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GLOBAL COMPETITION REVIEW

# US: Mergers – Striking a Balance

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During the past year, the Federal Trade Commission (FTC) and Department of Justice Antitrust Division (DoJ) maintained a heightened level of enforcement, particularly in evaluating mergers involving high technology and health care. These areas require a balancing of complex policy considerations that can have different, though not always contradictory, objectives. In the intellectual property arena, both agencies have continued to tread carefully, a fact evidenced by the tendency to impose less onerous conduct remedies in place of structural fixes when aggregation of intellectual property rights creates the potential for anti-competitive harm. In contrast, the FTC and DoJ have pursued a more traditional approach in health-care mergers, concluding that the Patient Protection and Affordable Care Act (ACA) should not have any major impact on the agencies' past practice of targeting health-care combinations for structural relief. Despite the apparent differences in treatment, in both instances the agencies have elected to adhere to traditional modes of analysis as much as possible, finding that their existing policy guidelines are sufficient to protect consumer welfare.

In addition to managing the 'intersections' of antitrust and intellectual property or health care, the agencies have also continued recent trends towards procedural enforcement and convergence. For example, the agencies have increased enforcement efforts regarding non-compliance with the HSR reporting requirements. Heavy fines continue to be levied for knowing violations, and the number of corrective filings is on the upswing. The DoJ has also prosecuted filing parties for misleading translation efforts that may obstruct the investigative process. And though the effects of 'global convergence' efforts are certainly debatable, the FTC and DoJ have continued the trend of increased interaction with authorities across jurisdictions in global transactions.

A changing of the guard at both agencies will create the potential for new enforcement priorities and tactics, but we believe the most likely scenario is 'more of the same' at both the DoJ and FTC. The conventional wisdom is that new Assistant Attorney General Bill Baer will carry on the DoJ's recent aggressiveness in the courtroom, while FTC Chair Edith Ramirez has expressed strong support for the FTC's recent aggressive posture in the health-care space.

## Focus on intellectual property issues

Over the past year, both agencies have increasingly sought to define standards for evaluating mergers that raise intellectual property issues. Both agencies have recognised that the antitrust and intellectual property laws 'share the same fundamental goals of enhancing consumer welfare and promoting innovation ... work[ing] in tandem to bring new and better technologies, products, and services to consumers at lower prices.'<sup>1</sup> However, in practice there has arguably been some inconsistency in articulating the best approach to protect consumer welfare in mergers involving important intellectual property assets. In most cases, the agencies appear to be handling intellectual property concerns through conduct remedies or by simply deferring decision until after closing.

In *Robert Bosch GmbH*,<sup>2</sup> for example, the FTC approached the issue of standard essential patents (SEPs) largely by focusing on past conduct of the acquired firm with respect to its intellectual property licensing. In that case, both Bosch and target SPX Service Solutions (SPX) were involved in the supply of various car parts in the United States. The FTC focused on the parties' combined market share of approximately 90 per cent in the supply of certain air conditioning system components and required a divestiture of Bosch's air conditioning component business to a third party.

In addition to the required divestiture, the FTC found that SPX owned certain patents that covered the most common types of air conditioning systems used in new vehicles. SPX had disclosed these patents to the relevant standard-setting body, SAE International, and the patents had been incorporated into industry standards for air conditioning systems. As part of SPX's agreement with SAE, SPX was under an obligation to license these SEPs on fair, reasonable and non-discriminatory (FRAND) terms.

The FTC alleged that prior to the merger, SPX had not honoured its FRAND obligations and that it had continued to prosecute infringement actions against competitors who were implementing the SAE standards in their air conditioning components. The FTC specifically concluded that this conduct constituted unfair competition in violation of section 5 of the FTC Act. As part of the SPX consent decree, the FTC required Bosch to offer a royalty-free licence to any competitor selling parts incorporating the covered SAE standards.

