The Antitrust Review of the Americas 2015

Published by Global Competition Review
in association with

Paul Hastings LLP

GCR
GLOBAL COMPETITION REVIEW

www.globalcompetitionreview.com

United States: Mergers

C Scott Hataway and Michael S Wise
Paul Hastings LLP

As anticipated, 2013 saw a continuing trend of aggressive enforcement in United States merger control. The Federal Trade Commission (FTC)'s efforts in the health-care space reached new heights with the successful challenges to St Luke's acquisition of Saltzer Medical Group in Idaho, Mylan's acquisition of Agila Specialties, and Watson Pharmaceuticals' acquisition of Actavis. These challenges served to complement significant appellate victories against ProMedica and Phoebe Putney.

While the FTC logged consistent wins against health-care companies, the Department of Justice (DoJ) challenged one of the largest and most significant airline mergers in US history. Rather than blocking the transaction, which the DoJ described as involving head-to-head competition 'on thousands of heavily traveled nonstop and connecting routes', the agency settled on the eve of trial for a divestiture of a relatively modest number of 'slots' primarily at Washington, DC's Reagan National Airport. The surprising result was met with some scepticism, particularly in light of the Department's aggressive pursuit of Bazaarvoice and Twin America, companies involved in relatively unknown transactions that were too small to be reported under the Hart-Scott-Rodino (HSR) Act.

The agencies supplemented aggressive substantive enforcement with continued escalation related to procedural compliance issues. And as has been the case for many years, both agencies continued efforts to generate consistent outcomes with sister agencies in other jurisdictions. Several changes in personnel will create subtle alterations to the current areas of emphasis, but we expect the antitrust agencies to continue their elevated enforcement efforts, particularly in the areas of health care, intellectual property and unreported mergers.

Health-care issues at the forefront

Last year, we highlighted the perceived tension between the Affordable Care Act (ACA) and the antitrust laws in merger investigations. FTC Commissioner Julie Brill was noted for her speech taking the position that 'the ACA neither requires nor encourages providers to merge or otherwise consolidate'.[1] Commissioner Brill recently reiterated this position, stating again that arguments claiming that the ACA encourages consolidation are 'creative, but misguided'.[2] Other FTC commissioners have at least acknowledged the tension. For example, Commissioner Maureen Ohlhausen recently noted that 'partly due to the Affordable Care Act, the health care sector has seen a significant amount of consolidation.'[3] In any event, the FTC remains committed to its position that health care merger enforcement will continue at an elevated pace, relying on traditional analytical approaches. As Commissioner Ohlhausen recently put it, 'The ACA emphasises provider integration, and we understand that that can yield efficiencies and other benefits for consumers. But efficiencies have always been part of modern merger review – that's nothing new.'[4]

St Luke's

Consistent with the FTC's position that health-care enforcement does not require any reassessment of traditional merger review tools, the agency has remained focused primarily on horizontal overlap concerns when challenging health care deals. One good example is the FTC's challenge to the St Luke's Health System proposed merger with the Saltzer Medical Group (Saltzer).[5]

The *St Luke's* case focused on combining doctors and hospitals in Idaho. St Luke's is primarily a hospital system, operating seven hospitals in the state. Saltzer is Idaho's largest independent, multi-specialty physician group. The transaction was largely vertical in nature – an alignment of a large hospital system with a large physician group, at least in part due to changes to the health-care industry (and particularly reimbursement mechanisms) tied to the ACA.

The FTC brought a suit to challenge the merger on 12 March 2013.[6] The agency did not challenge the merger on vertical grounds, such as suggesting that combining a hospital and a previously unaffiliated doctor group would foreclose competitors from access to an important input or distribution channel. Rather, the FTC based its theory of competitive harm on a horizontal reduction of competition between St Luke's and Saltzer in a market for adult primary care in a single city – Nampa, Idaho.

