, non-corporate interests 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 assets, non-corporate interests or voting securities that 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 US$337.6 million (as adjusted annually) or less but greater than US$84.4 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-the-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 US$84.4 million (as adjusted annually). In most cases, this threshold is cumulative. For example, if an acquirer already owns US$50 million of voting securities of an issuer, and seeks to acquire US$40 million in voting securities of that same issuer, the US$40 million acquisition will result in the acquirer 'holding' voting securities of US$90 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 US$337.6 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 US$16.9 million or more (as adjusted annually), and the other has worldwide sales or assets of US$168.8 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 US$168.8 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 US$16.9 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 response to question 7.

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. Some of the 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 or nexus 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 United States, 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 US$84.4 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 US$185.7 million; and
- the assets that will be held as a result of the transaction are valued at US$337.6 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 US$84.4 million, or made aggregate sales in or into the US of over US$84.4 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 the target companies must be aggregated in order to determine whether either of the US$84.4 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 US$84.4 million, or made aggregate sales in or into the US of more than US$84.4 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 the target companies must be aggregated to determine whether either of the US$84.4 million thresholds (as adjusted annually) is exceeded. Even if either of the US$84.4 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 US$185.7 million; and
- the value of the voting securities that will be held as a result of the transaction is US$337.6 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 US$84.4 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 (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 HSR 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 US$41,484 per day (as adjusted) 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 brought at least 17 failure to file cases in the past 11 fiscal years, and obtained fines ranging from US$180,000 to US$11 million. In 2016, the Department of Justice (DOJ) filed suit against ValueAct Capital for failure to make an HSR filing when purchasing over US$2.5 billion of Baker Hughes and Halliburton voting securities. In not making a filing, ValueAct relied on the investment-only exemption, but the DOJ argued that exemption was not applicable when ValueAct tried to influence the companies' business decisions during the course of their proposed merger. In June 2016, ValueAct agreed to pay a US$11 million fine. In 2017, Duke Energy Corporation was required to pay US$600,000 in civil penalties when it acquired Osprey Energy Center from Calpine Corporation before filing the required notification form and observing the required waiting period under the HSR Act. More specifically, the DOJ alleged that, pursuant to a tolling agreement, Duke Energy acquired beneficial ownership of Osprey's business before Duke Energy had fulfilled its obligations under the HSR Act.

Individual investors are also at risk when not complying with the HSR Act. In January 2017, the FTC charged two individuals in two different cases with violating the HSR Act. In one of the cases, an investor was fined for failure to file under the HSR Act for acquisitions of company stock post-IPO. The investor's pre-IPO ownership of Colfax Corporation was above 50 per cent, and therefore any subsequent purchase would have been exempt even though the original acquisition of these shares was also exempt from the HSR Act. However, because of the IPO, his holdings, which were valued in excess of the HSR Act threshold, decreased below the control level to approximately 20.8 per cent. Thus, Rales was required to file and observe the HSR waiting period prior to making any post-IPO purchase of Colfax Corporation voting securities. In the second case, the FTC fined Mr Ahmet Okumus US$180,000 for failing to report his purchases of voting securities in the internet services company Web.com through his hedge fund. Although the Commission found his HSR violation to be inadvertent, it still sought penalties because this was Mr Okumus' second HSR violation in two years.

10 Which parties are responsible for filing and are filing fees required?

If a transaction is subject to the filing requirements of the HSR Act, buy-side and sell-side 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 US$168.8 million are subject to a filing fee of US$45,000. Transactions valued at US$168.8 million

or more but less than US$843.9 million are subject to a filing fee of US$125,000. Transactions valued at US$843.9 million or more are subject to a filing fee of US$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 11:59 pm Eastern Time 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 in question 18 below.

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses 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. Failure to comply can result in a fine of up to US$41,484 per day (as adjusted) 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.

In August 2015, the FTC filed a complaint against Third Point LLC and three affiliated hedge funds (collectively, Third Point) relating to their failure to make an HSR filing and observe the waiting period when acquiring Yahoo! Inc (Yahoo) shares in 2011. The complaint alleged that the investment-only exemption was inapplicable because Third Point took certain actions inconsistent with passivity, such as contacting potential Yahoo board members and making statements about proposing directors for Yahoo. Third Point settled with the FTC and the FTC did not seek civil penalties because the violation was inadvertent and it was Third Point's first HSR violation. In another case dealing with the investor-only exemption, in September 2015, Leucadia National Corporation (Leucadia) settled a complaint brought by the FTC, where the FTC argued the investment-only exemption did not apply when as a result of a transaction, Leucadia's ownership interest in Knight Capital Group, Inc converted into shares of a new entity (KCG Holdings) worth approximately US$173 million. The FTC argued that Leucadia should have made an HSR filing and observed the waiting period, because the investment-only exemption does not apply when an institutional investor acquires voting securities of the same type as any entity included within the acquiring person, and in this instance, both the acquiring and acquired persons were broker-dealers. This was Leucadia's second HSR violation, and it agreed to pay civil penalties of US$240,000.