The FTC's investigation of *Bosch* was likely substantially influenced by its concurrent investigation of Google's practices relating to patents for mobile handsets that were acquired from Motorola Mobility. The DoJ had originally reviewed Google's acquisition of Motorola Mobility, and it closed its investigation in February 2012. As the DoJ noted in its press release, 'the acquisition of the patents by Google did not substantially lessen competition, but how Google may exercise its patents in the future remains a significant concern.'<sup>3</sup>

A year later, the FTC, rather than the DoJ, entered a consent decree regarding Google's post-merger conduct. The FTC concluded that, true to the DoJ's concerns, Google had not offered the Motorola patents on FRAND terms to its competitors, including Apple and Microsoft. As in *Bosch*, the FTC found that this constituted unfair competition in violation of section 5. And, again similar to *Bosch*, the FTC sought to remedy this concern through the use of a conduct restriction. Specifically, the FTC consent decree requires Google to employ a stated negotiation strategy with parties seeking to license these patents on FRAND terms. Moreover, Google is barred from seeking injunctive relief except where:

- (1) the potential licensee is not subject to United States jurisdiction;
- (2) the potential licensee has stated in writing or in sworn testimony that it will not accept a license for Google's FRAND-encumbered SEPs on any terms;
- (3) the potential licensee refuses to enter a license agreement for Google's FRAND-encumbered SEPs on terms set for the parties by a court or through binding arbitration; or
- (4) the potential

*licensee fails to assure Google that it is willing to accept a license on FRAND terms.*<sup>4</sup>

While the *Google* and *Bosch* consent decrees provide some indication that the FTC is paying particularly close attention to standard essential patents, the DOJ has also recently reconfirmed its commitment in this area. As noted above, the DOJ specifically highlighted concerns in the closing of its investigation of *Google/Motorola*, and the FTC later picked up on these concerns in its own investigation. In the same press release announcing the closing of its investigation of *Google/Motorola*, the DOJ also addressed its decisions to close investigations relating to the acquisition of certain Nortel Networks Corporation patents by Microsoft, RIM and Apple; and the acquisition of Novell Inc patents by Apple.<sup>5</sup> These patents all related to the development of mobile handsets. 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 SEP 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.’

The DOJ approach in the Nortel and Novell patent acquisitions is less formal than the consent decrees that the FTC entered in *Bosch* and *Google*, but these cases are similar in that they evidence the agencies’ attempts to address the important issue of patent aggregation and SEPs in the context of a merger review proceeding. Given that the aggregation of intellectual property rights does not always fit neatly into the legal precedents relating to section 7 of the Clayton Act, we may witness a growing disparity in the treatment of intellectual property mergers at the FTC and DOJ. While the FTC is empowered by the ambiguous and seemingly boundless FTC Act, the DOJ’s confinement to the well-litigated Clayton Act could create real outcome differences when intellectual property rights are a primary overlap.

### Dissonance with the Affordable Care Act

While the intersection of intellectual property rights and antitrust enforcement has been a topic of scholarly debate for decades, little attention has been paid to the impact of health-care reform on traditional antitrust policies. On 23 March 2010, President Barack Obama signed the ACA into law. The ACA creates significant economic incentives for consolidation and collaboration among health-care service professionals and management companies, with the ultimate goal of improving patient outcomes and decreasing costs through greater coordination among health-care providers. For example, the ACA creates a Medicare Shared Savings Program that allows provider organizations called accountable care organisations (ACOs) to accept accountability for the outcomes they achieve for their Medicare patients in exchange for sharing in a portion of any savings that are generated.

Under the ACA, an ACO may take many forms, but generally they are likely to be made up of single health-care systems, joint ventures composed of competing health-care providers, or partnerships of providers and payors.<sup>6</sup> Notably, they will in many cases be collaborations among providers that might otherwise be seen as competitors, and there are likely to be financial incentives to completely combine operations. Any incentives for collaboration or consolidation may naturally create tension with antitrust enforcement, which has historically viewed the benefits of health-care consolidation with some scepticism.