St Luke's operates an emergency outpatient clinic in Nampa, Idaho and employs eight primary care physicians there. Saltzer employed 16 primary care physicians in Nampa. The Commission concluded that the combination of these two primary care practices would give St Luke's increased ability and incentive to demand higher reimbursement rates from commercial health plans. In doing so, the FTC concluded that the claimed efficiency and quality gains suggested by St Luke's were insufficient to outweigh the potential for anti-competitive harm flowing from Nampa. On 24 January 2014, the court for the District of Idaho sided with the FTC, issuing a permanent injunction blocking the transaction.

The *St Luke's* decision is significant in that it revolved around a relatively small competitive overlap in the context of a large and presumably efficient vertical integration. At the same time, St Luke's demonstrates the FTC's continued focus on the application of traditional horizontal merger analysis to the health-care sector. In fact, while the ACA focuses providers' attention on a variety of efficiency gains and quality improvements that are vertical in nature (eg, physicians working with hospitals to improve care), the FTC appears to be primarily (if not exclusively) evaluating horizontal implications of any of the recent transactions. We should expect to see more challenges like this in the coming year.

Pharma enforcement

The FTC's merger enforcement in the pharmaceuticals sector has largely remained consistent in recent years. The Commission challenged Mylan, Inc's acquisition of Agila Specialties Global PteLtd and Agila Specialties Pvt Ltd. on 26 September 2013.[7] It also adopted a final order in its challenge to Watson Pharmaceuticals, Inc's acquisition of Actavis Inc on 14 December 2012.[8] In both cases, the FTC required divestitures of various drugs to generic manufacturers based on the its practice of defining relevant markets around particular drugs (as opposed to around courses of treatment for particular conditions).

In addition, on 6 November 2013, the FTC Premerger Notification Office adopted a final rule expanding HSR reporting obligations for patent licensing arrangements in the pharmaceuticals industry.[9] Under the old rules, transfer of an exclusive licence to a patent was reportable under the HSR Act if it met the size thresholds, but non-exclusive licences were not reportable. The new rule changes this by requiring HSR notification where a patent owner transfers 'all commercially significant rights' to another party and the size thresholds are met. This rule is intended to address a common practice in pharmaceutical licensing agreements where the patent holder retains 'co-rights' in the patented drug. For example, a patent holder might retain rights to co-develop, co-promote, co-market or assist the licensee in developing and commercialising the drug. The FTC now takes the position that these reservations of co-rights will not make the licence non-reportable. Notably, the rule applies only to the pharmaceuticals industry, in a rare departure from the normal practice of making HSR reporting requirements applicable across all industries.

FTC appellate victories

The FTC's health-care enforcement has also been bolstered by recent wins at the appellate level, affirming lower court victories against health-care companies. As the agency continues to succeed in persuading courts to follow its merger analysis at both the trial and appellate levels, we can expect to see challenges in more contested health-care cases.

ProMedica

On 6 January 2011, the FTC brought a challenge against the consummated acquisition of St Luke's Hospital (unrelated to St Luke's Health System discussed above) in Lucas County, Ohio by ProMedica Health System, Inc.[10] On 29 March 2011, the court granted a preliminary injunction, and the FTC pursued its challenge to the merger before an administrative proceeding.[11] On 12 December 2011, the administrative law judge issued a ruling that the merger would result in higher prices for inpatient hospital services in Lucas County, and the FTC issued an opinion and final order upholding the administrative findings and requiring divestiture of St Luke's Hospital.[12]

The parties appealed the FTC decision to the Sixth Circuit.[13] One of the most contested issues was the FTC's definition of the relevant market. Rather than relying on the traditional test of substitutability to determine the boundaries of the relevant market, the court relied on a 'cluster market' approach in which the court grouped together services for which competitive conditions were similar and for which the antitrust analysis would be largely the same. The FTC had advocated this approach based on administrative convenience because of the complexity of trying to analyse each category of service offered by a hospital as a separate market. Under the FTC's analysis, adopted by the Sixth Circuit, it was permissible to group primary and secondary hospital services together as a single cluster, while carving out obstetrician services to be analysed separately due to allegedly different competitive conditions. The Court rejected ProMedica's competing argument that the relevant market should be defined based on a 'package deal' theory that would include all hospital services together in a single market.

