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The Threshold

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CONTENTS

FROM THE CO-CHAIRS

To All Committee Members:

Welcome to the Fall edition of The Threshold! The articles in this issue cover a number of significant developments from 2018 that we hope our readers will find interesting.

Our first article, from John Magruder (Jones Day), recaps a series of brown bag sessions the FTC's Premerger Notification Office (PNO) hosted this year. During the sessions, the PNO discussed a number of key HSR topics for US practitioners, such as e-filings and informal interpretations. These issues will be important for both in-house and outside counsel who prepare HSR filings and advise clients on HSR compliance.

In our next article, Edward Schwartz and Karl Herrmann from Reed Smith discuss the fascinating *Steves and Sons v. JELD-WEN* case, in which a court required a divestiture of an acquired plant as a result of a private antitrust action. As the authors explain, this case may be a sign of things to come in US M&A antitrust law.

Our issue continues with an article covering an interesting panel that the M&A, Corporate Counseling, and Federal Civil Enforcement committees hosted on DOJ merger reforms. The panel's moderator, Laura Malament from Jones Day, first describes the changes to the DOJ's Model Timing Agreement and Model Voluntary Request Letter and Makan Delrahim's statements on the need for reform. She then takes our readers through observations made by each of the panelists. The panel included Patricia Brink (DOJ), Mika Clark Tupy (United Airlines), Mike Cowie (Dechert), Anjali Patel (Skadden), and Christine Varney (Cravath).

The issue concludes with the International Roundup from David Rosner and Danielle Levesque (Goodmans). The article contains a great overview of a number of high-profile merger developments around the world, including decisions in multi-jurisdictional mergers like Praxair/Linde, Essilor/Luxottica, and Qualcomm/NXP, as well as significant merger clearances in the EU, Australia, and South Africa. Every practitioner will want to be familiar with these developments.

This is the last issue of 2018. As always, The Threshold will be back in time for the ABA Spring Meeting. Happy holidays and have a happy new year!

Enjoy the newsletter!

Michael and Joanna

Michael L. Keeley
Joanna Tsai
Committee Co-Chairs

PNO Hosts HSR Practitioners during Summer Brown Bags

John Magruder*

This summer the Federal Trade Commission's Premerger Notification Office ("PNO") hosted three brown bag sessions to give both private practitioners and the antitrust agencies an opportunity to exchange ideas and provide feedback on how to continue improving the premerger filing process. The following summarizes the most important news from those sessions.

Electronic Filings – The PNO is in the early stages of developing a cloud-based e-filing platform, including an HSR Form that would be completed online. The cloud-based platform would permit attorneys to work on their filings prior to submission, potentially through use of a personal account. From the platform, practitioners could share their work in progress with other attorneys and with their clients, and when ready to file, with the FTC and DOJ. Only when finally submitted would the filing become visible to the agencies. When the platform's development is further along, the PNO stated that it would work with the private bar to ensure that the e-filing system meets the IT needs of private practitioners.

Once established, the e-filing system will replace filing in person, whether on DVD (used in 25%-30% of filings) or in paper format. The PNO has stated that other changes to the filing process, such as allowing firms to password-protect DVD filings or send filings via email, are unlikely for storage and administrative reasons. However, the PNO expressed openness to other ideas to resolve procedural difficulties, including acceptance of electronic signatures for the affidavit and certification accompanying the HSR filing and working with parties needing to change filings last minute, which is particularly difficult when filing with DVDs.

* John Magruder is an associate at Jones Day.

Executive Compensation Exemption – During the brown bag sessions, private practitioners expressed a desire for an exemption related to executive compensation. The typical scenario at issue would involve an officer, such as a CEO, acquiring additional voting securities of the company they work for as a result of stock-based incentive programs. The total value of the stock held as a result of the acquisition would be valued over the $84.4 million size of transaction threshold such that the executive and their company would need to file HSR and observe the waiting period before the acquisition closes. The PNO stated that an exemption for this scenario is not under active review, but that it is on their radar.

The Merger Screening Process – The PNO provided clarity on how filings are processed when received at the PNO. Filings submitted Monday through Friday of a given week are processed in time for distribution to attorneys in the merger shops on the following Wednesday. If possible, the PNO will work ahead to process additional filings submitted prior to Wednesday. Cash tender offers and bankruptcy transactions are given a high processing priority because those filings have a 15-day waiting period rather than the typical 30-day waiting period. The PNO sends a summary of each filing via email to the attorneys in the Bureau of Competition. This summary recommends granting early termination if the PNO thinks it is warranted. The DOJ has its own process for managing filings, but has access to the same database used by the PNO. The PNO uses a negative option system for grants of early termination. The attorneys responsible for the in-depth substantive review are given a limited amount of time (approximately 48 hours) to ask that early termination be put on hold. If no response is received from the attorneys performing the substantive review at either agency, early termination will be granted. This process keeps HSR filings moving through the system with minimal delays. As a result of this system, early termination notices can be erroneously granted, though this happens rarely. If the PNO discovers an error on the same day early termination was inadvertently granted, they will contact the parties to correct the error, but if the error isn't caught until the following day, the PNO will support the grant of early termination.

Changes to Informal Interpretations – In recent years, the PNO has edited older informal interpretations on their website to indicate that they should no longer be relied on, but the website's search engine makes it difficult for private practitioners to identify these outdated informal interpretations. For this reason, the PNO is considering adding a page to their website that will collect outdated informal interpretations. Because it would be difficult to collect all outdated informal interpretations, this page would only contain future changes to informal interpretations. Additionally, the PNO recommends that private practitioners not rely on any informal interpretation more than five years old unless checking with the PNO first.

The PNO stated that where possible it will not make particularly significant changes through informal interpretations. Instead, the PNO will publish a blog post on the Federal Trade Commission (the "Commission") website to explain the change. The PNO expects all changes in guidance to apply immediately to future HSR filings. The PNO also expects the changes to apply to unconsummated transactions where a filing was not initially required, but would be after the informal interpretation(s) have been modified. The PNO is willing to work with private practitioners on the applicability of these changes when they occur. If a conflict arises because of a change made to an informal interpretation during the preparation of an HSR filing or prior to a transaction closing, the PNO recommends contacting them to discuss the applicability of a change.

Payment of Filing Fees – The PNO has updated some of its guidance regarding the payment of filing fees. The filing fee can still be paid via check or wire transfer, but checks will no longer be accepted at the PNO office. If a wire transfer cannot be arranged, the PNO will accept a check if delivered to the Commission's Financial Operations Division (cashier's or certified checks are preferred).

The wire transfer of filing fees by foreign financial institutions has also been an issue for HSR practitioners since foreign financial institutions have often been unsuccessful when attempting to send filing fees via wire transfer. The PNO encourages practitioners and clients to make filing fee wire transfer payments from a U.S. subsidiary through a U.S. financial institution if at all possible. Delays in payment of the filing fee can result in rejection of the filing, resulting in a delayed start of the HSR waiting period.

Commission Rulemaking Effective August 15, 2018

At the same time the PNO hosted the summer brown bag sessions, the Commission amended the HSR rules and instructions to the HSR Form (the "Instructions"). These changes were intended to clarify existing rules and permit improvements to the system as a whole. No public comment period was required for these ministerial changes, which went into effect August 15, 2018.