Commentators have noted that while ACOs may not be able to exercise market power with respect to their Medicare patients because rates will be dictated by the government, the same is not necessarily true of the ACOs’ negotiations with private payors. Not surprisingly, this potential for anti-competitive effects raises significant questions in an antitrust context. As FTC Commissioner Brill recently noted, ‘we are starting to see some providers point to the ACO program as a justification’ for potentially problematic mergers, non-compete agreements, and other conduct.<sup>7</sup> Commissioner Brill further noted that in these cases:

*The parties and their counsel complain that the federal government is ‘speaking out of both sides of its mouth,’ with the Medicare program encouraging providers to come together and create organizations that will enable greater collaboration, while the antitrust agencies challenge them.*

Despite these protests, the DOJ and FTC have both remained strong in their view that these ACOs can be evaluated largely using traditional standards for competitor collaborations. For example, in October of 2011, the FTC and the DOJ issued a Statement of Antitrust Policy Enforcement Regarding Accountable Care Organizations.<sup>8</sup> In that statement, the DOJ made clear that it ‘will continue to vigorously enforce the antitrust laws, consistent with ... the goals of this innovative program to protect health care consumers from higher prices and lower quality care.’<sup>9</sup> The policy statement further provided that ACOs could be evaluated under the Rule of Reason framework, and it set market share benchmarks for use in evaluating ACOs. This use of traditional analysis for the health-care industry is not surprising, considering that the ACA contains a provision stating that the statute should not be construed to affect the operation of the antitrust laws.<sup>10</sup>

Likely in part to the high-profile nature of the health care industry presently and the market shifts that are taking place as the ACA is rolled out, both the DOJ and the FTC are spending considerable resources investigating and challenging mergers in this space. While the health services sector accounted for only 3.9 per cent of the mergers notified during Fiscal Year 2012, at least 12 out of the 26 transactions highlighted in the agencies’ annual report on HSR enforcement involved drug makers, insurance providers, hospitals, or physicians. There is no doubt that the agencies are paying close attention to this industry.

The FTC’s suit to block OSF Healthcare System’s proposed acquisition of rival health-care provider Rockford Health provides a good example of the FTC’s focus particularly on hospital mergers. According to the FTC complaint, the merger would have resulted in the number of hospital service providers in Rockford, Illinois dropping from three to two. OSF and Rockford argued that they would achieve substantial synergies from combining operations and also entered a proposed stipulation that they would not take actions to exclude competitors through their contracting with managed care organisations. They further accused the FTC of ‘ignor[ing] the unique, Government-created market structure of the U.S. healthcare system, the crisis in spiraling healthcare costs, and the ongoing, dramatic healthcare reform initiatives that are an essential part of the facts surrounding the delivery of health care services in Rockford.’<sup>11</sup> In contrast, the FTC argued that the parties’ proposed stipulation was merely a veiled attempt to conceal anti-competitive motives. The agency pursued an administrative action and also filed for a preliminary injunction, which was granted in an opinion thoroughly upholding the FTC’s analysis.<sup>12</sup> Of particular note

was the court's conclusion that the determination of whether the transaction would create meaningful efficiencies should be made through the course of the FTC's administrative proceeding on a full record. Shortly after this order was issued, the parties abandoned the transaction.