The Sixth Circuit win for the FTC will likely bolster its aggressiveness for challenging potentially problematic hospital mergers. In particular, the affirmation of the use of cluster markets in hospital cases will establish a strong precedent for agency discretion in combining products and services in future cases.

Phoebe Putney

The FTC scored another appellate victory in the case of *FTC v Phoebe Putney Health System, Inc*.[14] In 2011, the Hospital Authority of Albany-Douglas County in south-western Georgia, which operated Phoebe Putney Memorial Hospital, voted to acquire Palmyra Park Hospital. Combined, the two hospitals accounted for over 85 per cent of the hospital care in the region. The transaction was consummated and Phoebe Putney applied for and received a single licence from the state authorising it to operate the hospitals as a single hospital with two campuses. The state concurrently revoked the separate licences for Phoebe Putney and Palmyra Park.

This case differed from other hospital acquisitions because the Hospital Authority was a state entity, and therefore sought protection under the State Action Doctrine. At both the District Court level and the 11th Circuit Court of Appeals, Phoebe Putney was successful in arguing for immunity from the antitrust laws, and the FTC sought review by the United States Supreme Court. Justice Sotomayor wrote for a unanimous court, finding that the State Action Doctrine did not apply. According to the opinion, in order for immunity to attach, the anti-competitive effect of a state's action must be a foreseeable result of the law or regulation in question. The Court concluded that there was no evidence that the 1941 Hospital Authorities Law at issue was intended to displace competition, and thus concluded that the state action doctrine did not provide immunity from the antitrust laws.

With the Supreme Court victory in hand, the FTC proceeded with its case against the merger in an administrative proceeding. On 22 August 2013, the FTC announced that a settlement had been reached.[15] However, the settlement was notable for the fact that no divestiture was required. According to the FTC's analysis, under Georgia law, Palmyra Park could not simply be sold. In fact, the law required a 'certificate of need' before a new entrant could receive a licence to operate in the state. Among other things, a certificate of need applicant must show an 'unmet area need' and a lack of any adverse impact on other nearby hospitals (principally, Phoebe Putney). The FTC concluded that it would not be feasible for a third party to obtain a certificate of need and purchase a divested Palmyra Park. It therefore limited its relief to a requirement for Phoebe Putney to notify the FTC of future acquisitions; and a prohibition on objections to future certificate-of-need applications in the relevant area. The FTC was careful to make the point that the remedy agreed to in this case was unique given the state law issues encountered.[16]

Although the proposed settlement has now been on the table for several months, the FTC has still not finalised it. Rather, the agency appears to be relentlessly pursuing alternatives that would result in a divestiture. In April 2014, the FTC disclosed that the North Albany Medical Center would like to purchase Palmyra Park and that it was considering whether it would be possible to overcome the regulatory hurdles identified in its analysis of the proposed settlement. At the time of this writing, the agency was seeking an opinion from the Georgia Department of Community Health as to whether a divestiture can be ordered without a certificate-of-need application.

It seems that the FTC's decision to settle the case against Phoebe Putney may have resulted from a less than complete understanding of the underlying regulations at issue. However, the agency's ongoing efforts even after announcing the settlement to find an alternative resolution to the case highlight its unrelenting determination to leave no stone unturned in the battle against higher prices for health-care services.

Questions over enforcement tactics at the DoJ

On 13 August 2013, the DoJ filed a lawsuit to enjoin the US$11 billion merger of American Airlines parent AMR Corporation with U.S. Airways Group, Inc.[17] The DoJ complaint was sweeping, alleging a variety of harms to competition and consumers. Among other things, the DoJ claimed that:

- the merger would reduce the number of legacy carriers from four to three;
- the merger would eliminate head-to-head competition between the two companies on over 1,000 routes;
- the transaction would entrench the merged airline at Reagan National Airport in Washington, DC;
- the merger would result in discontinuance of US Airways' practice of competing vigorously for price-conscious travelers by offering discounts of up to 40 per cent for connecting flights on other airlines' nonstop routes under its Advantage Fares programme; and
- the merger would result in higher ancillary fees.

