The Merger Control Review

Seventh Edition

Editor
Ilene Knable Gotts

Law Business Research

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EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, particularly in Asia, are poised to add pre-merger notification regimes within the next year or so. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 41 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States and China may

end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany, for instance, provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and their participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine, the competition authority focused its efforts on discovering consummated transactions that had not been notified, and imposed fines in 32 such cases in 2015 alone.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia and India provide for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, India and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada,

China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the EC and the United States in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first 'gun-jumping' fine in 2014 and recently issued guidelines on gun-jumping violations. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction nonreportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japan Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multijurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe, and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, it is becoming the norm for coordination among the jurisdictions in multinational transactions that raise competition issues.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey),

or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The UK also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the International Merger Remedies chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing antidumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
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New York
July 2016

Chapter 5

US MERGER CONTROL IN THE HIGH-TECHNOLOGY SECTOR

C Scott Hataway and Michael S Wise[1]

I INTRODUCTION

While the precise contours of 'high technology' in merger review are not always consistent, there is no question that both the Antitrust Division of the United States Department of Justice (DoJ) and the United States Federal Trade Commission (FTC) view enforcement in this area as a priority, and potentially an area for developing new precedents for future cases. For example, the DoJ has described the protection of future innovation in high-technology deals as 'a decisive factor in our enforcement decisions'.[2] Likewise, the newest commissioner at the FTC has defined the 'task of 21st century competition enforcers' as ensuring 'that hi-tech markets remain dynamic, fertile grounds for new products and ideas'.[3]

Although the agencies are actively pursuing cases in high technology, in many ways the precise legal standards remain unsettled. In certain transactions, this may make it difficult for enforcers to have a consistent approach and for practitioners to advise their clients on whether a new deal will be subject to challenge. Innovation markets, commonly suggested in high-technology merger cases, have yet to be commonly accepted by the courts, and precedents on assessing future competition are also limited. Moreover, because of various factors unique to high-technology markets, even where the agencies can establish an accepted theory of competitive harm, defining an appropriate remedy is not always intuitive. These issues, among others, make high technology a particularly interesting area of development in US merger review.

1 C Scott Hataway is a partner and Michael S Wise is a senior associate at Paul Hastings LLP.

2 Renata Hesse, 'At the Intersection of Antitrust & High Tech: Opportunities for Constructive Engagement', p. 2 (January 2014).

3 Terrell McSweeney, 'The role of Antitrust Enforcers in Dynamic High-Tech Markets', p. 7 (January 2015).

II WRESTLING WITH INNOVATION MARKETS AND FUTURE COMPETITION

All merger enforcement is, of course, forward-looking, but the exercise of predicting future effects on competition when high technology is implicated can be especially complicated. First, defining a proper market in which competition is constrained is impossible using traditional methods when either the market does not yet exist or where one of the parties does not yet compete. Second, given the nature of innovation competition, it can be challenging to know when innovation will best be promoted by pooling research and development resources or by preserving separate, independent competitors pursuing competing solutions.

The FTC wrestled with these issues in the acquisition of Arbitron Inc by Nielsen Holdings NV. The agency took the position that the transaction would be likely to:

a eliminate future competition 'for the provision of national syndicated cross-platform audience measurement services';

b allow Nielsen to 'unilaterally exercise market power in the market for national syndicated cross-platform audience measurement services'; and

c result in 'higher prices for national syndicated cross-platform audience measurement services'.[4]

At the heart of the FTC's case was the position that Nielsen and Arbitron were the 'best-positioned' to develop audience measurement across television, mobile devices, tablets, and personal computers – a service that did not at that time exist.[5] Although this theory of harm related to 'a future market', the Commission noted that, based on the evidence, a remedy was necessary 'to address the likely competitive harm that would result from the acquisition'. On the basis of the FTC's position, the parties agreed to support new entry by providing a third-party with a royalty-free licence to Arbitron's cross-platform audience measurement business for at least eight years.

