The Antitrust Review of the Americas **2016**

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

The United States merger control enforcers remained active during the past year, consistent with recent trends.

For the Federal Trade Commission (FTC), health care remains one of the top priorities, driven in large part by the fact that it is an issue at the forefront of the national consciousness. Efforts in this space have so far met with great success, with the FTC scoring court victories at both the trial and appellate levels. Health-care providers are now seeing that the legislative push for health-care reform through better integration of care has provided little if any shelter from antitrust scrutiny in hospital and physician merger reviews – a fact that is unlikely to change barring further legislative involvement, which does not appear likely at the moment.

For the Department of Justice (DOJ), the last year has revolved around market definition: the DOJ has aggressively pursued cases that seek to define markets around only those customers most likely to be impacted by a deal, even where other similarly situated customers might be unaffected or benefited for one reason or another. This shift in focus has been a key driver behind the increase in enforcement activity and is something to watch carefully going forward.

Behind the front lines of enforcement, the agencies are taking steps to bolster their success against troubling deals and to reduce ancillary burdens of the review process. Thus, the FTC and DOJ are looking back, formally and informally, at the successes and failures of past remedial measures as a tool for driving remedies going forward. They are also looking for ways to streamline the HSR process, including through evaluating document production obligations and through potentially better coordination with other enforcement authorities. Though these efforts may matter little for those parties whose deals will ultimately be challenged, the streamlined processes will hopefully provide benefits for those parties who must go through the paces in order to close transactions that are pro-competitive.

At the DOJ and the FTC, increasing scrutiny comes with fluid approaches to market definition

Much has been written in recent years about increased antitrust enforcement under the Obama presidency. Surveying recent transactions reviewed by the DOJ and FTC, it is apparent that much of this increased enforcement has manifested where the agencies have taken novel approaches to defining relevant antitrust markets. By defining increasingly narrow markets, and in some cases proposing different market definitions in the alternative, the agencies have been able to achieve significant success in court, larger settlements and abandoned transactions. Several recent cases highlight this trend.

Relevant product markets

'Must have' products and services

Perhaps the most interesting example of a narrowed product market definition arises when one of the agencies deems a particular product or service to be a 'must have'. A recent litigated case by the DOJ against American Express provides a pointed case study.[1] Although this was not a merger case, the principles have important implications for merger review.

In *American Express*, the DOJ challenged American Express' contracting practices, alleging that the company was exercising market power by precluding merchants from 'steering' customers to use alternative credit cards. The court concluded that American Express had only 26 per cent of the relevant market, which the court defined as 'general purpose credit and charge card network services'.[2] In normal circumstances, such a low market share would be insufficient to confer market power, but the court went on to note that significant brand loyalty among American Express cardholders meant that merchants who chose not to accept American Express risked losing a substantial share of their business. Thus, despite the low market share, American Express could exercise market power because merchants viewed its network as a 'must have' for their business, even though alternatives such as Visa and MasterCard were readily available. The court ultimately ruled that American Express' restrictions ran afoul of the Sherman Act and issued an injunction requiring American Express to rewrite its merchant contracts.

The 'must have' market definition in *American Express* has already reared its head in the merger control context. The FTC's challenge to *St. Luke's/Saltzer*, discussed in more detail below, is one example. There, the FTC successfully claimed that insurers saw the Saltzer primary care physicians as essential to their networks, giving the combined firm greater leverage in negotiations. With the agencies and courts becoming more comfortable with market power theories at lower concentrations, the potential for novel leveraging theories in merger control become increasingly likely.

Atypically narrow markets

Several recent merger challenges by the DOJ and FTC highlight the agencies' efforts to define increasingly narrow product and service markets when seeking to explain a transaction's effect on competition. Last year, we noted two examples of consummated merger challenges with such narrow definitions: *Bazaarvoice*, which dealt with a market for online product rating and review platforms; and *Twin America*, which dealt with a market for hop-on, hop-off double-decker bus tours. This year, we see a similar focus on narrow product markets in a number of cases.