As DoJ Assistant Attorney General Bill Baer put it at the time the complaint was filed, 'both airlines have stated they can succeed on a stand-alone basis and consumers deserve the benefit of that continuing competitive dynamic'.[18]

On 12 November 2013, the DoJ filed a proposed final judgment with the court, seeking acceptance for a remedy that would allow the parties to consummate the merger.[19] In contrast to the broad complaint, the remedy consisted primarily of divestiture of take-off and landing slots at Reagan National Airport and New York La Guardia Airport, along with ancillary facilities at a handful of other airports. According to the DoJ, the settlement 'promises to impede the industry's evolution toward a tighter oligopoly by requiring the divestiture of critical facilities to carriers that will likely use them to fly more people to more places at more competitive fares. In this way, the proposed remedy will deliver benefits to consumers that could not be obtained by enjoining the merger.'[20] Importantly, the DoJ's remedy required the divested slots to be sold to existing low-cost carriers (LCCs) rather than existing 'legacy' carriers.

The DoJ's settlement was criticised largely on the basis that it did not square with the allegations in the complaint. For example, commentators noted that the settlement did not directly address the reduction in 'legacy' carriers from four to three or the effects relating to ancillary fees. Moreover, while the complaint alleged that LCCs were not effective constraints on legacy carrier pricing, the DoJ's statement supporting the remedy suggested that by allowing LCCs to enter at Reagan National and La Guardia, those LCCs would be positioned to provide a constraint on future prices. Similarly, the complaint alleged anti-competitive harm on over 1,000 individual routes, each of which constituted a separate relevant market. However, the remedy seemed premised on the understanding that system-wide competition from LCCs will drive down prices, even on routes where the LCCs are not directly competing.

The DoJ defended its settlement first by arguing that it was entitled to deference under the Tunney Act, and second by arguing that it would 'disrupt the cozy relationships among the incumbent legacy carriers, increase access to key congested airports and provide consumers with more choices and more competitive airfares on flights all across the country'.[21] In essence, the DoJ took the position that the LCCs would be able to expand through the slot divestitures and impose a check on legacy carrier pricing.

Ultimately, the Court sided with the DoJ, approving the settlement on April 25, 2014. According to the decision, 'evaluating the proposed Final Judgment under the limited standard appropriate under the Tunney Act, the Court finds that the settlement agreement is "within the reaches of the public interest"'.[22] Although the court ultimately concluded that deference was due to the DoJ's settlement analysis, the case raises important points about the DoJ and its litigation strategy. For example, it appears that the DoJ's position when filing its complaint may have been to leverage a favourable settlement, while recognising that at least some of the alleged harms need not be addressed at the remedy stage. In addition, it seems likely that the DoJ sought to maximise its own flexibility in determining the weight to be given to the claimed efficiencies in the transaction, arguing in the complaint that they were illusory, but in the settlement that they were important to preserve. In both instances, we see a DoJ that is aggressively seeking tactical litigation advantages and trading off some transparency in its analysis to do so.

High-profile enforcement against consummated mergers

Both the DoJ and the FTC have spent considerable time and energy over the last year litigating cases against consummated mergers that were not subject to the reporting requirements of the HSR Act. In many of these cases, the initial transaction was under the notification threshold, and came to the agencies' attention either through complaints by market participants or staff review of trade publications. Three consummated merger challenges, the FTC's suits against St Luke's, Phoebe Putney, and ProMedica, are noted above. Two other DoJ challenges were also aggressively pursued over the last year: a suit to unwind the Bizaarvoice acquisition of PowerReviews and a suit to unwind Twin America, a joint venture involving sightseeing bus operators in New York City.

Bazaarvoice[23]

In June 2012, Bazaarvoice acquired PowerReviews, a competitor in the market for providing product rating and review platforms for retailers. The transaction was below the HSR reporting threshold, but shortly after the deal was closed the DoJ opened an investigation into the potential competitive impact. In January 2013, the DoJ sued to break up the deal, resulting in a decision in January 2014 in the DoJ's favour. Bazaarvoice has been ordered to divest PowerReviews, but as of the time of writing the parties are still litigating over whether certain Bazaarvoice intellectual property must be included in the divestiture package.[24]

Bazaarvoice is notable for several reasons. The court relied heavily on the DoJ's burden-shifting framework for analysing the transaction, whereby a showing of a high market share for the combined firm will result in a prima facie violation that can be rebutted only by very compelling evidence. The court also noted that the DoJ needed only to show a 'reasonable probability' that the transaction was anti-competitive in order to prove a violation. Both of these standards made it difficult for Bazaarvoice to mount a successful defence.