The FTC had a more difficult time in its challenge to Steris Corp's acquisition of Synergy Health plc. While Steris and Synergy were two of the three largest providers of sterilisation services, they provided different sterilisation technologies. Steris used a gamma radiation process while Synergy relied on a technology referred to as 'e-beam'.[6] Because the different technologies targeted different products, Steris and Synergy were not current competitors, which the FTC acknowledged. Rather, Synergy was considering entering the United States with an x-ray technology that would have competed with Steris' gamma ray technology at the time of the transaction. Although Synergy abandoned those plans, the FTC sued, describing Synergy as an 'actual potential entrant' and arguing that Synergy only ceased its attempts to enter in light of its proposed acquisition by Steris. However, unlike in *Nielsen/Arbitron*, the parties in this transaction sought to challenge the FTC's position in court, arguing that Synergy's future competition was too speculative. Here, the court agreed with the parties and denied the FTC's request to enjoin the transaction, at which point the FTC dropped its challenge and the acquisition was consummated.

4 Draft Complaint at 3-4.

5 Statement of the Commission at 1-2.

6 See Order, *Fed Trade Comm'n v Steris Corp*, Case No. 1:15-CV-1080 (ND Ohio 24 September 2015).

In contrast to the FTC's focus on future competition in *Steris/Synergy* and *Nielsen/ Arbitron*, the DoJ refused to take into account potential future competitors in its case against Bazaarvoice Inc's acquisition of PowerReviews Inc. This was a consummated merger that the DoJ sought to unwind based on concerns that the two companies were the primary providers of ratings and review platforms for online retailers. The court categorised ratings and review platforms as part of the 'social commerce industry', which is 'at an early stage of development, rapidly evolving, fragmented, and subject to potential disruption by technological innovations', meaning that 'the future composition of the industry as a whole is unpredictable'.[7] In addition, Bazaarvoice pointed out that over 100 customers had provided depositions in the case, and none stated that the merger had disadvantaged them.[8]

In arguing that the merger was anticompetitive, the DoJ took the position that in spite of the evolving nature of the market, the parties' internal documents provided strong evidence that they viewed each other as primary competitors, and they viewed the merger as reducing competition. In a lengthy opinion, the court agreed with the DoJ, while nonetheless acknowledging that '[t]his case inescapably adds fuel to the debate over the proper role of antitrust law in rapidly changing high-tech markets'.[9]

The court's observation in *Bazaarvoice* is particularly poignant in light of the exponential speed of change in virtually all markets touched by technology. As noted author and inventor Ray Kurzweil has been teaching for more than a decade:

> *[W]e're doubling the power of information technologies, as measured by price-performance, bandwidth, capacity and many other types of measures, about every year. That's a factor of 1,000 in 10 years, one million in 20 years, and one billion in 30 years.*[10]

The exponential speed of change stands in stark contrast to the rudimentary tools of merger review, which tend to rely on a linear view of past performance, combined with the dated notion that only a current, revenue-producing market participant may discipline innovation. Clearly, one need not accept the premise that we will soon be ruled by robots (a controversial Kurzweil conclusion) to grasp the otherwise widely accepted view that technology markets advance exponentially. There are simply no government guidelines or economic models that have captured this fundamental aspect of today's 'relevant product markets'.

A key takeaway from the enforcement outcomes in high-technology cases today may be found toward the end of the *Bazaarvoice* opinion, where the court noted that:

> *…while Bazaarvoice indisputably operates in a dynamic and evolving field, it did not present evidence that the evolving nature of the market itself precludes the merger's likely anticompetitive effects.*[11]

7 *United States v. Bazaarvoice, Inc*, No. 13-CV-00133-WHO, 2014 WL 203966, at *10 (ND Cal 8 January 2014).

8 Id. at *4.

9 Id at *76.

10 Kurzweil, R, 'Singularity Q&A,' www.kurzweilai.net/singularity-q-a; see also Kurzweil, R, 'The Law of Accelerating Returns,' www.kurzweilai.net/the-law-of-accelerating-returns.

11 2014 WL 203966 at *76.

Here, the Court acknowledged that in light of the DOJ making a *prima facie* showing of an anticompetitive effect (largely based, as noted, on bad internal documents), Bazaarvoice had the burden to overcome a presumption of anticompetitive harm, and it was unable to do so. In contrast, the court in *Steris/Synergy* concluded that the FTC had failed to establish its *prima facie* case, which was based on the development of new technology by Synergy in the future. In short, because of the lack of adequate tools to predict change in technology markets, the burden of proof will carry particular significance in all high-technology cases. Any predictions about future outcomes in a high-technology space will necessarily be viewed as speculative compared to predictions about traditional markets where linear analysis of historical data is both easier to grasp and supported by court and agency precedent.