In the media industry, the DOJ targeted the merger of National CineMedia and Screenvision, defining a market for movie theatre 'pre-show' advertising, separate from other types of marketing and advertising, including television, radio and internet. The parties, on the other hand, claimed the deal would make them more competitive with other forms of marketing, particularly television advertising.[3] The parties abandoned this merger in March 2015 after the DOJ filed a lawsuit.[4]

Likewise, in several recent broadcast television mergers, the DOJ has consistently defined a market for spot advertising on broadcast television stations, ignoring cable television spot advertising and other forms of marketing in its analysis.[5] While the DOJ's position in broadcast television mergers has been consistent over time, it is notable that internet-driven changes in the consumption of television and other media content have not led DOJ to broaden its approach in these cases.

The FTC also used a particularly narrow market definition to challenge Steris Corporation's proposed acquisition of Synergy Health plc.[6] In discussing the transaction with investors, Synergy Health's CEO claimed that Synergy had 'about a 2 per cent market share ... in America'. He further noted that 'All of our services are in eBeam, which is a service technology that Steris doesn't offer. Again, completely complementary, the two businesses, with no overlap.'[7] In contrast to Synergy's definition of a sterilisation market, the FTC defined a market around 'radiation sterilisation services'.[8] The FTC also went on to define an even narrower market around specific sterilisation customers: 'there is also a relevant market for contract gamma and x-ray sterilization services sold to targeted customers that would not switch to e-beam in the event of a [small but significant non-transitory increase in price]'.[9] Using these definitions, the FTC alleged that the markets were highly concentrated and that the merger would be anti-competitive. At the time of writing, the parties are contesting the FTC's lawsuit.

While the DOJ position in broadcast television cases noted above was at least predictable based on past enforcement in that space, it is clear that in the *CineMedia/Screenvision* and *Steris/Synergy* cases, the parties were not anticipating the narrow market definitions used by the agencies. These lawsuits emphasise the challenges facing counsel in advising on the antitrust implications of prospective transactions in light of the agencies' current enforcement posture.

Shifting definitions in pharmaceuticals

The FTC's continued focus on the pharmaceuticals industry has also led to aggressive and sometimes divergent use of product market definition. For example, in the FTC's review of Valeant Pharmaceutical's acquisition of Precision Dermatology, the agency defined a relevant market around brand name and generic acne medications called 'single-agent topical tretinoins'.[10] This led to the parties having a combined market share of over 80 per cent and thus to the FTC's requirement that they divest Precision's branded acne treatments as a condition to completing the transaction.[11] Conversely, in the FTC's review of Prestige Brand Holdings' acquisition of Insight Pharmaceuticals, the parties in this deal both sold over-the-counter branded motion sickness treatments with distinct active ingredients – Prestige's Dramamine used dimenhydrinate and Insight's Bonine used meclyzine. Although the FTC noted that private label motion sickness products 'have significant sales', it concluded that they were not in the same product market because they are sold at a 'fixed discount to branded OTC' products and 'are not typically promoted or marketed'.[12] Thus, the FTC combined two different drugs in its relevant market but excluded generic versions of both, leading it to require a divestiture of Bonine as a condition to the merger. Taken together with *Valeant/Precision*, this decision suggests a very fluid approach to pharmaceuticals product markets at the FTC, making predictions about antitrust risk more complicated for practitioners.

Relevant geographic markets

In addition to the interesting developments regarding relevant product market definitions, several recent cases have highlighted novel and aggressive geographic markets being defined by the FTC and DOJ. As with the product market definitions, these geographic markets heavily favour the government and lead to increased scrutiny of certain transactions.

One major shift in approach has been the use of national markets in tandem with local markets, thus establishing two relevant dimensions of competition. We saw this last year with the DOJ's challenge to the merger of American Airlines and US Airways, where the agency considered both 'city pair' markets (individual airline routes between cities) and 'system-wide' competition essentially national in scope.[13] There, the national or system-wide dimension of competition substantially reduced the number of relevant competitors by eliminating most low cost carriers with limited networks. A similar approach was used in 2011 in the doomed *AT&T/T-Mobile* transaction.[14]

This year, the FTC's challenge to the merger of Sysco and US Foods followed a similar model, defining 32 local markets where competition would be reduced, but also alleging harm to competition among 'broadline distributors with a truly national footprint'.[15] Sysco and US Foods aggressively contested the FTC's conclusion that there is a separate market for national suppliers. For example, Sysco's attorney contended that 'There is no national market... It's mythology.' He went on to claim that the FTC's case was based on 'old-fashioned antitrust analysis applied incorrectly'.[16] According to Sysco and others, the parties face substantial competition not only from local distributors but also from ecommerce and other wholesalers like Restaurant Depot.