In addition to the court's use of standards favourable to the DoJ, the court also favoured the persuasiveness of the DoJ's evidence. Among other things, the DoJ presented premerger documents that stated that the two defendants were 'primary competitors' and that the transaction would prevent 'price erosion' and 'entry by competitors'. Bazaarvoice countered with over 100 customer declarations and arguments that other technology companies could easily reposition to enter the market. However, the court concluded that the customer testimony should not be given great weight and also held that entry barriers were higher than the defendants argued.

Twin America

In December 2012, the DoJ filed a lawsuit against Twin America, LLC, a joint venture in New York City between two competing tour bus operators.[25] According to the DoJ complaint, the two entities that formed Twin America, City Sights and Coach USA, accounted for 99 per cent of the market for 'double-decker hop-on, hop-off sightseeing buses in New York'. At the time of writing the DoJ's suit is still pending, with the parties engaged in pretrial practice.

While no decision has yet been reached in Twin America, a few facts are noteworthy. First, the DoJ suit was filed a month before the suit against Bazaarvoice and the transaction itself took place over three years before the suit was filed. This suggests one of the issues with consummated merger challenges – without the timing pressure imposed by the HSR Act, the government may have the incentive to proceed slowly through a court action. This is perhaps more interesting given the DoJ's allegation that Twin America had, before the complaint, imposed an anti-competitive price increase that is still in place, whereas no post-merger anti-competitive conduct was alleged against Bazaarvoice. Second, the DoJ's proposed product market appears to be quite narrow.

Cases like *American Airlines* will continue to make big headlines because of their size and scope, but the consummated challenges, often brought against small transactions with more limited impact on consumers, are playing a major role in the FTC and DoJ enforcement programmes. Buyers should take note that a lack of HSR notification will not exempt transactions from antitrust scrutiny, particularly where the transaction involves any horizontal overlap.

Other notable trends

Review of HSR Annual Report statistics

There were 1,286 transactions subject to HSR reporting in fiscal year 2013 (ending 30 September 2013), which is down slightly from 1,400 the year before and 1,414 in 2011.[26] Of these, just under 17 per cent were given clearance to either the DoJ or FTC for investigation. Second requests were issued in 3.65 per cent of all transactions or around 22 per cent of all transactions where clearance was granted.

The DoJ issued second requests in just over 30 per cent of the transactions where it obtained clearance, down from over 40 per cent in the previous year. Conversely, the FTC's rate of issuing second requests increased from almost 15 per cent to over 17 per cent. There is also an interesting disparity between the ratio of enforcement actions to second requests. In 2013, the DoJ issued 22 second requests and brought 15 enforcement actions, while the FTC issued 25 second requests and brought 23 enforcement actions. The FTC's high rate of action is partly accounted for by the FTC bringing a greater number of challenges to consummated mergers, where no second request is issued. Of the matters identified in the 2013 Annual Report, two DoJ matters and five FTC matters involved consummated deals. However, even adjusting for these effects would suggest that the DoJ is bringing an action in just under 60 per cent of cases where a second request is issued, compared with 72 per cent for the FTC.

Management changes at the FTC

On 9 April 2014, Terrell McSweeny was confirmed as the newest FTC Commissioner, giving the Commission a 3-2 Democrat majority, with Julie Brill and Chairwoman Edith Ramirez as the other Democrats and Maureen Ohlhausen and Joshua Wright as the Republican appointees.[27] While Commissioner McSweeny's views on competition policy issues are not yet clear, she does have a background in health-care policy issues that will no doubt be relied on as the FTC pursues its enforcement against health-care transactions.