As *OSF Healthcare* and many other cases demonstrate, the agencies are ready to fully pursue potentially anti-competitive mergers and are not any more likely to credit proposed efficiency justifications now than they were prior to the ACA. The FTC's decision on 12 March 2013 to file a complaint to prevent the acquisition of a physician practice group in Nampa, Idaho, by St Luke's Health System provides continuing evidence of this trend. According to the FTC's complaint, the St Luke's merger would leave 'a single dominant provider of adult primary care physician services in Nampa, with the combined entity commanding nearly a 60 percent share of that market' and would further make alternative health-care providers 'far less attractive for employers with employees living in Nampa'.<sup>13</sup> For its part, St Luke's has claimed that it is 'working to offer a competitive alternative to the traditional fee-for-service insurance model that incentivizes overutilization.' The hospital believes that doing so, however, 'would require a large base of patients and doctors – and the Saltzer deal would be 'critical' to the transition.'<sup>14</sup>

Despite the seemingly obvious tensions in *OSF, St Luke's* and other cases, Commissioner Brill described potential arguments that the ACA is in conflict with the antitrust laws as 'creative, but misguided'.<sup>15</sup> She reasons that 'far from being a barrier to procompetitive collaboration envisioned in the ACA, antitrust aligns naturally with the goals of ACOs.' She further noted that 'the ACA neither requires nor encourages providers to merge or otherwise consolidate.' To date, the agencies have not squarely addressed the argument that there are certain benefits of scale created through the ACA that are driving continued merger activity by hospitals, insurance companies, and other health-care market participants. There will no doubt be more decisions like *OSF/Rockford* going forward as the agencies strive to hold the line on protecting competition in the face of ACA policies that arguably promote health-care consolidation. Indeed, on 28 June 2013, FTC Chairwoman Ramirez announced that the agency would be looking 'very closely' at hospital mergers in particular and investigating 'growing concerns' that consolidation among health-care providers has resulted in negative impacts on both price and quality.<sup>16</sup> Ramirez invited her audience to 'stay tuned' for additional enforcement efforts in this industry.

#### Other notable trends

Second requests are increasingly common overall. Campaigning for the presidency in 2007, Barack Obama stated that he would reinvigorate merger enforcement. In many ways, it has been difficult to evaluate the extent to which the DoJ and FTC are making this promise a reality. For example, in Fiscal Year 2009, the first year of the Obama presidency, the percentage of notified transactions in which a second request was issued increased to 4.5 per cent, after hovering around 2.5 per cent to 3 per cent in the preceding years.<sup>17</sup> However, when considering that the number of premerger notifications dropped from 1,726 in 2008 to 716 in 2009, there is reason to believe that at least some of the increase in second request issuance could be simply attributable to the agencies having significantly more resources to investigate on a per-filing basis. After all, the manpower at the FTC and DoJ is not tied to the number of notifications that are submitted in a given year.

While the extent to which enforcement efforts have increased or decreased can be difficult to determine, it is certainly true that

mergers notified today are significantly more likely to receive a second request than those notified between 2005 and 2008. A review of the data shows that from 2005 to 2008, second requests were issued in 2.8 per cent of all notified transactions, while they were issued in 3.5 per cent of all notified transactions in 2012.

Another way of looking at the data is to compare the number of second requests issued by the FTC or the DoJ after either agency has obtained clearance. Here, there is a marked difference between the FTC, which is largely an independent agency, and the DoJ, which serves the Executive branch. In 2012, for example, an agency obtained clearance in roughly 15 per cent of the transactions that were notified, with the FTC accounting for almost twice as many investigations as the DoJ. However, the DoJ issued second requests in over 40 per cent of the transactions where it obtained clearance, while the FTC issued second requests in around 15 per cent.<sup>18</sup> This is a fairly dramatic increase in DoJ second requests. From 2005 to 2008, the DoJ issued second requests in only 23 per cent of its investigations. From 2009 to 2012, that figure increased to almost 36 per cent. The FTC was much more static, issuing second requests in around 13 per cent of its investigations from 2005 to 2008 and 14 per cent from 2009 to 2012.

Practically speaking, these figures offer some insight into practice before the two agencies. For example, parties should view the opening of a preliminary investigation as significantly more likely if they are in an industry likely to be reviewed by the FTC. But once an investigation is opened, they are far more likely to receive a second request if they are before the DoJ. While the agencies generally prefer to say that they operate from the same playbook, these statistics demonstrate another practical difference that can affect parties' timelines in obtaining approval.