Given their fundamental differences in approach, the parties were unable to reach a settlement with the FTC, and the agency filed a lawsuit on 19 February. The market definition issue was pivotal to the case: in the proposed national market, Sysco and US Foods were the only two competitors, making the deal essentially a merger-to-monopoly, while in the local markets there were allegedly thousands of competitors. On 23 June 2015, a federal judge sided with the FTC and issued a preliminary injunction against the deal. While the judge expressed some 'reservations' about the FTC's market definition, he ultimately concluded that the agency's analysis better reflected the realities of the market than the rebuttal put forward by the defendants.

Earlier in the year, the DOJ's opposition to Comcast Corp's acquisition of Time Warner Cable Inc also came down to the agency's national market definition, conflicting with the parties' contention that the markets should be defined regionally. Comcast and Time Warner are, respectively, the largest and second-largest cable television and broadband internet providers, but they provide services to customers in different geographic areas. Thus, the parties argued that they did not compete with each other and that the combination would not result in a reduction in choice for any consumers.[17] Although the parties abandoned the deal before DOJ filed suit based on its stated opposition to the deal, the DOJ was pursuing a theory that the relevant market was a national market for content distribution, rather than a set of regional markets for content consumption. Specifically, an unnamed DOJ official remarked that 'if you have close to 60 per cent of the high-speed eyeballs, that's a pretty big gateway'.[18]

While *Sysco/US Foods* and *Comcast/Time Warner* highlight the use of a national market to limit the competitive impact of smaller firms, a recent DOJ case takes the opposite approach, defining regional markets that effectively limit the importance of national competition. In its review of a joint venture in flour milling among ConAgra Foods Inc, Cargill Inc, CHS Inc and Horizon Milling LLC, the DOJ limited its geographic market analysis to a 150 to 200 mile radius from any given customer.[19] The decision is notable given that the DOJ expressly found that 'transportation costs tend to be a relatively small portion of the delivered price of flour' and that 'some customers are capable of receiving flour delivery from distant mills by rail or 'rail-to-truck transfer'.[20] The agency ultimately concluded that some customers would not find it economical to purchase from more than 200 miles away, at least to the extent that they would not change their purchasing behaviour in response to a small but significant non-transitory increase in price. As a result of the DOJ's focus on these customers, the parties agreed to divest four flour mills to obtain approval for the deal.

As the foregoing cases suggest, in many industries it has recently become more difficult to predict how the agencies will define the relevant market, making it more challenging to determine how to advise clients on antitrust risks. And with the federal courts offering increased support for government interpretations of the relevant market, we should expect to see the agencies continuing to stake out positions on market definition that lead to high levels of predicted anti-competitive effects in the coming year.

The FTC's health-care winning streak continues

Over the past year, we have seen a string of successes in high-profile health-care cases, particularly at the FTC. Two of the most significant wins related to the FTC's challenges to St. Luke's Health System's acquisition of Saltzer Medical Group in Idaho and Promedica Health System's acquisition St Luke's Hospital in Ohio. In a third case, the FTC scored an important appellate victory in 2013 but was unable to capitalise on it by obtaining structural relief due to state health-care laws – in some ways the first major roadblock the FTC has encountered in health-care challenges since the Affordable Care Act in 2011.

St Luke's

As we noted in last year's update, the FTC brought a suit to challenge St Luke's acquisition of Saltzer Medical Group on 12 March 2013.[21] The case focused on a horizontal reduction of competition between St Luke's and Saltzer in a market for adult primary care in the city of Nampa, Idaho. On 24 January 2014, the court for the District of Idaho sided with the FTC, issuing a permanent injunction blocking the transaction. Although it found that the transaction would likely increase quality, the Court believed that the parties had not shown with sufficient clarity that the benefits could not be achieved without the combination.