The changes to the Instructions included some basic updates. The Instructions now contain the correct address for DOJ's Premerger and Division Statistics Unit, where the DOJ receives its HSR filings (the DOJ moved its Premerger and Division Statistics Unit in late 2017). Other additions made to the Instructions and HSR rules clarify long standing-positions held by the PNO, including how to determine control of a trust and incorporating references to non-corporate interests where they were intended in earlier rulemakings.

The new Instructions also added a few requirements to the HSR process. Privilege logs accompanying an HSR filing now need to identify the name of any counsel providing privileged legal advice. Previous guidance from the PNO suggested that the name of the attorney was only required if the privileged comments came from outside counsel.[1] Further, the description of the transaction submitted with the HSR filing must now include a code name index if any of the attached documents refer to the parties using code names.

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[1] Premerger Notification Staff, How to avoid common HSR filing mistakes with Item 4(c) and 4(d) documents, (January 8, 2015), https://www.ftc.gov/news-events/blogs/competition-matters/2015/01/how-avoid-common-hsr-filing-mistakes-item-4c-4d.

Other clarifications were made to reduce the burden on filing parties. The Instructions now explicitly allow the acquired party to skip providing geographic market information when a business overlap exists between it and the acquiring party's associates. The rulemaking also allows or shifts transmittal of routine HSR communications to email, including 801.30 notice letters, grants of early termination and requests for additional information.

Author's Note

As always, consulting an experienced HSR practitioner is highly advised when it comes to navigating the HSR Act's requirements. Failing to adapt to changes in the HSR process means taking unnecessary risks. Minor issues, such as those related to filing fees or incomplete privilege logs, can delay the start of the HSR waiting period. More serious problems can be caused by relying on outdated exemption guidance, which can lead to civil penalties of more than $41,000 per day until the parties are in compliance. A quick conversation with your HSR counsel can save firms and clients a substantial amount of time and money.

"Not So Fast!" District Court Orders Divestiture of Assets in Private Clayton Act Case Six Years After DOJ Clears Deal

Edward B. Schwartz and Karl E. Herrmann[*]

Increasingly, the antitrust agencies have been challenging unreported transactions post-closing under the Clayton Act, seeking an unwinding of the transactions or at least divestitures of some of the assets purchased. Until recently, however, the threat that a private plaintiff would obtain a court order post-closing requiring an unwinding or divestiture has been more theoretical than real. The threat may now be more real than theoretical. In what is the first decision of its kind, a federal district court has ordered a defendant in a private action brought, in part, under Clayton Act Section 16, to divest assets approximately six years after they were purchased.[1] In that case, the defendant, a door manufacturer and door component supplier, had acquired a competitor in 2012 in a transaction that was twice reviewed without a challenge by the Department of Justice (DOJ) Antitrust Division: pre-merger and then again post-closing upon a complaint to the DOJ by the competitor/customer plaintiff.[2] Yet, after having awarded the plaintiff $175 million in damages, on October 5, the District Court for the Eastern District of Virginia ordered the defendant to sell key door component manufacturing assets that the defendant had acquired as part of the 2012 transaction.[3] The decision could mean that, going forward, acquirers should be less confident about the finality of their mergers and acquisitions post-closure.

In February of this year, following a trial in *Steves and Sons, Inc. v. JELD-WEN, Inc.*, a jury awarded plaintiff Steves and Sons, Inc. (Steves) over $12 million in past damages and over $46 million in damages in future lost profits

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[1] *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-cv-545 (E.D. Va. Oct. 5, 2018).

[2] *Id.*at 19 and 42.

[3] *Id.* at 7-8.

(pre-trebling) for injuries arising from the 2012 acquisition of Craftmaster International (CMI) by JELD-WEN.[4] Steves manufactures and sells interior molded doors, and it purchases interior molded doorskins as a necessary component to manufacture its doors.[5] As of 2012, CMI and JELD-WEN were two of the three U.S. manufacturers from which Steves and other door manufacturers could purchase interior molded doorskins.[6] All three doorskin manufacturers were vertically integrated, meaning they sold both interior molded doorskins—the "decorative covering" to the front and back of an interior door—and the wooden frame of the interior molded door to which a doorskin is adhered.[7] The fully assembled interior door and doorskin "resembles a solid wood door but is much lighter," resulting in lower shipping costs.[8]

In anticipation of its acquisition of CMI and a potential investigation, JELD-WEN entered into long-term supply agreements in early 2012 with a number of interior molded doorskin customers, including Steves.[9] The Steves agreement included provisions: (1) limiting the prices that JELD-WEN could charge based upon a contractually defined formula relating to key input costs, and (2) providing for lengthy termination notice periods (seven years for JELD-WEN to terminate).[10] Shortly thereafter, the DOJ closed an investigation of the transaction in September 2012, and the deal closed in October 2012.[11]

After initially complaining to the DOJ, which declined to take any action after a second investigation, Steves filed suit against JELD-WEN in 2016, alleging that within a few years of the close of the deal, JELD-WEN began to wield its increased market power arising from the merger to harm competition, including by breaching the parties' 2012 contract.[12] For example, Steves alleged

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[4] *Id.*
[5] *Id.* at 3.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 4.
[10] *Id.* at 7 and 17.
[11] *Id.* at 19 and 42.
[12] *Id.* at 42.

that JELD-WEN increased the prices it charged Steves—in violation of the contractually defined formula—even though key input costs that determined price in the formula were actually declining.[13] Steves also alleged that JELD-WEN began to add a "capital" charge on sales to Steves, also in violation of the contract.[14] To compound the problem for Steves, in July 2014, Masonite—the only other remaining North American supplier of doorskins to independent interior door manufacturers—announced that it would no longer sell doorskins to independent manufacturers.[15] Soon thereafter, JELD-WEN—the only remaining viable supplier of doorskins to independent manufacturers—gave notice to Steves of its intent to terminate their supply agreement in 2021.[16]

Following a jury verdict in favor of Steves under Clayton Act Section 7 awarding past damages and future lost profits, Steves sought—in lieu of the award of future damages—equitable relief in the form of the divestiture of JELD-WEN's Towanda plant, an interior molded doorskins manufacturing facility that JELD-WEN acquired when it purchased CMI. On October 5, Judge Payne issued an order partially granting the motion by Steves and ordering JELD-WEN to divest the Towanda plant.

Section 7 of the Clayton Act prohibits mergers that "may [] substantially lessen competition, or [] tend to create a monopoly." While the DOJ and the Federal Trade Commission (FTC) are expressly given the power to enforce the Clayton Act on behalf of the federal government, the Act also enables private plaintiffs to seek damages under Section 4 and equitable relief, including divestitures if appropriate, under Section 16[17], for mergers violating Section 7. But private plaintiffs—in addition to proving the elements of a Section 7 claim

[13] *Id.* at 29.
[14] *Id.* at 30.
[15] *Id.*
[16] *Id.*
[17] 15 U.S.C. § 26 ("Any person, firm, or corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.").

and satisfying the test for the award of injunctive relief—must also establish standing to seek injunctive relief and withstand equitable defenses and other equitable considerations, barriers the government does not face in its enforcement of Section 7. Indeed, as the court made clear, "divestiture is not as easy a remedy [in a private action] as it is in a government action."[18] In fact, the court observed that the case was the first ever Section 16 claim to "have gone to verdict, and in which a private party [] sought a divestiture."[19]

To establish standing under Section 16, a plaintiff must demonstrate antitrust injury, which is "threatened loss or damage of the type the antitrust laws were designed to prevent."[20] Steves asserted that it would likely go out of business at the termination of its supply agreement with JELD-WEN in 2021, as it would have no other supplier of interior molded doorskins.[21] The court held that the jury's finding of damages for future lost profits operated as a finding of fact that Steves would suffer antitrust injury from the threatened loss of their business, and therefore, Steves had standing under Section 16 to pursue a divestiture.[22]