In addition, Commissioner Ramirez appointed Debbie Feinstein as the new Director of the Bureau of Competition and Steve Weissman to be the new Deputy Director.[28] Both attorneys were previously in private practice and are highly experienced in merger review and litigation. While it is unlikely that either appointment will result in a significant change in policy, they do suggest a continued focus on aggressively challenging perceived anti-competitive transactions in both court and administrative proceedings.

Global convergence continues

The FTC and DoJ continue to tout the importance of global convergence in the context of international transactions. However, as discussed above, many of the high-profile cases over the last year have been predominantly domestic in nature. One exception is the FTC's challenge to General Electric Company's US$4.3 billion acquisition of the aviation business of Avio SpA. In this case, the concern was largely vertical – GE and Pratt & Whitney were the only two providers of a particular class of aircraft engine, and Avio provided a necessary input for those engines. The FTC worked in connection with the European Commission to craft a behavioural remedy precluding GE from restricting Pratt & Whitney's access to the input.

In addition, on 25 September 2013, the antitrust agencies issued a new model confidentiality waiver for use by companies subject to investigation by both US and non-US competition authorities. According to the agencies, '[t]he model waiver is designed to streamline the waiver process to significantly reduce the burden on individuals and companies, as well as to reduce the agencies' time and resources involved in negotiating waivers.'[29] To better explain the waiver process, the model waiver was issued along with a set of frequently asked questions designed to address common concerns about the waiver process. The agencies stated that 'by permitting cooperating agencies to discuss or otherwise exchange the individual's or company's confidential information, a waiver enables agencies to make more informed, consistent decisions and coordinate more effectively, often expediting the review.'[30]

Compliance remains a priority

Over the last two years, we have seen an increase in HSR compliance cases. In fiscal year 2013, the agencies noted that there were 39 corrective filings made for past violations. Although this is less than the 60 corrective HSR filings in fiscal year 2012, both are substantially higher than in 2011 (16 corrective filings), 2010 (24 corrective filings) and 2009 (24 corrective filings). This sharp uptick seems to be the result of several high-profile compliance penalties levelled in 2011 and 2012.

Despite the market's increased efforts at compliance, the agencies have continued to impose significant monetary penalties for failure to report. Interestingly, the heavy fines in this area have been imposed for what appear to be inadvertent violations. In one case, a member of the Coca-Cola board of directors paid US$480,000 to settle charges that he had failed to make an HSR filing in connection with his receipt of voting securities from Coca-Cola.[31] In another case, an investment firm failed to file an HSR notification relating to its acquisition of voting securities that exceeded HSR thresholds and agreed to pay US$720,000 to settle the charges.[32] While these fines seem substantial for inadvertent actions, the agencies noted that in both cases, the entities charged had made corrective filings in the past for alleged inadvertent failures to file, suggesting that multiple 'oversights' are not tolerated.

Conclusion

The increase in enforcement efforts in the United States has been noticeable and steady. Yet the application of increased effort has not necessarily led to uniform treatment. As noted in our discussion last year, differences in governing law seem to create disparate outcomes reached by the DoJ, which is limited to the well-litigated Clayton Act, and the FTC, which is empowered by the amorphous FTC Act. Similarly, the FTC's statistical emphasis on the health care space suggests that this industry has been targeted for special treatment during this period of elevated scrutiny. Similarly, the DoJ's willingness to compromise in a politically charged, national multi-billion-dollar transaction stands in stark contrast to its uncompromising position in seemingly less critical consummated transactions. Though predicting the exact outcomes has been more art than science in recent years, it seems clear that all parties in the United States must tread carefully when executing strategic transactions. Careful analysis, prudent document management and conservative risk assessment certainly seem to be the order of the day.

Notes

1 Julie Brill, 'Promoting Healthy Competition in Health Care Markets: Antitrust, the ACA, and ACOs' (11 June 2013), at 5.

2 Julie Brill, 'Competition in Health Care Markets' (9 June 2014), at 9.

3 Maureen K. Ohlhausen, 'Health Care, Technology, and Health Care Technology: Promoting Competition and Protecting Innovation' (26 February 2014), at 2.

4 *ABA Antitrust Health Care Chronicle*, A Discussion with FTC Commissioner Maureen K. Ohlhausen (1 November 2013), at 4.