St Luke's appealed the trial court decision to the Court of Appeals for the Ninth Circuit. Chief among St Luke's complaints about the lower court's ruling were that it defined the geographic market too narrowly and that it failed to properly credit potential efficiencies against anti-competitive effects.

On 10 February 2015, the Ninth Circuit rejected those complaints and affirmed the order requiring St Luke's to divest Saltzer. The Ninth Circuit reasoned that the evidence supported a narrow geographic market because patients would be unlikely to switch providers in response to a small price increase. It also upheld the trial court's conclusion that insurers would not have sufficient bargaining leverage to defend against such a price increase.

Turning to efficiencies, the Ninth Circuit was sceptical that any defence exists, stating that the Supreme Court has 'cast doubt on the defence'. The opinion went on to reason, without deciding, that if such a defence exists, it must require 'extraordinary efficiencies' that 'cannot be achieved without the concomitant loss of a competitor', and that are 'verifiable, not merely speculative'. Measured against this standard, the Ninth Circuit concluded that St Luke's efficiencies claims were lacking – particularly because St Luke's did not prove that the benefits were unobtainable without a merger and it did not prove that the efficiencies would ultimately have a positive effect on competition.

St Luke's petitioned the Ninth Circuit for a rehearing en banc. The Ninth Circuit denied that petition on 20 April 2015, effectively ending the parties' challenge to the FTC's case.

ProMedica

The FTC's win in *St Luke's/Saltzer* followed closely after its victory in the Sixth Circuit against Promedica Health System's bid to acquire St Luke's Hospital in Ohio. Unlike *St Luke's/Saltzer*, the *Promedica* case involved a merger of two hospitals, with many more service market overlaps. In addition, *ProMedica* differed because the FTC litigated the case in its own administrative proceeding, rather than in a federal court.

The key issue in the case was the use of 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.

ProMedica petitioned for certiorari to the Supreme Court in April 2015. The Supreme Court rejected that petition in May, and ProMedica is now working on developing a divestiture plan for St Luke's Hospital.

Phoebe Putney

Since 2011, the FTC has been wrangling with Phoebe Putney Memorial Hospital over its acquisition of Palmyra Park Hospital in Georgia. According to the FTC, the transaction was highly anti-competitive, with the two hospitals accounting for over 85 per cent of the hospital care in the region. The FTC's challenge to the deal went all the way to the Supreme Court, which rejected Phoebe Putney's claim of state action immunity based on the State of Georgia's regulation of hospitals.

Although Georgia's hospital regulations did not preclude the FTC from determining that the transaction was anti-competitive, they did raise an insurmountable hurdle to achieving a divestiture. Georgia required any new hospital to obtain a 'certificate of need', which requires a showing that there are not enough hospital beds in the community. Such a certificate was not available for a potential divestiture because the region in question was already considered 'over-bedded'. Thus, on 31 March 2015, the FTC finalised an order that was limited 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.

Reflecting on this experience, Deborah Feinstein, the FTC's director of competition, noted that 'this outcome makes plain the need for preliminary relief, in the form of an injunction or a negotiated hold separate, to maintain the competitive status quo. Such a step not only prevents any potential harm to competition in the interim but also preserves remedial options for the Commission pending a determination on the merits of the antitrust case'.[22]

FTC announces study of merger remedies

As a prelude to Director Feinstein's sentiments on the failed *Phoebe Putney* divestiture, the FTC announced in January 2015 its intent to conduct a new study to assess the effectiveness of its merger remedies at preventing reductions in competition.[23] The study, is intended to review the results of 92 orders issued between 2006 and 2012, including both structural and behavioural remedies in a variety of industries. According to the FTC, the study will seek input from customers, competitors and parties, and will be conducted using a variety of means, including voluntary interviews, questionnaires, and potentially compulsory process.

This remedies study will update efforts completed in 1999 to review divestiture orders between 1990 and 1994. The 1999 study was more limited in several ways: it reviewed about one-third of the total number of orders proposed in the new study; it was limited to structural remedies; and it focused on interviews with divestiture buyers, rather than seeking input from other industry participants. However, it is generally credited as a basis for significant changes to the FTC's divestiture process. For example, after the 1999 study, the FTC became more exacting about requiring up front buyers for divested assets, broadening the scope of the asset package to be divested and requiring appointed monitors.[24] Although it will take some time for the new study to be completed and even longer for any formal guidance to be issued by the agency, it is likely that we will begin to see changes to the FTC's merger remedy process in the near future as a result of this study.