III DIFFICULT BALANCING IN REMEDY DECISIONS

When regulators conclude that a given transaction is likely to result in a reduction in competition, they still may face a difficult decision regarding the type of remedy to impose. In some high-technology cases, the agencies have sought to block the deal entirely on concerns over high-technology innovation. In others, a much more limited remedy, such as the licensing of key patents, has been permissible.

The DoJ's opposition to Applied Materials' acquisition of Tokyo Electron is an interesting example of a high-technology case where no remedy was apparently capable of alleviating the potential innovation issues. Applied Materials and Tokyo Electron were, in the DoJ's view, 'the two largest competitors with the necessary know-how, resources, and ability to develop and supply high-volume non-lithography semiconductor manufacturing equipment'.[12] In other words, in addition to having a handful of traditional horizontal overlaps, the DOJ viewed Applied Materials and Tokyo Electron as the two primary competitors in a future market for products being developed.

Applied Materials and Tokyo Electron offered a divestiture package to the DoJ, which was targeted at eliminating horizontal overlaps in key product lines – a solution with a good track record in traditional antitrust cases. In doing so, the parties described the DoJ's concerns about future products in the high-volume non-lithography space as speculative. However, the DoJ persisted in its view, and ultimately deemed the divestiture package to be insufficient, primarily because the DoJ viewed the parties as having unique incentives to innovate. The parties subsequently abandoned their deal, evidently concluding that it would not be possible to create a divestiture package that would effectively address these innovation concerns.[13]

In other cases, the DoJ and FTC have been willing to allow more limited divestitures in order to preserve innovation competition. One example is the DoJ's approach to Google Inc's acquisition of ITA Software Inc.[14] ITA developed software used by airlines, online travel agents and online travel search sites to provide airline flight information. Google intended to enter the market for online travel searching, and the DoJ was concerned that once it

12 Press Release, 'US Dep't of Justice, Applied Materials Inc and Tokyo Electron Ltd Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy' (27 April 2015).

13 Applied Materials, Inc, Applied Materials, Inc and Tokyo Electron Limited Agree to Terminate Business Combination Agreement (26 April 2015).

14 See *United States v. Google Inc*, Case No. 1:11-cv-00688, Competitive Impact Statement (DDC 8 April 2011).

did so, Google would have the incentive to foreclose rivals from using ITA, raise the costs or degrade the software's performance. In order to address this concern, the DoJ required Google to license the software on fair, reasonable and non-discriminatory terms, to continue development of the software, and to create certain firewalls. This remedy preserved the ability of existing providers to compete using the ITA software, but also allowed Google to enter the market as a new, vertically integrated competitor.

The DoJ's treatment of a series of patent acquisitions relating to mobile handsets is perhaps at the far end of the spectrum from *Applied Materials/Tokyo Electron*. The transactions at issue were:

a the acquisition of certain Nortel Networks Corporation patents by Microsoft RIM, and Apple; and

b the acquisition of Novell, Inc patents by Apple.[15]

In the *Nortel* and *Novell* investigations, the DoJ specifically noted that it 'took into account the fact that during the pendency of these investigations' Apple and Microsoft made public statements establishing 'that they will not seek to prevent or exclude rivals' products from the market in exercising their [standard essential patent] rights'. The DoJ then concluded that '[i]f adhered to in practice, these positions could significantly reduce the possibility of a hold up or use of an injunction as a threat to inhibit or preclude innovation and competition'. In essence, the DoJ relied on public statements by the parties about their willingness to license the patents in question on non-discriminatory terms and allowed each of these deals to proceed.

These examples present a broad spectrum of approaches to potential issues. In high-technology cases, this is perhaps not surprising given the wide range of potential factors that can be relevant and the varying degrees of certainty that exist when dealing with future markets and innovation. In any event, parties must be cognisant that in high-technology transactions, remedy discussions will often deviate from the standard set of structural remedies seen most commonly in traditional horizontal cases.