In October 2015, Len Blavatnik, an investor, agreed to pay civil penalties of US$656,000, settling a complaint brought by the FTC for his failure to make an HSR filing relating to his August 2014 acquisition of TangoMe shares worth approximately US$228 million. Blavatnik previously violated the HSR Act in 2010, and did not consult HSR counsel prior to acquiring TangoMe's shares.

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, in November 2014, a federal court ordered Flakeboard America Limited and SierraPine, both makers of MDF particleboard, to pay to the DOJ fines of almost US$5 million for pre-closing actions that allegedly violated HSR gun jumping and Sherman Act laws under a settlement agreement. Additionally, the Antitrust Division, in January 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 US$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 US$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 for 10 days (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, and are there sanctions for supplying wrong or missing information?

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 (including the executed purchase agreement or letter of intent),

as well as a variety of business documents. In particular, the parties are required to submit all studies, surveys, analyses and reports 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 geographical markets. Documents routinely found to be responsive, and filed by parties, include board and management presentations, confidential information memoranda, synergy and efficiency analyses. Documents need not be formal presentations, and emails may need to be filed if they meet the criteria set forth above.

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 portfolio investments 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, https://www.ftc.gov/enforcement/premerger-notification-program.)

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 few 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.

An officer or director must certify under penalty of perjury that the information in the HSR form is true, correct and complete.

17 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 and the DOJ have 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 https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources and on the DOJ's website at https://www.justice.gov/atr/merger-review-process-initiative-policy).

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'. In some cases, the parties may also withdraw and 're file' under the HSR Act, which starts a new initial 30-day (or 15-day) waiting period. This voluntary process gives the agency additional time to review the deal and may avoid the need for 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 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 anticompetitive 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.

18 What is the statutory timetable for clearance? 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 request for additional information and documentary material ('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 second request.

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.

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 in August 2010.

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 anticompetitive effects (or actual anticompetitive effects in cases of consummated transactions) or alternatively by circumstantial evidence. The guidelines recognise the potential for merger efficiencies to enhance competition and benefit consumers. In practice, the agencies have found efficiencies most likely to make a difference when likely adverse competitive effects were not great. Also see question 23.

Although the Guidelines have no force of law, they are highly influential in the antitrust agencies' determinations whether to challenge horizontal mergers. The 2010 Guidelines, in particular, downplay the reliance on market definition in the horizontal merger analysis, and provide for certain alternative measurements of anticompetitive 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.

The Guidelines note that in extreme cases a failing firm defence may be taken into account; however, in practice these situations are very rare.

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', available at https://www.ftc.gov/system/files/documents/public_statements/300481/000407ftcdojguidelines.pdf.

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. For example, in January 2017, the FTC claimed Mallinckrodt plc harmed competition when its subsidiary Questcor Pharmaceuticals Inc acquired the US rights to Synacthen Depot, a potential competitor to Questcor's HP Acthar Gel product. Mallinckrodt agreed to grant a licence to develop Synacthen Depot to a licensee approved by the FTC and to pay a fine of US$100 million. In March 2015, the FTC challenged Impax Laboratories Inc's US$700 million acquisition of CorePharma, LLC. In order to settle the FTC's charges that the acquisition would be anticompetitive, the parties agreed to divest CorePharma's generic pilocarpine tablet line (used to treat dry mouth) and its generic ursodiol tablet line (used to treat cirrhosis and gall bladder diseases). The FTC was concerned that the acquisition would reduce the number of future suppliers in these two drug markets. In November 2014, the FTC challenged Medtronic Inc's US$42.9 billion acquisition of Covidien plc, alleging that the acquisition would be anticompetitive because both companies were developing drug-coated balloon catheters. At the time there was only one company supplying the product and Medtronic and Covidien were the only companies with products in clinical trials. Medtronic agreed to divest Covidien's drug-coated balloon catheter business to The Spectranetics Corporation.

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, for example, 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 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 consider such factors 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 anticompetitive 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 of 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. By way of example, in October 2016, the proposed merger between Penn State Hershey Medical Center and PinnacleHealth System was abandoned by the parties after a Circuit Court remanded the case, and directed the District Court to enter a preliminary injunction even though the parties presented 'considerable evidence' to show that the merger would produce pro-competitive effects.