A Section 16 plaintiff must also show that the divestiture is "appropriate in light of equitable principles."[23] Arguing that Steves did not meet the standard for granting an injunction, JELD-WEN reasoned that the jury's award of future lost profits was an adequate remedy that showed Steves' injury was not irreparable.[24] The court held otherwise, citing evidence of the "incalculable" loss to Steves, such as the "independent value to continuing Steves as family operation [after 150 years in business]" and the family's "deep connection with Steves' business."[25] Further, the court noted that Steves' loss of its business was a more serious harm than JELD-WEN's potential loss of value on their investment in CMI,[26] and

[18] *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-cv-545 at 66.
[19] *Id.* at 51.
[20] *Id.* at 70 (citations omitted).
[21] *Id.* at 74.
[22] *Id.*
[23] *Id.* at 69 (citations omitted).
[24] *Id.* at 80-82.
[25] *Id.* at 77-78.
[26] *Id.* at 95-96.

concluded that the public interest would be served by a divestiture by "restor[ing] competition [in the doorskin market] that the merger lessened."[27] For these reasons, the court concluded that the divestiture of the Towanda plant was an appropriate remedy.[28]

While the status of the court's order is unclear,[29] and the effects of the decision on other mergers may not be known for some time, the decision, at a minimum, should put parties who are contemplating mergers and who have consummated mergers in the last several years on notice about the heightened risk of a court-ordered unwinding or a divestiture. First, the *JELD-WEN* decision could encourage similar challenges to other recently (and, perhaps, not so recently)[30] consummated mergers. Post-merger companies that may have benefited from a change in their market position after a merger or have engaged in conduct that competitors, customers, or suppliers might view as anticompetitive have always faced risk of challenge under both Clayton Act Section 7 and Sherman Act Section 2, with the attendant risk of the award of damages. And the antitrust agencies have the authority to challenge an un-reviewed merger post-closing, and to seek an unwinding of the deal or divestitures: a power that both the FTC and the DOJ have been wielding with increasing frequency. However, while merged firms have faced a risk of a Section 16 divestiture order in a private case brought under Section 7 since 1990 when the Supreme Court removed any doubt that such relief was available,[31] no plaintiff has successfully cleared the various hurdles that stand between a proposed divestiture order and obtaining

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[27] *Id.* at 106. JELD-WEN also asserted equitable defenses, arguing that Steves unreasonably delayed its suit against JELD-WEN by filing nearly four years after the consummation of the merger, but the court disagreed, noting that Steves "took every reasonable step to try to secure a reliable supply of doorskins that was essential for its survival" instead of immediately initiating a lawsuit. *Id.* at 140-41.
[28] *Id.* at 148.
[29] As of the date of publication, JELD-WEN has not filed notice of an appeal.
[30] There is a four-year statute of limitations for private actions under Section 4B of the Clayton Act. 15 U.S.C. § 15b. Steves filed its complaint in 2016, within four years of the close of JELD-WEN's acquisition.
[31] *California v. American Stores Co.*, 495 U.S. 271, 275 (1990) (reversing Ninth Circuit, in case brought by State of California, and reinstating injunction issued by district court ordering hold separate and divestitures of grocery stores under Section 16).

such relief. The court's decision in the *JELD-WEN* case could make that theoretical threat far more real, encouraging other aggrieved private parties to sue under Section 7 and Section 2,[32] and to seek an order of divestiture (or, even, unwinding) under Section 16.

Whether judges, when confronted with other private merger challenges, will use the *JELD-WEN* decision as a template for unwinding mergers is the real question. Without a doubt, industry consolidation and merger control are the subject of much public discourse, and there seems to be a rising tide of concern expressed from various quarters—including Capitol Hill—that the U.S. enforcement agencies have been too lax in permitting such consolidation. It is certainly plausible that, with a chorus of criticism echoing in their ears and the *JELD-WEN* decision having paved the way, some judges will be open to expanding the role of private parties to serve as "private attorneys general" in Clayton Act enforcement—including with respect to the pursuit of structural remedies—where the DOJ or FTC has failed to act.[33]

Second, merged firms that take steps to assuage the concerns of customers and/or others about the effects of the proposed transaction—by, for example, entering into long-term supply contracts—would be wise not to unduly provoke such third-parties post-closing into challenging the transaction under the Clayton Act by backing away from such commitments. It is common practice for merging parties to contact suppliers and customers and make them comfortable with a planned merger to reduce the risk of a complaint to the antitrust enforcers, as JELD-WEN had done with Steves and others. But post-merger, the court found that JELD-WEN violated and sought to terminate their contract with Steves and as a result, Steves brought a lawsuit challenging JELD-WEN's acquisition of

[32] While Steves did not bring a Section 2 claim, divestiture is available as a remedy under Section 16 for violations of Section 2. *See, e.g., Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishing,* 80 F. Supp. 900, modifying 80 F. Supp. 888 (S.D.N.Y. 1948).

[33] Indeed, the Supreme Court wrote that "the purposes of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purposes of enforcing the antitrust laws. Section 16 should be construed and applied with this purpose in mind." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969).

CMI. This was likely one of a number of facts that persuaded the Eastern District of Virginia to order the divestiture in *JELD-WEN*. Thus, even parties that have cleared merger review must be careful to not breach commitments they made to suppliers and customers when they were still seeking merger clearance.

Third, this decision should serve as a reminder that closing a transaction does not mean that a transaction is safe from a future challenge. The DOJ and FTC have recently made severable notable challenges to consummated transactions, and the success of this private suit signals yet another risk for consummated mergers: even mergers closed years earlier. If this case is allowed to stand, merged firms may wish to be that much more mindful about how they wield their power in the relevant market(s), if any, arising from the transaction, even if the transaction was the subject of antitrust agency review. Indeed, even assuming that the merged firm lacks market power, and the transaction did not substantially lessen competition, the cost alone of defending an antitrust case against a challenge to the transaction might be reason enough to take care post-merger not to provoke such a claim.

Finally, parties frequently employ antitrust risk-shifting provisions intended to allocate the risk of an enforcement agency blocking a deal. Parties do not, however, typically address in their contract documents the allocation of risk arising from a post-merger Clayton Act challenge by an antitrust agency.[34] However, against the backdrop of the antitrust agencies challenging more deals post-closing, does the *JELD-WEN* decision and the potential risk of more private lawsuits seeking structural relief post-closing increase the need (or at least desire) for post-closing antitrust risk-shifting provisions in some deal documents? Perhaps. If the *JELD-WEN* decision becomes a catalyst for future disgruntled customers, suppliers or competitors to try to mirror the plaintiff's success in that

[34] Parties may be reluctant to use such language due to the concern that it would signal to an agency reviewing the deal that the parties foresaw the antitrust risk and chose to try to "fly under the radar" rather than approach the reviewing agency, thereby possibly increasing the risk of a challenge.

case and seek partial divestitures or even an unwinding of a merger post-closing, some merging parties may view post-closing risk-sharing provisions as desirable, if not necessary, for some deals to go forward.[35]

[35] Such provisions would of course only make sense where there is still a seller post-closing: *i.e.*, where the buyer is purchasing less than an entire business, or the business is being sold by a parent company. So, for example, where a private equity fund sells a portfolio company to a strategic buyer in a non-reportable transaction, it is quite possible that the risk of a divestiture or unwinding in an action brought by an enforcement agency *or* a private party post-closing could motivate parties to employ post-closing risk-sharing provisions.