#### Management changes at FTC and DoJ suggest continued heightened enforcement

In January 2013, William J Baer was sworn in as the new assistant attorney general for the Antitrust Division. Previously, Baer worked as a director for the FTC Bureau of Competition and later as a partner at Arnold & Porter LLP in Washington, DC. Among other things, Baer brings significant experience in handling complex civil and criminal antitrust investigations, and the DoJ highlighted in particular his past experience in 'high tech, communications, health care, and intellectual property' as being important credentials for his position.<sup>19</sup> It is expected that under his watch the DoJ will maintain an aggressive enforcement programme in both mergers and litigation.

The FTC has also experienced significant front office turnover in the last year. In January 2013, Chairman Jon Leibowitz announced his resignation. He was replaced as chair by existing Commissioner Edith Ramirez in March. Since taking over as chairwoman, Ramirez has reaffirmed the FTC's commitment to enforcement particularly in the health-care space. Leibowitz's departure follows closely after the resignation of Commissioner J Thomas Rosch in November 2012. As a result, there were two openings at the FTC in early 2013. In January, Joshua D Wright was sworn in as a new commissioner to fill one of these spots. Wright is an antitrust scholar, a former law professor at the George Mason University School of Law, and has written extensively on economics, antitrust and consumer protection. In June 2013, President Obama appointed Terrell McSweeney to fill the other open seat. While McSweeney has been less focused on antitrust and consumer protection in the past, commentators have noted that her 'political acumen and experience with key industries like health care make her a strong fit for the agency.'<sup>20</sup>

While the changes at the DoJ and FTC create some potential for realignment of priorities, it appears unlikely that there will be any sweeping changes at either agency. The new appointees have largely confirmed that they will continue the rigorous enforcement seen over the last several years, and they appear likely to maintain the same focus on health care and other issues that have become critical components of each agency's agenda.

### Global convergence continues

The FTC and DoJ continue to tout the importance of global convergence in the context of international transactions. In Fiscal Year 2012, the FTC concluded its investigation of Western Digital's purchase of the hard disk drive business of Hitachi, a transaction in which the agency 'cooperated with antitrust agencies in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore and Turkey, often working closely with the staff of these agencies on the analysis of the proposed transaction and potential remedies to reach outcomes.'<sup>21</sup> Likewise, the DoJ entered a consent decree in United Technologies Corporation's acquisition of Goodrich Corporation and highlighted its conclusion that 'Close cooperation between the Division, European Commission, and Canadian Competition Bureau achieved a coordinated remedy that will preserve competition in the United States and internationally.' In her speech on 19 April 2013, DoJ Director of Civil Enforcement Patricia Brink stated that 'our efforts to work with our international colleagues have increased greatly in the last few years and will continue to be an area of focus.'<sup>22</sup> We expect both US agencies to continue efforts to achieve consistency in outcomes when other jurisdictions are reviewing the same transaction.

### Compliance is an increasing priority

Another interesting trend in the last year was a sharp increase in HSR compliance efforts. In Fiscal Year 2012, the agencies noted that there were 60 corrective HSR filings made for prior violations, which is a substantial increase from the 16 that were made in 2011 and the 24 made in 2010 and 2009. This sharp uptick may indicate increased vigilance to identify transactions that should have been filed but were not. The uptick coincides with heavy monetary penalties against two parties for failing to file. In one instance, the CEO of Comcast 'failed to comply with the HSR Act's premerger notification requirements before acquiring Comcast voting securities as part of his compensation beginning in 2007,' and he was fined \$500,000.<sup>23</sup> In the other, Biglari Holdings Inc failed to file before acquiring voting securities of Cracker Barrel Old Country Store Inc, apparently because it argued that it qualified for a passive investment exemption. The DoJ disagreed and fined Biglari \$850,000.<sup>24</sup> Both of these examples suggest an expansion of agency focus on parties' filing obligations, as the cases represent a marked increase in activity after a year with no compliance cases.