Relatedly, Assistant Attorney General Bill Baer has been following the effectiveness of DOJ merger remedies in recent years. In February 2015, Baer gave a speech at the Global Competition Review Antitrust Leaders Forum where he reviewed two recent high-profile merger cases in which DOJ had demanded a structural remedy: American Airlines' merger with US Air and Anheuser-Busch InBev's acquisition of Grupo Modelo. In both cases, Baer noted that the pro-competitive benefits flowing from the remedies required by DOJ were already being seen in the market. He also noted the importance of DOJ's willingness to litigate in securing these remedies. Thus, it would be fair to say that both agencies are taking a deliberate look at their past effectiveness and using the insights gleaned to refine their enforcement approaches.

Focus on document production burdens

Both the FTC and the DOJ have been actively engaged in finding ways to limit the burdens inherent in the merger review process. These burdens are perhaps most significant following the issuance of a Second Request. Bill Baer recently stated that the DOJ has developed 'standardised electronic production requirements' and that the agency has 'embraced predictive coding', a technology aimed at reducing the volume of documents that must be reviewed.[25] Likewise, Deborah Feinstein stated that 'the Bureau will soon announce guidance about its merger review process' that is intended to strike an appropriate balance between the burden on parties and the FTC's need for information, 'particularly given advances in electronic production techniques'.[26]

Merger control compliance remains a priority

As in recent years, the agencies have remained committed to actively enforcing the reporting requirements of the HSR Act, even in cases with little or no substantive antitrust concerns. One relevant example is the FTC's action against Berkshire Hathaway in August 2014.[27] Berkshire Hathaway had converted certain notes into voting securities, and the conversion fell within the HSR Act's reporting requirements, even though the notes accounted for only a 28 per cent stake in the target company. Berkshire Hathaway made a corrective filing in January 2014, but the FTC assessed it with a penalty of US$896,000 for the period between closing on the conversion and the expiration of the HSR waiting period. Apparently the fact that this was a second infraction by Berkshire Hathaway contributed to the FTC's decision to seek the maximum penalty (US$16,000 per day of non-compliance).[28]

The DOJ took on more egregious conduct in its suit against Flakeboard and SierraPine in late 2014.[29] In that case, the parties had abandoned plans to merge after the DOJ raised concerns about competition for medium-density fibreboard. During its investigation of the merger, however, the DOJ found that the parties had also coordinated to close one of SierraPine's mills and move those customers to Flakeboard prior to HSR approval. This classic case of 'gun jumping' constituted a violation of the HSR Act, resulting in a penalty of US$3.8 million. In addition, the DOJ sought disgorgement of US$1.15 million, which it found to be 'a reasonable approximation of the ill-gotten profit Flakeboard received as a result of the parties' coordination'.[30]

Global convergence?

The US enforcers continue to tout their collaboration with foreign regulators when reviewing global deals. In a recent speech, Assistant Attorney General Bill Baer noted that 'engagement with our counterparts overseas requires significant and continuing resource commitments. But it is worth it. Consumers and the competitive environment benefit when antitrust enforcers work in parallel'.[31] As an example, Baer mentioned the DOJ's work with Canada, Brazil, and Mexico on Continental AG's purchase of Veyance Technologies. The FTC has made similar statements in recent history.[32]

While there certainly appears to be agreement at the FTC and DOJ that cooperation with international enforcers in cross-border merger reviews is desirable, we are also seeing the rise of merger control regimes in new jurisdictions that are less aligned with US priorities. Thus, although the DOJ and FTC are successfully working together with Europe, Canada and similar jurisdictions, coordination with China and other emerging countries can present challenges. For example, in June 2014, China blocked the formation of a strategic alliance between container shipping companies (the P3 Alliance) despite the alliance passing muster in the US and the EU.[33] China, South Africa and other emerging jurisdictions continue to apply public interest tests for merger control that look beyond a deal's impact on competition.