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.

In January 2017, the DOJ sued to block Aetna Inc's bid to acquire Humana Inc, and the District Court enjoined the merger, finding that the transaction was likely to substantially lessen competition in the sale of individual government-sponsored health plans.

In April 2017, the US Court of Appeals upheld a District Court decision to enjoin Anthem's proposed acquisition of Cigna. Eleven states

and the District of Columbia joined the DOJ in this challenge, which allegedly would have combined two of the four largest national medical health insurance carriers in the US in the largest merger in the history of the US health-insurance industry.

In July 2017, the DOJ sued to block the merger of Energy Solutions, Inc and Waste Control Specialists LLC, alleging that the acquisition would substantially lessen competition for disposal of low-level radioactive waste in violation of the Clayton Act. The District Court decided to enjoin the merger.

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 and, ultimately, abandonment of the transaction).

Failure to comply with any provision of the HSR Act may result in a fine of up to US$41,484 for each day (as adjusted) during which the person is in violation of the HSR Act. The agencies have imposed very substantial fines (up to US$11 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 more than 30 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 January 2014, the DOJ filed suit against Heraeus Electro-Nite Co, LLC (Heraeus), challenging its September 2012 acquisition of substantially all the assets of Midwest Instrument Company, Inc (Minco) in a transaction that was not reportable under the HSR Act. Both Heraeus and Minco supplied sensors and instruments to measure and monitor the temperature and composition of molten steel. The complaint alleged that Heraeus engaged in the transaction in order to eliminate its closest competitor (with about a 35 per cent market share) after its market share had been reduced from approximately 85 per cent to approximately 60 per cent. The complaint further alleges that the acquisition eliminated the competition between the two parties, creating a near monopoly. The parties agreed to a settlement, and in the final judgment filed in April 2014, Heraeus was required to sell all the Minco assets to a divestiture buyer and take other actions designed to restore the competition that existed prior to the transaction.

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 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 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 US$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 photoengraving 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 monitoring, has been on the rise where mergers may present vertical foreclosure issues.

In July 2013, the FTC challenged General Electric Company's US$4.3 billion acquisition of the aviation business of Avio SpA, alleging that the acquisition gave GE the ability and incentive to disrupt the design and certification of an engine component designed by Avio for rival aircraft manufacturer Pratt & Whitney. GE and Pratt & Whitney were the only engine manufacturers for Airbus's A320neo aircraft and competed head-to-head for A320neo sales. Avio was the sole designer for the accessory gearbox (AGB) on the Pratt & Whitney engine for that Airbus aircraft. As a condition to the transaction, the FTC prohibited GE from interfering with Avio's design and development work on the AGB for the Pratt & Whitney engine, and from accessing Pratt & Whitney's proprietary information about the AGB that was shared with Avio.

In April 2011, the Antitrust Division allowed Google Inc's acquisition of ITA Software, Inc to proceed on condition that Google continue to license and improve ITA's travel software product, which was used by airfare comparison and booking websites. 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 reduce the quality of the software available to them.

In January 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.

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.

The Antitrust Division, in 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 https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf. FTC's guidance on merger remedies is available at https://www.ftc.gov/tips-advice/competition-guidance/merger-remedies.

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 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' (https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq) and a Statement of the Bureau of Competition on Negotiating Merger Remedies (https://www.ftc.gov/tips-advice/competition-guidance/merger-remedies). The Department of Justice has also issued its Policy Guide to Merger Remedies (https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf).

In June 2017, the DOJ entered into a consent decree with The Dow Chemical Company and EI DuPont de Nemours & Co, requiring them to divest multiple crop protection and two petrochemical products in order to proceed with their proposed $130 billion merger. The DOJ claimed that the parties were two of only a handful of chemical companies that manufacture certain crop protection chemicals and that vigorous competition between them had benefited farmers through lower prices, more effective solutions and superior service, which would be lost if the merger was allowed to proceed.

In December 2017, the DOJ settled with CLARCOR Inc and Parker-Hannifin Corporation with respect to their merger, which was consummated in February 2017 after complying with the HSR filing and waiting period requirements. The DOJ alleged that prior to the merger the parties were the only suppliers of a certain aviation fuel filtration system and filter elements to US customers, with the only other manufacturer of such products being located in Germany. The settlement required that Parker-Hannifin divest this business.