In addition to enforcing reporting requirements, the agencies have also shown an increased sensitivity to compliance with document demands. In one recent example, the DoJ brought criminal charges against an executive of Hyosung Corporation, Kyoungwon Pyo, for improperly destroying and altering 4(c) documents, which must be attached to a company's HSR filing.<sup>24</sup> According to court filings, Mr Pyo 'participated in and directed the identification, review, and collection of documents' for the premerger notification that Hyosung filed in connection with its acquisition of Triton Systems. The government further alleged that Mr Pyo 'did, and did direct others to, corruptly destroy, mutilate, and conceal records, documents, and other objects' in such a way as to misrepresent

Hyosung's analysis of the proposed transaction. Mr Pyo pleaded guilty to a felony obstruction of justice charge and agreed to serve five months in prison, and Hyosung's subsidiary involved in the proposed acquisition also pleaded guilty and paid a \$200,000 criminal fine. Obviously, the imposition of a prison sentence in conjunction with a routine HSR filing is certain to resonate with filing parties.

### Conclusion

Merger enforcement in the US continued at a strong pace in 2012. The application of antitrust principles to intellectual property aggregation and health-care consolidation should continue to present thorny issues for agencies and practitioners. Notably, parties that find themselves before the DoJ should note the significantly increased potential for issuance of a second request, while those appearing before the FTC should be wary of the expansive reach of the FTC Act. Despite these apparent differences, and a change in leadership, we expect both agencies to continue a trend of aggressive enforcement, both in substance and process. Only time will tell whether they are able to strike an efficient balance between antitrust enforcement and the competing policy considerations inherent to a modern free market economy.

### Notes

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- 4 In the Matter of Motorola Mobility LLC and Google Inc, FTC File No. 121-0120, Analysis of Proposed Consent Order to Aid Public Comment (3 January 2013).
- 5 Id.
- 6 See 42 USC § 1395jij.
- 7 Julie Brill, Promoting Healthy Competition in Health Care Markets: Antitrust, the ACA, and ACOs (11 June 2013).
- 8 Fed Trade Comm'n and US Dep't of Justice: Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 76 Fed Reg 67026, 67030-31 (28 October 2011).
- 9 Id at 3.
- 10 42 USC § 1305; see also Preamble to Final Rule Implementing Provisions of ACA Related to ACOs, 76 Fed Reg 67802, 67841 ('Nothing in this final rule shall be construed to modify, impair, or supersede the applicability of any of the Federal antitrust laws.').
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  - 18 *Id.* at Exhibit A.
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  - 24 *United States v Biglari Holdings Inc*, No. 1:12-CV-01586 (D.D.C. filed 25 September 2012).
  - 25 See *United States v Kyoungwon Pyo*, Case No. 1:12-cr-00118-RLW, Information (DDC 3 May 2012), available at [www.justice.gov/atr/cases/f282900/282974.pdf](http://www.justice.gov/atr/cases/f282900/282974.pdf).



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As both a private practitioner and a former trial attorney with the US Department of Justice'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.



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Michael Wise is an associate in the Litigation practice at Paul Hastings and is based in the firm's Washington, DC, office. He focuses his practice on antitrust and competition issues. Mr Wise has represented clients seeking merger and acquisition approval under the Hart-Scott-Rodino Act in several key industries, including fashion apparel, information technology, computer hardware, energy, and mining. His experience includes the efficient and successful handling of Second Requests, as well as the coordination of filings for the European Commission and other foreign regulators. Mr Wise has also represented several companies in responding to Civil Investigative Demands from the Department of Justice and the Federal Trade Commission. In addition, Mr Wise has handled complex litigation matters arising under the Sherman Act and state unfair competition laws.

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