5 See *FTC v St Luke's Health Sys Ltd*, Case No. 1:13-CV-00116-BLW, Findings of Fact and Conclusions of Law (D. Id. 24 January 2014).

6 US Federal Trade Commission, 'FTC and Idaho Attorney General Challenge St Luke's Health System's Acquisition of Saltzer Medical Group as Anti-competitive,' press release (12 March 2013).

7 US Federal Trade Commission, 'FTC Puts Conditions on Mylan's Proposed Acquisition of Agila from Strides,' Press Release (26 September 2013).

8 *In the Matter of Watson Pharmaceuticals Inc*, Docket No. C-4373, Decision and Order (FTC 14 December 2012).

9 78 Fed. Reg. 68,705, 68,706 (15 November 2013).

10 US Federal Trade Commission, 'FTC and Ohio Attorney General Challenge ProMedica's Acquisition of St Luke's Hospital,' press release (6 January 2011).

11 See *FTC v ProMedica Health Sys Inc*, Case No. 3:11-cv-00047-DAK, Findings of Fact and Conclusions of Law (N.D. Oh. 29 March 2011).

12 *In the Matter of ProMedica Health Sys, Inc*, Docket No. 9346, Initial Decision (FTC 12 December 2011).

13 *ProMedica Health Sys, Inc v FTC*, 12-3583, 2014 WL 1584835 (6th Cir. 22 April 2014).

14 133 S.Ct. 1003 (2013).

15 US Federal Trade Commission, 'Hospital Authority and Phoebe Putney Health System Settle FTC Charges That Acquisition of Palmyra Park Hospital Violated U.S. Antitrust Laws,' Press Release (22 August 2013).

16 See, for example, Andy Miller, 'FTC May Revive Phoebe Fight, Seeks State Guidance,' Georgia Health News (1 April 2014), available at: www.georgiahealthnews.com/2014/04/ftc-revive-phoebe-fight-seeks-state-guidance/.

17 *United States v US Airways Group, Inc*, Case No. 1:13-cv-01236, Complaint (D.D.C. 13 August 2013). The complaint was later amended on 5 September 2013.

18 US Department of Justice, 'Justice Department Files Antitrust Lawsuit Challenging Proposed Merger Between US Airways and American Airlines,' press release (13 August 2013).

19 *United States v US Airways Group, Inc*, Case No. 1:13-cv-01236, Proposed Final Judgment (D.D.C. 12 November 2013).

20 US Department of Justice, 'Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-Wide Competition and Settle Merger Challenge,' press release (12 November 2013).

21 US Department of Justice, remarks as prepared for delivery By Assistant Attorney General Bill Baer at the conference call regarding the Justice Department's proposed settlement with US Airways and American Airlines (12 November 2013).

22 *United States v US Airways Group, Inc*, Case No. 1:13-cv-01236, memorandum opinion (D.D.C. 25 April 2014).

23 *United States v Bazaarvoice, Inc*, Case No. 3:13-cv-00133-WHO, memorandum opinion (N.D. Ca. 8 January 2014).

24 See, for example, Melissa Lipman, 'DoJ Accuses Bazaarvoice Of Ignoring Antitrust Ruling,' *Law360* (13 March 2014), available at www.law360.com/articles/518233/doj-accuses-bazaarvoice-of-ignoring-antitrust-ruling.

25 *United States and State of New York v Twin America, LLC, Coach USA, Inc, International Bus Services, Inc, CitySights, LLC and City Sights Twin, LLC*, No. 12-CV-8989 (S.D.N.Y. filed 11 December 2012).

26 See US DoJ and FTC *Hart-Scott-Rodino Annual Report: Fiscal Year 2013*.

27 See Brent Kendall, 'Senate Confirms FTC Nominee McSweeny,' *The Wall Street Journal* (9 April 2014).

28 US Federal Trade Commission, 'FTC Chairwoman Edith Ramirez Names Senior Staff,' press release (17 June 2013); Jeff Sistrunk, 'Baker Botts Partner Heads To FTC's Competition Bureau,' *Law360* (19 September 2013).