Practitioners' Views on DOJ's Recent Merger Review Reforms

Laura Malament[*]

According to the Department of Justice, between 2013 and 2017, there was a 65% increase in the time taken by US antitrust enforcers to conduct merger investigations.[1] Today, review of significant mergers can last 10 or more months, which is problematic for both parties and antitrust enforcers. This has led both the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") to propose changes to the merger review process in the last year. On September 25, 2018, DOJ announced steps it intends to take to modernize the merger review process in a speech at the Global Antitrust Enforcement Symposium. In late November, many of the proposals were incorporated into the DOJ's first published Model Timing Agreement and Model Voluntary Request Letter.

On November 20, 2018, the ABA Mergers & Acquisitions, Corporate Counseling, and Federal Civil Enforcement committees co-sponsored a teleconference that brought together five antitrust practitioners – Patricia Brink, Director of Civil Enforcement, DOJ; Christine Varney, partner, Cravath, Swaine & Moore LLP; Mike Cowie, partner, Dechert LLP; Mika Clark Tupy, Managing Counsel for Antitrust & Global Competition, United Airlines; Anjali Patel, associate, Skadden, Arps, Slate, Meagher & Flop LLP – to discuss the DOJ

[*] Laura Malament is an associate in the Antitrust & Competition Law practice group of Jones Day. She moderated the ABA panel, "It Takes Two to Modernize Antitrust, Delrahim Says, but Will Anything Really Change?," discussed in this article.

[1] Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, It Takes Two: Modernizing the Merger Review Process, Remarks at the 2018 Global Antitrust Enforcement Symposium (Sept. 25, 2018) at 2 (hereinafter, Delrahim Speech), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust (*citing* Alec Burnside et al., DAMITT Q2 2018 Update: Duration of Significant Antitrust Merger Investigations May Have Plateaued Despite Unchanged Levels of Enforcement in the US and EU (July 19, 2018) (hereinafter, DAMITT Q2 2018), https://www.dechert.com/knowledge/hot-topic/damitt--how-long-does-it-take-to-conduct-significant-u-s--antitr.html).

reforms. This article reviews the DOJ's changes and several practitioners' views regarding their benefits and implications for parties.

Reasons for DOJ's Changes

The DOJ identified three primary motivations for making these changes while providing important context about the volume of mergers actually investigated by the DOJ. In 2017, the DOJ investigated just 2.3% of notified transactions, and issued second requests in less than 1% of the proposed transactions.[2] Thus, the reforms discussed are only relevant to a small number of complex transactions with geographic or product overlaps. The vast majority of transactions will close within the HSR Act's prescribed 30-day initial waiting period after notifying the agency of the transaction.

But that 1% of transactions, DOJ acknowledges, imposes significant costs on both the merging parties and the government. Working to shorten the merger review process, DOJ explains, is necessary to reduce "waste [of] public and private resources."[3] The government spends vast amounts of time and money reviewing significant mergers and these costs have only increased as the volume of corporate data and documents parties produce increases. At the same time, the DOJ's budget has remained flat, requiring the DOJ to continue to work towards efficiently managing the review process.[4]

The other goals of the DOJ's changes are to reduce delay and increase transparency, both of which decrease uncertainty and risk for parties.[5] The DOJ's Model Timing Agreement, Model Voluntary Request Letter, and FAQs, published in November, seek to facilitate both goals. The Model Voluntary Request Letter[6] sets out what the DOJ thinks is most helpful for parties to provide "within the first

[2] *Id.* at 5 (citing U.S. Department of Justice, Antitrust Division Workload Statistics FY 2008 – 2017, *available at* https://www.justice.gov/atr/file/788426/download).
[3] *Id.*
[4] *Id.*
[5] *Id.* at 4-5.
[6] U.S. Dep't Of Justice, Antitrust Div., Model Voluntary Request Letter (November 2018), *available at* https://www.justice.gov/atr/page/file/1111341/download.

few days of their HSR filing, if not *before* filing."[7] Providing this information quickly can lead to the DOJ closing investigations earlier or narrowing the scope of the "second request," a large information request issued by the DOJ for mergers that raise competitive concerns. The Model Timing Agreement[8] sets forth the DOJ's view on custodians, depositions, and timing with the goal of streamlining negotiations over these issues to more quickly get the parties and DOJ focused on the competitive issues raised by the merger. Accordingly, the DOJ "does not intend to deviate from [the Model] under most circumstances."[9]

Model Timing Agreement Sets a 60 Day Decision Window

In his speech, Delrahim promised the DOJ would strive to "make a decision in no longer than 60 days – sooner if possible" following compliance with the second request.[10] This is memorialized in the Model Timing Agreement. During the November 20 panel, Cowie observed that past timing agreements have often provided the DOJ with more than 100 days past the second request compliance date, so a commitment to 60 days is "the most significant improvement" in the Model Timing Agreement.

Describing the benefits and costs of entering into a timing agreement as a "trade off," Varney, explained that parties "give up the ability to force a quick 30 day decision on [their] own schedule based on when [they comply]; in return, parties get a commitment to narrow the second request, a list of custodians, and a limit to potential investigational hearings." In response, Brink, speaking in her personal capacity, stated that the DOJ does not "condition second requests on entering into a timing agreement."

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[7] Delrahim speech at 7.
[8] U.S. Dep't Of Justice, Antitrust Div., Model Timing Agreement (November 2018) at 2 (hereinafter, Model Timing Agreement), *available at* https://www.justice.gov/atr/page/file/1111336/download.
[9] U.S. Dep't Of Justice, Antitrust Div., Frequently Asked Questions – Voluntary Requests and Timing Agreements (November 2018) at 5 (hereinafter, Model FAQs), *available at* https://www.justice.gov/atr/page/file/1111331/download. This was reiterated by Patricia Brink, Director of Civil Enforcement at DOJ, speaking in her personal capacity, who said that "DOJ considers the provisions to be standard, but it is essentially a negotiated document."
[10] Delrahim speech at 9.

Benchmark of Six Months for DOJ Review

Beginning with the title of his speech, "It Takes Two: Modernizing the Merger Review Process," Delrahim makes clear that speeding up the review process requires the parties to partner with DOJ staff early and throughout the process.[11] Though some cases may mandate a longer review, DOJ set a benchmark of six months to complete its review of transactions.[12] DOJ will also begin publishing merger review statistics, which will refresh the DOJ's last release of these statistics in 2006.[13]

To complete an investigation six months after filing, parties would have to certify compliance with the second request within three months after receipt. This is because, in practice, a second request is often issued 30 days after the initial filing with the Premerger Notification Office. And, pursuant to the DOJ's Model Timing Agreement, the DOJ may be granted 30 additional days beyond the 30 days provided by the HSR Act for the DOJ to complete its review (for a total of 60 days on the back-end).

Complying with a second request in three months would be "ambitious, but feasible," according to Cowie. In order to achieve this, companies will need to work quickly to understand and to explain to counsel and economists their data systems and databases. In addition, Cowie says, companies will have to work quickly to assess who in their organizations are the subject matter experts for data requests and the appropriate custodians for typical document requests. Therefore, companies will have to do everything possible to "reduce impediments" in order to comply within three months. At the same time, Cowie says, "more cooperation from the government [will be] necessary to make this work." The DOJ will have to be faster at decision making to provide prompt feedback on databases and other

[11] *Id*. at 6.
[12] *Id*.
[13] *Id*. at 12.

possible sources of responsive information so parties can "move through the assembly line" that is required to comply with the second request.