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 anticompetitive 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 DOJ 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' efforts to cooperate with other antitrust authorities during merger investigations continue to increase. The United States has entered into various cooperation agreements with jurisdictions such as Australia, Brazil, Canada, Chile, Colombia, Israel, Japan, Mexico, Peru and the European Union that allow competition authorities to share certain information relating to antitrust investigations. Cooperation can also occur without an agreement. 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.

In addition, the United States has entered into memoranda of understanding with Russia, China, India and Korea 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. In September 2013, the antitrust agencies issued a model waiver of confidentiality for parties and third parties to use in transactions involving concurrent review by non-US competition authorities and a set of frequently asked questions to accompany the model waiver. The model waiver and FAQ document are available at https://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust.

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.

In June 2018, the US District Court, despite objections from the DOJ, ruled that AT&T could acquire Time Warner without any conditions, in a decision emphasising that vertical integration is often pro-competitive and lawful. The case was the first time in 40 years that a court heard a fully litigated challenge to a merger proposing to combine companies at different links in the same supply chain. The DOJ argued that the merger would substantially lessen competition in the video programming and distribution market by enabling AT&T to use Time Warner's 'must-have' television content to raise its rivals' video programming costs, therefore harming consumers with increased prices. However, the judge ruled that the government failed to prove that the transaction would violate the antitrust laws.

In March 2017, the FTC sued to block the merger of Advocate Health Care Network and NorthShore University HealthSystem, alleging that the combination would create the largest hospital system in the North Shore area of Chicago. The FTC alleged that the combined entity would control more than 50 per cent of the general acute care inpatient hospital services in the area. While the District Court denied the FTC's initial request for a preliminary injunction, the Seventh Circuit reversed, and after further proceedings, the District Court granted an injunction and the parties abandoned the merger.

In 2014, the Sixth Circuit reviewed and upheld an FTC hospital merger decision and order, which challenged ProMedica Health System's (ProMedica) acquisition of rival St Luke's in 2010 (the parties are two hospital providers in Toledo, Ohio). In January 2011, the FTC challenged the transaction arguing that it was anticompetitive and would raise prices for consumers and ordered a divestiture of St Luke's. The Sixth Circuit agreed with the FTC's analysis and upheld its decision and order. In 2015, the Supreme Court declined to hear the case.

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.

Enforcement practice and future developments

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

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. In addition, the agencies have become more active in making informal enquiries to the parties for further information during the initial HSR Act waiting period. The FTC and DOJ provide annual reports on their enforcement actions, which are available online at https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

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

35 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 FTC more recently finalised some additional changes to the HSR Rules, the most significant of which would apply to licensing transactions in the pharmaceutical industry. Refer to the FTC's website, https://www.ftc.gov/enforcement/premerger-notification-program, to confirm the currently applicable thresholds and for notice of any potential changes to rules.

In 2013, the FTC formally adopted a change to its pre-merger rules that essentially codified the existing informal practice of withdrawing and refiling HSR notifications. The purpose of a 'pull and refile' is to effectively restart the initial 30-calendar-day waiting period and allow the agencies additional time to complete a review of a transaction without being forced to issue a second request in order to obtain additional time (see question 17). The new rule specifies that an acquirer can withdraw and refile a notification within the second business day of withdrawal without paying a new filing fee. While an acquirer can withdraw and refile multiple times, the proposals make clear that an acquirer can refile without paying a new fee only once.

In June 2016, the FTC announced an increase in the maximum civil penalties it may impose for violations of the HSR Act. The maximum civil penalty for HSR violations increased from a daily fine of US$16,000, to a much larger fine of US$40,000 per day, which was adjusted to US$41,484 in January 2018. These higher maximum civil fines apply to violations that predate the effective date. The agencies annually adjust for inflation their maximum civil penalty threshold every January.

As of 2016, rule changes allow for HSR filings to be submitted on DVD. The notification form and instructions were also updated in September 2016 and July 2018. The most recent amendments can be found at https://www.ftc.gov/policy/federal-register-notices/16-cfr-parts-801-803-amendments-hsr-premerger-notification-rules.

Davis Polk

Arthur F Golden	**arthur.golden@davispolk.com**
Ronan P Harty	**ronan.harty@davispolk.com**
Arthur J Burke	**arthur.burke@davispolk.com**
Christopher B Hockett	**chris.hockett@davispolk.com**
Jon Leibowitz	**jon.leibowitz@davispolk.com**
Howard Shelanski	**howard.shelanski@davispolk.com**
Jesse Solomon	**jesse.solomon@davispolk.com**
Mary K Marks	**mary.marks@davispolk.com**

450 Lexington Avenue
New York 10017
United States

Tel: +1 212 450 4000
Fax: +1 212 701 5800
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