IV MULTI-SIDED MARKETS AND HIGH TECHNOLOGY

An evolving area of interest in merger review is how the FTC and DoJ are likely to view competition issues raised in high-technology mergers implicating multi-sided platforms. Unlike traditional markets, multi-sided markets tend to involve businesses that generate revenue by providing a platform on which customers and sellers can interact with each other, rather than by providing a product or service directly. The most common example in past analysis has been the newspaper industry, which generates a large portion of its revenue from selling advertisement space rather than by selling newspapers. Today, we are witnessing more and more examples in the high-technology space, particularly when it comes to online sales solutions or social media platforms.

15 US Dep't of Justice, 'Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc's Acquisition of Motorola Mobility Holdings Inc and the Acquisitions of Certain Patents by Apple Inc, Microsoft Corp and Research in Motion Ltd' (13 February 2012).

For the purposes of merger review, the most significant issue with a multi-sided market is that it raises the potential that competition concerns on one side of the platform may be offset or outweighed by procompetitive benefits on the other side of the platform. Traditional merger analysis, which proceeds by defining a single-sided relevant market and then assesses effects within that market, does not readily account for this balancing. While existing agency merger precedents have not explicitly set forth issues in terms of single-sided versus multi-sided markets, the DoJ confronted these issues in its analysis of collaboration between Google and Yahoo! in 2008 and then between Microsoft and Yahoo! in 2010.

Google and Yahoo! both provide online search services and include advertised search results in addition to natural search results when a user runs a query. Under the parties' agreement, Yahoo planned to 'replace a significant portion of its own internet search results advertisements with search results advertisements sold by Google', and the companies would have shared the resulting revenue.[16] In evaluating the proposed deal, the DoJ seems to have taken a traditional approach, defining an internet search advertising market covering ads delivered on each search engine's search results page and an internet search syndication market, covering syndication of each provider's search services to third parties, such as online retailers and newspapers. Looking at these two markets, the DoJ concluded that the combined shares would lead to a presumption that the agreement would result in lost competition, at which point the parties elected to terminate their agreement.

Two years later, the Division approved an advertising agreement between Microsoft Corp and Yahoo!, noting that '[t]he search and paid search advertising industry is characterized by an unusual relationship between scale and competitive performance', and that the agreement would result in 'more rapid improvements in the performance of Microsoft's search and paid search advertising technology than would occur if Microsoft and Yahoo! were to remain separate'.[17] While not an explicit nod to the multi-sided nature of the internet search platform, this statement at least suggests greater acknowledgement of the need to consider the user-facing side of the platform when assessing the competitive effects on advertising.

The agencies are already facing multi-sided market arguments directly in other contexts, including in the DoJ's recent suit against American Express for its anti-steering rules.[18] Credit and debit cards are multi-sided platforms in which the card networks compete for purchasing consumers on one side and for acceptance at selling merchants on the other side. While the court in *American Express* ultimately declined to adopt American Express' position that it must analyse both sides of the platform together as part of a single relevant market, it did note that it was obligated to 'account for the two-sided features of the credit card industry in its market definition inquiry, as well as elsewhere in its antitrust analysis'.[19]

As the internet has grown, more and more multi-sided platforms have developed, and we are likely to see increasing focus here in the coming years. Indeed, today many household

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16 US Dep't of Justice, 'Yahoo! Inc. and Google Inc Abandon Their Advertising Agreement' (5 November 2008).

17 *Microsoft/Yahoo!*, Press Release, 'Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of the Internet Search and Paid Search Advertising Agreement between Microsoft Corporation and Yahoo! Inc' (18 February 2010).

18 *US v. American Exp Co*, 2015 WL 728563 (EDNY 19 February 2015).

19 Id at *26.

names are players in high-technology multi-sided markets, including Google, Uber, Airbnb, Expedia, Amazon, Facebook and eBay. It will be particularly interesting to see the degree to which the agencies apply traditional, single-sided analysis or develop new tools in cases that raise multi-sided market issues.

V CONCLUSION

While it would be impossible to touch on all the unique aspects of high-technology merger enforcement in this chapter, the foregoing issues are some of the more prominent ones in this area. It is the nature of high technology to be rapidly evolving, and the antitrust agencies will likely continue to balance traditional models of enforcement with modified approaches that are intended to better promote innovation. Undoubtedly, parties will continue to face challenges in convincing regulators to depart from commonly accepted guidelines regardless of their applicability to high-technology transactions. We can expect continued development of precedents in this space as parties and regulators test their approaches in the courts.

Appendix 1

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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.

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