Varney mirrored Cowie's comments: "everyone needs to be open to working kinks out to make it work." While welcoming the DOJ's efforts to increase transparency and reduce uncertainty, she expressed some skepticism that six months would be sufficient to close investigations given the "tight timeline" between the milestones set out in the Model Timing Agreement. While six months may be an achievable goal for less complex, smaller mergers, Varney said, "no one should expect that it takes six months" to complete large mergers with significant overlaps. The key, explained Tupy, will be to involve counsel earlier in the process than they otherwise may have been.

Exceptions to the Six Month Benchmark

Echoing Varney's comments, Brink stated that DOJ made clear that the duration of the review process will depend in part on the type of transaction. According to DOJ, at least three factors have contributed to the extended review time for recent mergers. First, the volume of data and documents retained by companies requires the parties to spend more time to complete their review and also, for the DOJ to analyze once received.[14] Brink encouraged parties to communicate with DOJ about how to produce documents in a timely and cost effective way. Second, agencies are increasingly requiring upfront buyers when a divestiture is necessary.[15] And, third, transactions are increasingly large, global and complex, raising difficult competition issues.[16] Brink again encouraged parties to reach out to DOJ staff to obtain information about what the review will look like and seek their help in coordinating their review with foreign antitrust enforcers.

[14] *Id.* at 2.
[15] *Id.*
[16] *Id.*

Improving Coordination with Foreign Antitrust Enforcers

In seeking to help better manage the length of merger investigations, Delrahim offers, with the cooperation of the parties, to "help reduce the burdensome red tape wherever possible" in parallel merger reviews by global antitrust enforcers.[17] Brink encouraged parties to try to align the timing of different jurisdictions' reviews because parties often find it is helpful for the agencies to discuss remedies amongst themselves so as to avoid conflicting remedies or conflicting views of the facts. Varney applauded DOJ's willingness to help provide clarity in the process, particularly where MOFCOM, China's antitrust enforcer, is involved. She also added that in her experience, the DOJ has aided parties by helping explain to foreign enforcers why a remedy accepted by the DOJ should be sufficient globally.

20 Custodians and 12 Depositions In Return for Earlier Data and Document Productions and End to Privilege Log "Gamesmanship"

As a general matter, DOJ will assume that 20 custodians per party will be sufficient.[18] That is a welcome downward departure of 10 custodians from the 30 custodians permitted in the DOJ's 2006 Merger Process Review Initiative.[19] In addition, generally DOJ will not seek more than 12 depositions per party, though these two figures are subject to change based on the facts of the specific transaction and the approval of the deputy AAG in charge of the investigation.[20]

In exchange for these two benefits, DOJ proposes that parties produce documents and data earlier.[21] According to the Model Timing Agreement, parties applying a technology assisted review ("TAR") process are required to provide responsive non-privileged documents on a rolling basis and at least 30 days before

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[17] *Id.* at 11.
[18] *Id.* at 9.
[19] Press Release, U.S. Dep't Of Justice, Antitrust Div., Antitrust Division Announces Amendments to its 2001 Merger Review Process Initiative (Dec. 15, 2006), *available at* https://www.justice.gov/archive/opa/pr/2006/December/06_at_838.html.
[20] Delrahim speech at 9.
[21] *Id.*

certifying compliance.[22] Parties not using a TAR process are required to provide responsive non-privileged documents in two tiers: for priority custodians, 45 days before certification, and for the rest, 30 days before certification. The DOJ also proposes to require responses to several data specifications 30 or 45 days before certification depending on the specification.[23]

In addition, to thwart privilege log "gamesmanship" – what Delrahim terms the parties' withholding of documents on the basis of privilege only to dump many as de-privileged documents shortly before a deposition[24] – the Model Timing Agreement requires that parties produce all documents initially withheld for privilege but later determined not to be privileged to be produced no later than 10 days before complying with the second request if using TAR,[25] and if not using TAR, 20 days after the production deadlines for each tier of custodians.[26] If documents initially withheld for privilege but then de-privileged constitute more than a *de minimis* amount for any single custodian – 5% of the total number of produced documents for that custodian[27] – the party may not certify compliance until 30 days after completion of the production of these de-privileged documents if using TAR,[28] and if not using TAR, 45 days after the production for a priority custodian, or 30 days after the production of any other custodian.[29] Thus, DOJ makes clear, the reforms announced and materialized in the Model Timing Agreement do not indicate that the DOJ will "unilaterally disarm[]."[30]

Patel explained that the impact of the changes will be case dependent. The DOJ still requires significant data and documents to make an enforcement decision. Thus, while limiting the number of custodians is helpful, the files of

[22] Model Timing Agreement at 3.
[23] Model Timing Agreement at 4-5 (including transaction level data, profit-and-loss statements, and customer, product, geography, and competitor data).
[24] Delrahim speech at 10.
[25] Model Timing Agreement at 3.
[26] Model Timing Agreement at 4.
[27] Model Timing Agreement at footnote 5.
[28] Model Timing Agreement at 3.
[29] Model Timing Agreement at 4.
[30] Delrahim speech at 6.

predecessors, secretaries, and centrally located corporate documents may need to be collected and produced, as they are today. In addition, Patel explained concessions made by the DOJ may be reserved for the post complaint period if the transaction is challenged in court.[31] Patel suggests the DOJ may ease the burden on parties by using a multi-phased or tiered compliance approach whereby the DOJ reviews a party's responses to a subset of the second request specifications and a priority list of custodians' documents before proceeding to request additional specifications and documents.

Postponing Some Discovery Until Post Complaint

Given that only a small number of transactions are litigated, DOJ proposes reducing the second request burden in exchange for parties agreeing to longer post-complaint discovery.[32] Brink and Varney were both in agreement that preparing for trial in four to five months is challenging for all parties to a merger litigation. When asked how DOJ will determine what discovery could be pushed to the post-complaint period, Brink said the DOJ will continue to focus on determining more precisely exactly what they need when drafting the second request.

Front Office Meetings

Another potential benefit of the reforms is the DOJ's willingness to permit parties to meet with the Antitrust DOJ Front Office earlier in the process.[33] Typically, parties do not meet with the Front Office until much later in the process. However, the Model Timing Agreement is silent on the timing of Front Office meetings and the number of meetings the parties are permitted.[34]

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[31] *Id*. at 10.
[32] *Id*.
[33] *Id*. at 6.
[34] Model Timing Agreement at 8 ("If the Division has continuing concerns about the Proposed Acquisition, the Parties will be given an opportunity to meet with the appropriate Division Front Office personnel . . . .").

The DOJ's modifications to the merger review process are a welcome update. "What's significant this time is you have the government making very concrete improvements, very concrete targets," Cowie said. Though less extensive, the FTC too has taken concrete steps to improve the merger review process. The FTC has agreed to a similar goal of reducing the time it takes to conduct merger investigations and announced that it will introduce a deal-tracking system to help understand what steps by the parties or the FTC are most significantly delaying the review process.[35]

The FTC also published its first Model Timing Agreement this past August.[36] While it was commonplace for the DOJ to enter into timing agreements, Cowie said, the FTC's publication of its own Model Timing Agreement is an "important step in convergence." That said, one significant difference between the DOJ and FTC Model Timing Agreements is that the FTC allows 60 to 90 days following certification for the FTC to complete its investigation,[37] in contrast to DOJ's 60 days. However, Cowie explained, the FTC has indicated a commitment to faster and less costly merger analyses so we can expect the FTC to head in the same direction as DOJ.