29 US Federal Trade Commission, 'Federal Trade Commission and Justice Department Issue Updated Model Waiver of Confidentiality for International Civil Matters and Accompanying FAQ,' press release (25 September 2013).

30 Id.

31 *United States v Barry Diller*, No. 1:13-CV-01002 (D.D.C.) (final judgment issued 3 July 2013), available at www.ftc.gov/sites/default/files/documents/cases/2013/07/130703dillerjdmt.pdf.

32 *United States v MacAndrews & Forbes Holdings Inc*, No. 1:13-CV-0926 (D.D.C.) (final judgment issued 1 July 2013), available at www.ftc.gov/sites/default/files/documents/cases/2013/07/130701macandrewsforbesjdmt.pdf.

C Scott Hataway
Paul Hastings LLP

C Scott Hataway is an antitrust and competition partner in the litigation department of Paul Hastings, where he focuses on competition and trade regulation matters. His areas of practice include merger, civil nonmerger, and criminal antitrust counselling; district court and appellate litigation; and advocacy before the US Department of Justice, the Federal Trade Commission and international enforcement agencies. Mr. Hataway has extensive experience in multi-jurisdictional merger review and has appeared before the European Commission, China's Ministry of Commerce, the Korean Fair Trade Commission, and the Japan Fair Trade Commission.

As both a private practitioner and a former trial attorney with the DoJ's antitrust division, Mr Hataway has successfully led merger review cases in such industries as consumer electronics, telecommunications, national defence, information technology, energy infrastructure, primary metal production, broadcast communications, and transportation. He has also represented clients in criminal and civil non-merger investigations, including state and federal inquiries into alleged unlawful licensing practices in the music industry, alleged tying and standard-setting violations in the communications industry, alleged monopolisation in the pharmaceuticals industry, and alleged collusion in the electronics industry.

Complementing his work with federal agencies, Mr Hataway has also represented clients involved in various competition-related commercial disputes in state and federal court, including alleged Sherman Act violations, trademark infringement, copyright infringement, trade secret misappropriation and other unfair business practices.

Michael S Wise
Paul Hastings LLP

Michael Wise is an associate Paul Hastings' Washington, DC office, where he focuses his practice on antitrust and competition issues. His experience in merger control matters includes the efficient and successful handling of Second Requests, as well as the coordination of filings for the European Commission and other foreign regulators. His recent representations include contested transactions in the telecommunications, broadcast television, and health care sectors. In addition, Mr. Wise has handled complex litigation matters arising under the Sherman Act and state unfair competition laws.

PAUL HASTINGS

875 15th Street, NW
Washington, DC 20005
United States
Tel: +1 202 551 1700
Fax: +1 202 551 1705

C Scott Hataway
scotthataway@paulhastings.com

Michael S Wise
michaelwise@paulhastings.com

www.paulhastings.com

Rated first in *The American Lawyer*'s 2014 A-List, Paul Hastings is a leading international law firm that provides innovative legal solutions to many of the world's top financial institutions and Fortune Global 500 companies. With offices across Asia, Europe, and the US, we have the global reach and extensive capabilities to provide a personalised service wherever our clients' needs take us.

Paul Hastings represents many of the world's foremost businesses in their most significant antitrust and competition matters. Our team of former US federal prosecutors provides leading capabilities and experience coordinating and defending cartel investigations across continents. We are among only a handful of firms worldwide with the capability to defend associated 'follow-on' civil litigation from these investigations in all major antitrust jurisdictions.

Paul Hastings advises M&A clients across a range of industries, representing clients before antitrust enforcement agencies in Europe, Asia and North America. Our ranks include lawyers with long-standing private practice experience, as well as former government agency officials who have prosecuted hundreds of merger clearance investigations for global enforcement agencies. Paul Hastings is one of the only firms in the world with lawyers in its merger clearance practice who have successfully tried multiple merger cases before the US federal courts.

Our clients' businesses do not have borders – neither do we. Our work for clients across the globe gives us the experience and understanding to guide clients through the growing matrix of national competition laws.

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Partner of the
ABA Section of International Law

Law
Business
Research

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012

ISSN 1468-7054