Procedural divergence also persists in global transactions. While the US and other developed nations generally have established nexus requirements for foreign-to-foreign merger control filings (in the US, for example, a foreign target must generally have significant US revenue or US assets), other jurisdictions have not always followed this practice, resulting in more complicated filing analyses for global deals. To highlight some more common examples, Brazil requires evaluation of the 'group' that the target is a part of for its nexus test even where the target is a small fraction of the seller's business, and Ukraine's nexus requirement is small enough to catch deals with only relatively minor domestic turnover.

Given these challenges, while the commitment of the United States to global convergence is laudable, it may be less apparent to companies whose deals trigger filings outside Europe and North America.

Conclusion

Merger review in the United States has remained rigorous in the past year, part of a trend that can be at least in part tied to President Obama's commitment to reinvigorate antitrust enforcement when he took office in 2008. While this outcome is not much of a surprise to the antitrust bar in the United States, it has been harder to predict how the agencies' heightened scrutiny will play out in particular cases, largely due to their willingness to press the boundaries of traditional market definition. Cases in recent years clearly demonstrate that the agencies are willing to deviate from past approaches when advantageous, while in other cases sticking with past practice despite intervening technological developments. The increasingly aggressive climate requires that antitrust counsel focus on fundamentals: document control, pro-competitive messaging and early agency engagement. By identifying and mitigating a transaction's perceived impact on potentially disadvantaged customers, both counsel and client can reduce the potential for 'creative' structural analyses by the federal agencies.

Notes

1 *US et al v American Express Co et al*, Case No. 1:10-cv-04496-NEG-RER (EDNY, 19 February 2015).

2 Id. at 38.

3 See, eg, Nathalie Tadena, 'Big Screen Advertisers Have Small Screen Ad Ambitions,' *The Wall Street Journal* Blog (3 April 2014), available at http://blogs.wsj.com/cmo/2014/04/03/big-screen-advertisers-have-small-screen-ad-ambitions/.

4 US DOJ, 'Justice Department Issues Statement on the Abandonment of the National Cinemedia/Screenvision Merger,' Press Release (16 March 2015), available at www.justice.gov/atr/public/press_releases/2015/312525.htm.

5 See, eg, US DOJ, 'Justice Department and the Pennsylvania Office of Attorney General Require Divestiture from Sinclair Broadcast Group in Order to Proceed with Its Acquisition of Perpetual Corp,' Press Release (15 July 2014), available at www.justice.gov/opa/pr/justice-department-and-pennsylvania-office-attorney-general-require-divestiture-sinclair; US DOJ, 'Justice Department Requires Divestitures in Media General Inc. Acquisition of Lin Media LLC,' Press Release (30 October 2014), available at www.justice.gov/atr/public/press_releases/2014/309608.htm; US DOJ, 'Justice Department Requires Divestiture in Order for Nexstar to Proceed with its Acquisition of Communications Corporation of America,' Press Release (Nov. 26, 2014), available at www.justice.gov/opa/pr/justice-department-requires-divestiture-order-nexstar-proceed-its-acquisition-communications.

6 See US Fed. Trade Comm'n, 'FTC Challenges Merger of Companies That Provide Sterilization Services to Manufacturers,' Press Release (29 May 2015), available at https://www.ftc.gov/news-events/press-releases/2015/05/ftc-challenges-merger-companies-provide-sterilization-services.

7 Transcript of Steris Corp. Conference Call to Discuss Acquisition of Synergy Health plc (13 October 2014), available at www.sec.gov/Archives/edgar/data/815065/000119312514370437/d804033dex994.htm.

8 *Fed. Trade Comm'n v Steris Corp*, Case No. 1:15-cv-01080-DAP, Complaint (ND Ohio 4 June 2015), available at https://www.ftc.gov/system/files/documents/cases/150529sterissynergytro.pdf.

9 Id. paragraph 8.

10 See *Matter of Valeant Pharmaceuticals Int'l, Inc and Precision Dermatology, Inc*, Complaint, FTC Docket No. C-4477 (FTC 3 July 2014), available at https://www.ftc.gov/system/files/documents/cases/140703valeantprecisioncmpt1.pdf.