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[35] Flavia Fortes, MLex, US merger review set for procedural overhaul at DOJ; FTC also aims to streamline review (September 25, 2018).
[36] Federal Trade Comm'n, Model Timing Agreement (August 2018), *available at* https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_8-22-18.pdf.
[37] *Id.* at 1.

International Roundup

David Rosner and Danielle Levesque[*]

The third quarter of 2018 saw a significant number of interesting merger review developments around the world. Summarized below are some of the more topical and interesting cases that arose in Q3, as well as a notable recent policy developments concerning merger review in India.

I. Multi-Jurisdictional Clearances in Global Mergers

Praxair / Linde Win Conditional Clearances Around the World

On October 31, Praxair and Linde completed their US$83 billion merger following antitrust clearances in a number of jurisdictions, including South Korea, China, India, Brazil, Mexico, Taiwan, the European Union, the United States and Canada.[1] Praxair and Linde are two of the four largest industrial gases companies in the world. Both companies span the industrial gas supply chain, operating scale-level production facilities, local filling stations and local retail branches across the globe. The merger review process for this transaction represents an impressive and sustained effort to plan numerous local divestitures in order to win approval from agencies across the world.

The parties originally announced their planned merger in December of 2016,[2] following which they embarked on a six month commercial negotiation to agree a final transaction. Given their overlapping operations, the parties recognized the probable need to make divestitures in order to win clearances, and

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[1] See Linde AG's Press Release, "Business Combination Between Praxair and Linde AG Successfully Completed", October 31, 2018, available online: http://lindepraxairmerger.com/download/companies/Linde/lindepraxairmedia/311018_Linde_plc_PR_Business_Combination_Successfully_Completed_E.PDF.

[2] See Praxair's Press Release, "Linde and Praxair Announce Intention to Merge", December 20, 2016, available online: https://www.praxair.com/news/2016/linde-and-praxair-announce-intention-to-merge.

agreed at the outset to sell assets generating up to US$4.3 billion in sales or up to US$1.27 in EBITDA in order to win the those clearances.

The parties then began a multijurisdictional merger review process. In public disclosure from August 2017, the parties reported having received a Second Request from the Federal Trade Commission and having submitted notifications in China, India and South Korea, with additional notifications planned in a number of other jurisdictions.

Many of the reviews resulted in in-depth investigations. In Europe, the Commission opened a "Phase II" investigation in February of 2018, explaining publicly its concerns that the transaction would reduce the number of competitors able to bid for the largest projects from four-to-three.[3]

Reflecting their initial understanding that divestitures would be required to address the agencies' concerns, the parties pro-actively entered into negotiations with divestiture buyers. In July 2018, the parties announced an agreement by Praxair to sell the majority of its European gases business (which generated approximately €1.3 billion in annual sales) to Taiyo Nippon Sanso Corporation for €5 billion.[4] Later that month, the parties announced an agreement by Linde to sell the majority of its North American gasses business and certain of its business activities in South America (which collectively generated approximately €1.4 billion in annual sales) to a consortium that includes German industrial gasses manufacturer Messer Group for US$3.3 billion.[5]

[3] See DG Comp press release, "Commission opens in-depth investigation into proposed merger between Praxair and Linde", February 16, 2018, available online: http://europa.eu/rapid/press-release_IP-18-822_en.htm.
[4] See Linde press release, "Status of the proposed business combination – sale of Praxair's European gases business to allow merger clearance of the business combination by European Commission", July 5, 2018, available online: https://www.the-linde-group.com/en/news_and_media/potential-merger/news_20180705_2.
[5] See Linde press release, "Status of the proposed business combination – agreement to sell assets in the Americas to Messer and CVC", July 16, 2018, available online: https://www.the-linde-group.com/en/news_and_media/press_releases/adhoc/news_20180716.

Despite these divestiture agreements, the parties warned their shareholders the next month that the divestiture limits agreed at the time of announcement would likely need to be exceeded in order to win the necessary approvals,[6] and in September the parties were reported to have entered into discussions to sell additional assets.[7]

Following these further discussions, the parties began to win conditional approvals from a number of major jurisdictions where the parties' overlapped. In August, the European Commission approved the merger, subject to the sale of Praxair's entire European gas business, the sale of Praxair's interest in an Italian joint venture to its joint venture partner, and the divestiture of global level helium sourcing contracts.[8] In India, the Competition Commission issued its approval following Linde's agreement to sell its interest in a joint venture and both parties' agreement to sell various assets in different parts of India.[9] At the end of September, China's State Administration for Market Regulation issued its approval conditional upon divestiture of customer contracts totaling 90 million cubic feet of helium per year and a behavioral commitment to provide Chinese customers a stable supply of various gasses at prices not exceeding 2016 levels.[10] In early October, the South Korean Fair Trade Commission conditioned its clearance upon a number of divestitures, including either of the parties selling the

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[6] See Linde press release, "Business combination with Praxair, Inc.: revenue threshold for divestiture commitments to be exceeded", August 22, 2018, available online: https://www.the-linde-group.com/en/news_and_media/press_releases/adhoc/news_20180822.

[7] See, for example, Reuters, "Linde, Praxair close to selling more assets to save merger: source", September 19, 2018, available online: https://www.reuters.com/article/us-linde-m-a-praxair-antitrust/linde-praxair-close-to-selling-more-assets-to-save-merger-source-idUSKCN1LZ14Y.

[8] See DG Comp press release, "Commission clears merger between Praxair and Linde, subject to conditions", August 20, 2018, available online: http://europa.eu/rapid/press-release_IP-18-5083_en.htm.

[9] See Competition Commission of India press release, "CCI approves the combination of Linde Aktiengesellschaft and Praxair, Inc. under Section 31(7) of the Competition Act, 2002, subject to modifications/remedies to address the anti-competitive effects resulting from the said combination", September 19, 2018, available online: https://www.cci.gov.in/sites/default/files/press_release/Press%20release%2012%202018-19.pdf.

[10] See Kaela Cote-Stemmermann, Global Competition Review, "China Conditionally approves Linde/Praxair merger", October 2, 2018, available online: https://globalcompetitionreview.com/article/1175190/china-conditionally-approves-linde-praxair-merger.

assets of their Korean bulk gasses business and either of the parties selling their assets related to the Korean supply of excimer laser gas (which Linde produced in the United States).[11] Following the entering of a consent decree with the Federal Trade Commission in the United States, Canada's Competition Bureau entered into a consent agreement with the parties that required the divestiture of Linde's Canadian business.[12]

Essilor / Luxottica Win Final Approvals with Behavioral Commitments

Essilor and Luxottica's merger, initially announced in January 2017, won its final clearances from China and Turkey (subject to conditions) in the third quarter. The merger had won many of the necessary approvals from other jurisdictions, including the United States and European Union, in the first quarter of 2018.

In July, the Chinese State Administration for Market Regulation conditionally approved the merger subject to a number of behavioral commitments. These commitments include promises that eyewear products will not be sold below cost without a justified reason, that exclusivity conditions would not be imposed on Chinese retailers, and that tied selling would not be imposed.[13] At the beginning of October, Turkey's Competition Board approved the merger subject to Essilor's divestiture of a retail eyewear subsidiary and various behavioral commitments (including a restriction on tied sales).[14]

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[11] See KFTC press release, "KFTC requires Linde and Prexair (sic) to divest assets to proceed with merger", October 2, 2018, available online: http://www.ftc.go.kr/solution/skin/doc.html?fn=aaa9369776cdd637d41f4d89080ab4e7547c58dbcf838437ee350591f5883d47&rs=/fileupload/data/result/BBSMSTR_000000002402/.
[12] See Competition Bureau press release, "Competition preserved in the supply of industrial gases in Canada", October 26, 2018, available online: https://www.canada.ca/en/competition-bureau/news/2018/10/competition-preserved-in-the-supply-of-industrial-gases-in-canada.html.
[13] See Kaela Cote-Stemmermann, Global Competition Review, "China conditionally clears Essilor/Luxottica merger", July 30, 2018, available online: https://globalcompetitionreview.com/article/1172416/china-conditionally-clears-essilor-luxottica-merger.
[14] See Turkish Competition Board press release, "The final examination concerning the merger between Luxottica Group S.p.A. and Essilor International S.A. concluded", October 2, 2018, available online: https://www.rekabet.gov.tr/en/Guncel/the-final-examination-concerning-the-mer-e6577ac7aec7e81180e500505694b4c6.

Qualcomm Abandons NXP Semiconductors Merger After Not Obtaining Chinese Approval

After more than two years and at least 29 extensions of the "outside date", Qualcomm abandoned its bid to buy NXP Semiconductors (NXP) after failing to obtain clearance in time from China's SAMR.[15] Despite winning approvals in eight other jurisdictions, including conditional approval from the European Commission, the SAMR declined to approve the merger during the parties' self-imposed time-frame, explaining publicly that the remedies proposed were insufficient, and that "[t]he results of our evaluation showed that Qualcomm's latest plan could not resolve competition issues."[16]

Some commentators speculated that the deal was not approved by SAMR because of U.S. and Chinese political friction. The deal was announced days before the election of U.S. President Donald Trump, and was reviewed at the same time as the ongoing trade dispute between the U.S. and China. In response to such concerns, China officials have publicly stated that the delay was only due to antitrust, and not political, issues.[17]

II. <u>Other Notable Decisions from Around the World</u>

European Union – Apple / Shazam – High Tech / Big Data Merger

In December 2017, Apple announced its proposed acquisition of Shazam for approximately US$400 million. Apple operates iTunes (in competition with other streaming music services like Spotify) and Shazam operates an app that consumers use to identify songs (which it monetizes by selling ads and referring

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[15] https://www.forbes.com/sites/tiriasresearch/2018/07/24/to-be-or-not-to-be-qualcomm-and-nxp/#3f19a86d2722

[16] See Competition Policy International, "China: Watchdog is open to making mends with Qualcomm", July 29, 2018, available online: https://www.competitionpolicyinternational.com/china-watchdog-is-open-to-making-mends-with-qualcomm/

[17] See Cao Li and Raymond Zhong, New York Times, "As Qualcomm Deal Is Scrapped, China Denies Trade Link", July 26, 2018, available online: https://www.nytimes.com/2018/07/26/technology/qualcomm-china-trade-war.html.

users to websites (such as iTunes and Spotify) where consumers can purchase music). Shazam also possesses significant volumes of data about the music listening habits and interests of its users.

The transaction was subject to notification obligations in a number of member states of the European Economic Area (Austria, France, Iceland, Italy, Norway, Spain and Sweden), which referred the transaction to the European Commission for review.[18]

While certain national authorities expressed concern that the merger might lead to foreclosure of rival music streaming rivals,[19] the Commission's investigation expanded to also assess whether access to Shazam's data would permit Apple to put its music streaming rivals at a competitive disadvantage.

Following an in-depth Phase II review, in September the European Commission unconditionally cleared the merger.[20] The Commission's investigation concluded, among other things, that (i) refusal to supply Shazam to rivals would not foreclose them, as Shazam was an entry point of limited importance to rivals, (ii) access to Shazam's consumer data would not materially increase Apple's ability to induce switching by its rivals' customers, and (iii) the integration of Apple and Shazam's data would not permit Apple to place its rivals at a competitive disadvantage.

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[18] See DG Comp press release, "Commission to assess the acquisition of Shazam by Apple", February 6, 2018, available online: http://europa.eu/rapid/press-release_IP-18-664_en.htm.
[19] See Tom Webb, Global Competition Review, "Apple/Shazam could cause foreclosure, says Spanish official," March 2, 2018, available online: https://globalcompetitionreview.com/article/1166271/apple-shazam-could-cause-foreclosure-says-spanish-official.
[20] See European Commission – Press Release, "Mergers: Commission clears Apple's acquisition of Shazam", September 6, 2018, available online: http://europa.eu/rapid/press-release_IP-18-5662_en.htm

European Union – Microsoft and GitHub Obtain Final Approval

On October 19, 2018, the European Commission approved Microsoft's acquisition of GitHub.[21] Microsoft and GitHub both supply various tools for the development and release of software.

The Commission's Phase I clearance decision concluded that there existed significant competition from remaining players. The Commission's decision also assessed whether Microsoft would have the ability and incentive to integrate its own and GitHub's tools and services while limiting integration by third party rivals. The Commission found that Microsoft would not in fact have the market power to undermine the open nature of GitHub to the detriment of its rivals; among other things, such actions would diminish the value of GitHub for developers, who can switch to other platforms.

The Commission's decision in Microsoft/GitHub is reminiscent of its decision in the Oracle/Sun Microsystems merger in 2010. In that case, the Commission focused on whether Oracle would have the ability and incentive to degrade Sun's MySQL database management system (which competed with Oracle's database management system). The Commission concluded that Oracle would not have such an ability due to, among other things, MySQL's open source nature (which permitted the development of MySQL-based forks that constrain Oracle) and Oracle's public commitment to continue offering future versions of MySQL under open source licenses. One key difference between the Commission's 2010 decision in Oracle/Sun and its 2018 decision in Microsoft/GitHub is that the Oracle/Sun decision was made in Phase II following an in-depth review (eight months after the transaction's announcement), while the Microsoft/GitHub decision was made in Phase I (four months after the transaction's announcement).

[21] See, European Commission's Press Release, "Mergers: Commission approves acquisition of GitHub by Microsoft", October 19, 2018, available online: http://europa.eu/rapid/press-release_IP-18-6155_en.htm

Singapore – Uber and Grab Fined for Merger, Uber Appeals

On March 26, 2018, Uber Technologies (Uber) sold its operations in eight south-Asian countries to a rival, Grab, for a 27.5% stake in Grab. The next day, the Competition & Consumer Commission of Singapore (CCCS) commenced an investigation into the sale, imposing various interim measures in the following weeks.

In July, the CCCS concluded its investigation and issued a Proposed Infringement Decision, inviting public feedback on potential remedies. In September, the CCCS issued its final decision.

The CCCS' final decision found that the transaction eliminated Grab's closest competitor from the market, and that absent the transaction Uber would have continued competing against Grab. The CCCS found that as a result of this elimination, Grab was able to increase effective fares (including through the reduction in the number of points earned by riders for money spent on Grab) by 10-15%. In addition, the CCCS found that Grab's exclusivity agreements with taxi companies, car rental partners and some of its drivers made it difficult for competitors to enter into or expand within the market, thereby raising barriers to entry further.