11 See FTC, 'FTC Puts Conditions on Valeant Pharmaceuticals' Proposed Acquisition of Precision Dermatology,' Press Release (3 July 2014), available at https://www.ftc.gov/news-events/press-releases/2014/07/ftc-puts-conditions-valeant-pharmaceuticals-proposed-acquisitionPre.

12 *In the Matter of Prestige Brands Holdings, Inc and Insight Pharmaceuticals Corporation*, File No. 141 0159, Analysis of Agreement Containing Consent Orders to Aid Public Comment (28 August 2014), available at https://www.ftc.gov/system/files/documents/cases/140828prestigebrandsanalysis.pdf.

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

14 See *United States v AT&T Inc*, Case No. 1:11-cv-01560, Complaint (DDC 31 August 2011), available at www.justice.gov/atr/cases/f274600/274613.pdf.

15 FTC, 'FTC Challenges Proposed Merger of Sysco and US Foods,' Press Release (19 February 2015), available at https://www.ftc.gov/news-events/press-releases/2015/02/ftc-challenges-proposed-merger-sysco-us-foods.

16 Sarah Scully, 'Sysco On The Offensive In Response to Antitrust Lawsuit,' The Houston Chronicle (Feb. 20, 2015), available at www.houstonchronicle.com/business/retail/article/Sysco-responds-to-FTC-s-move-to-block-merger-6092132.php.

17 See, eg, Gautham Nagesh and Steven Perlberg, 'Comcast Argues for Time Warner Cable Deal', *The Wall Street Journal* (8 April 2014).

18 Brent Kendall and Shalini Ramachandran, 'Holder Had Authorized DOJ Lawsuit Against Comcast-Time Warner Deal', *The Wall Street Journal* (24 April 2015).

19 *US v Conagra Foods, Inc*, Case No. 1:14-cv-00823, Competitive Impact Statement (20 May 2014), available at www.justice.gov/atr/cases/f306000/306056.pdf.

20 Id. at 7.

21 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).

22 Deborah Feinstein, Director's Report: Spring 2015, (17 April 2015) at 6, available at https://www.ftc.gov/system/files/documents/public_statements/637441/bc_directors_report_-_spring_2015.pdf.

23 See Fed. Trade Comm'n, Press Release, 'FTC Proposes to Study Merger Remedies,' (9 January 2015), available at https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies.

24 See, eg, William Baer and Ronald Redcay, 'Solving Competition Problems in Merger Control: The Requirements for an Effective Divestiture Remedy,' 69 Geo Wash L Rev 915, 919 (2001).

25 Bill Baer, Reflections on Elements of Effective Antitrust Enforcement, (6 February 2015).

26 Deborah Feinstein, Director's Report Spring 2015, (17 April 2015) at 19-20, available at https://www.ftc.gov/system/files/documents/public_statements/637441/bc_directors_report_-_spring_2015.pdf.

27 See *United States v Berkshire Hathaway Inc*, Compl, No. 1:14-cv-01420 (DDC 20 August 2014), available at www.ftc.gov/system/files/documents/cases/140820berkshirecmpt.pdf.

28 Id.

29 *United States v Flakeboard America Ltd*, Case No. 3:14-cv-4949, Complaint (7 November 2014).

30 US Dep't of Justice, Justice Department Reaches $5 million Settlement With Flakeboard, Arauco, Inversiones Angelini and SierraPine for Illegal Premerger Coordination, Press Release (7 November 2014).

31 Bill Baer, Reflections on Elements of Effective Antitrust Enforcement, (6 February 2015).

32 See, eg, 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).

33 Maersk, 'The P3 Network will not be implemented following decision by the Ministry of Commerce in China,' Press Release (17 June 2014), available at www.maersk.com/en/the-maersk-group/press-room/press-release-archive/2014/6/the-p3-network-will-not-be-implemented-following-decision-by-the-ministry-of-commerce--in-china.

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 non-merger, 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 a private practitioner and a former trial attorney with the DOJ's antitrust division, Mr Hataway has successfully led merger review cases in industries such 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 represented clients 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 Sponsor of the
ABA Section of International Law

Law
Business
Research

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012

ISSN 1468-7054