As a result of its conclusions, the CCCS imposed a number of remedies. These remedies included an obligation on Uber to sell the vehicles of a specified car rental company to a rival, as well as obligating Grab to end exclusivity provisions with drivers and maintain its pre-merger pricing algorithm and driver commission rates. Separately, the CCCS imposed fines of approximately US$4,751,700 on Uber and approximately US$4,634,454 on Grab. The CCCS explained the basis for the fines by noting that (i) the parties elected not to utilize the CCCS's voluntary notification regime, (ii) the parties elected instead to close the transaction and begin integrating immediately, and (iii) the parties appeared to recognize that the CCCS may fine them for such conduct, apportioning the risks of such a penalty between them by way of contract.[22]

Uber has appealed the CCCS' decision,[23] publicly explaining that the motivation for its appeal includes (i) an objection to the CCCS' conclusion that barriers to entry are high, and (ii) an objection to the CCCS' apparent conclusion that Uber knew its decision not to notify the merger pre-closing would be contrary to Singaporean merger control rules.

Australia – Arrow and Apotex 4-3 Merger Approved Without Conditions

In September, the Australian Competition & Consumer Commission (ACCC) issued its unconditional clearance of the merger of Arrow Pharmaceuticals and Apotex's Australian operations.[24] Arrow and Apotex are two of the four largest suppliers of generic pharmaceuticals in Australia.

The ACCC's review focused on whether competition would be harmed as a result of the horizontal overlap between the parties in various generic pharmaceuticals, including whether customers and their contracting practices would have the ability to ensure the intensity of competition was not diminished. The ACCC concluded that while the companies were direct competitors, they were constrained by the remaining two other large generic pharmaceutical manufacturers. Because customers purchased generic pharmaceuticals through tender processes, the intensity of competition would not be diminished as a result of the merger. In addition, the merged company would be constrained from raising prices under its existing contracts by the terms of those contracts, which

[22] See, Competition & Consumer Commission of Singapore, "Grab-Uber Merger: CCCS Imposes Directions on Parties to Restore Market Contestability and Penalties to Deter Anti-Competitive Mergers", September 24, 2018, available online: https://www.cccs.gov.sg/media-and-publications/media-releases/grab-uber-id-24-sept-18

[23] See, Uber's press release, "Our Decision to Appeal the Consumer & Competition Commission of Singapore Decision", October 22, 2018, available online: https://www.uber.com/newsroom/cccs-appeal/

[24] See, Australian Competition & Consumer Commission Media release, "ACCC won't oppose Arrow and Apotex merger", September 20, 2018, available online: https://www.accc.gov.au/media-release/accc-won%E2%80%99t-oppose-arrow-and-apotex-merger

permit pharmacies to purchase from rivals where a more attractive offer is available in the market.

Australia – Nine and Fairfax Merger Approved Despite Lessening of Competition

In November, the ACCC announced it would not oppose the proposed merger between Nine Entertainment (Nine) and Fairfax Media (Fairfax).[25] Nine and Fairfax are both diversified media companies.

The ACCC assessed competition between the companies in a number of notable ways. The ACCC assessed the degree of competition in certain regions of Australia where both companies maintain newsrooms, but did not ultimately find reason for concern that newsrooms in those areas competed sufficiently closely. In another line of inquiry, the ACCC assessed whether the companies' overall operations competed closely with each other for audience, ultimately finding that Nine's content targets a mass market audience while Fairfax's media are more targeted at more specific audiences. The ACCC also investigated competition between the companies in advertising markets, content acquisition markets and non-news content markets, but did not find reason for concern.

The bulk of the ACCC's investigation appears to have focused on the degree of competition between the companies in the supply of online news. The ACCC characterized the merger as a "five-to-four" merger among companies that "employ a large number of journalists." Despite there being only three other remaining major competitors, the ACCC found that smaller online news organizations provided some degree of competitive constraint, explaining that while there existed barriers to expansion in the online news market, significant entry had already occurred and had "made a noticeable difference." The ACCC

[25] See, ACCC Media release, "ACCC will not oppose Nine-Fairfax merger", November 8, 2018, available online: https://www.accc.gov.au/media-release/accc-will-not-oppose-nine-fairfax-merger

also took account of changes in the "media markets", noting the significant fall in revenue in advertising at Fairfax as a result.

Ultimately, the ACCC concluded that the merger of Nine and Fairfax would reduce competition, but that such a reduction would not be substantial. The ACCC explained its expectation that following the merger Nine and Fairfax may change how they operate (resulting in less intense competition in online news), but changes in the media landscape were more significant drivers of these changes than the merger itself. As a result of this conclusion, the ACCC decided not to challenge the merger.

South Africa – Sibanye and Lonmin Approved with Conditions

On December 1, 2017, Sibanye Gold Limited (Sibanye-Stillwater), the fourth largest platinum producer in the world agreed to purchase all shares of Lonmin Plc (Lonmin), the third largest platinum producer in the world. The last remaining condition to closing of the merger was approval from South Africa's Competition Commission (SACC). On September 17, 2018, SACC approved the deal, subject to conditions required to mitigate public interest concerns.[26]

SACC said the transaction did not prevent or lessen competition in platinum markets but did raise "significant public interest concerns." Among other things, SACC expressed concerns about the negative impact of the merger on employment, procurement from historically disadvantaged persons, and relationships with the community.

In order to mitigate these public interest concerns, SACC requires that, among other things, (1) Sibanye must start three short-term mining projects to avoid some of the inevitable layoffs (of approximately 3,000 employees); (2) Lonmin must keep its existing contracts with suppliers that are owned by

[26] See, Competition Commission of South Africa's Media Statement, "Proposed Merger Between Sibanye Gold Limited and Lonmin PLC", September 17, 2018, available online: http://www.compcom.co.za/wp-content/uploads/2018/01/PROPOSED-MERGER-BETWEEN-SIBANYE-GOLD-LIMITED-AND-LONMIN-PLC.pdf

historically disadvantaged persons; and (3) the merged entity must respect Lonmin's existing supply agreement with a local community. The Competition Tribunal must review these conditions and make a final ruling on the deal.[27]

III. Merger Policy Developments

India – Change to the Procedural Rules for Pre-Merger Notification

The Competition Commission of India (CCI) has amended its rules of procedure so that merging companies may offer voluntary commitments to resolve concerns of the CCI in advance of a rigorous Phase II investigation.

In particular, two amendments were made to allow such amendments. First, any additional time that the CCI takes to evaluate the proposed modifications will not count toward the 210-day deadline it must otherwise meet when reviewing mergers. Second, merging companies now have the ability to pull and refile their notifications. This practice, available in other jurisdictions (including the U.S.), allows parties to restart the statutory clock and offer meaningful solutions to preliminary antitrust concerns.

Companies can modify their intended merger either before the CCI forms an opinion, or after it has made an initial finding. Now, parties can offer structural or behavioral remedies in advance of an in-depth review, avoiding the time and costs associated with an in-depth Phase II investigation.

[27] Sibanye-Stillwater Press Release, "SA Competition Commission makes recommendation to the Tribunal that the Lonmin acquisition be approved subject to agreed conditions", September 18, 2018, available online: https://thevault.exchange/?get_group_doc=245/1537255284-sibanye-comp-comm-recommendation-re-lonmin-18sep2018.pdf

About the Mergers and Acquisitions Committee

The **Mergers and Acquisitions Committee** focuses on issues relating to mergers, acquisitions and joint ventures. Committee activities and projects cover private litigation, both state and federal enforcement, and international merger enforcement activities.

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