

Higher thresholds and new rules for unincorporated entities

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The US merger control regime consists mainly of the enforcement of section 7 of the Clayton Act,¹ which prohibits mergers and acquisitions that may substantially lessen competition, and the Hart-Scott-Rodino Act (the HSR Act),² which requires parties to most mergers or acquisitions above a certain dollar threshold to observe a 'waiting period' before closing the deal, during which the government can review the competitive effects of the transaction.

As they have for the past few years, the number and value of mergers and acquisitions rose again this past year, leading to another rise in the number of HSR Act filings and enforcement actions. Although the Federal Trade Commission (FTC) and Department of Justice (DoJ) have not yet issued their official report for the fiscal year ending in 2005, preliminary data from the FTC indicates that the value of transactions reported under the HSR Act nearly doubled from US\$630 billion in fiscal 2004 to US\$1.1 trillion in fiscal 2005, driving a 25 per cent jump in the number of merger investigations. The DoJ's annual workload statistics show that the total number of HSR Act notifications rose from 1,454 in fiscal 2004 to 1,695 in fiscal 2005. During this time, the FTC challenged nearly a dozen transactions and brought two enforcement proceedings for violations of the HSR reporting requirements.³ The DoJ initiated investigations in 90 transactions for which HSR filings were made and another 16 not involving HSR filings (slightly up from 13 in fiscal 2004). It issued 25 'second requests' under the HSR Act and publicly challenged four transactions. Of these, three were successfully challenged in court and one was restructured or abandoned by the parties.⁴

The following summarises recent initiatives regarding HSR Act compliance: the publication by the FTC and DoJ of a joint commentary on their horizontal merger guidelines; the DoJ's recent clearance of Whirlpool's acquisition of Maytag; and possibly tougher Tunney Act review of consent judgments in two consummated telecommunications mergers.

Improved HSR processes and revised thresholds

US merger review and enforcement policy remain generally the same, but there have been significant procedural changes. In addition to raising the filing thresholds, as required annually, the FTC and DoJ have established a secure website to permit all-electronic filings of HSR notifications, and the FTC has announced reforms that may reduce the burden of complying with 'second requests'.

The HSR Act continues to require parties to a proposed merger to file a pre-merger notification form and pay a filing fee, if certain threshold circumstances and other jurisdictional requirements are met. The filing is reviewed by either the Antitrust Division of the DoJ or the FTC's Bureau of Competition. Which agency will review a given merger depends primarily on the industry involved and the agencies' respective areas of expertise. Once the notification form is filed, the parties cannot close the merger until an initial waiting period has elapsed. During this period, the reviewing agency will assess the likely competitive effects of the transaction. The agency may decide to grant 'early termination' of the waiting period, allowing the transaction to close. If competitive concerns exist, the agency may decide to issue a 'second request', a demand for additional information and documents that can often be time-consuming and

burdensome.⁵ The second request effectively extends the waiting period until 30 days after the parties have reached substantial compliance with the government's demand. During the second request period, the government may try to reach a remedial agreement or consent decree with the parties to alleviate competitive concerns regarding the transaction. If no such agreement can be reached, the government may ultimately decide to seek a court injunction to prevent consummation of the merger. The FTC also has the power to review mergers in administrative proceedings in addition to a court challenge.

Whether a transaction must be reported to the agencies depends on the sizes of the transaction and of the parties,⁶ dollar value thresholds for which are established by statute and revised annually to remain constant in real terms.⁷ As of 18 February 2006, all transactions must be reported (regardless of the size of the parties) if the acquiring person will hold an aggregate amount of the voting securities and assets of the acquired person in excess of US\$226.8 million.⁸ Furthermore, if as a result of the transaction the acquiring person will hold more than US\$56.7 million (but less than US\$226.8 million) of the voting securities and assets of the acquired person, the transaction must be reported if (a) the seller has at least US\$11.3 million in total assets (or, if engaged in manufacturing, annual net sales or total assets), and the buyer has at least US\$113.4 million in net sales or total assets, or (b) the seller has at least US\$113.4 million in annual net sales or total assets and the buyer has at least US\$11.3 million in such sales or assets.⁹ Comparable US dollar values incorporated into the HSR Rules implementing the statute and specifying various exemptions have also been adjusted. The filing fees remain the same, but the thresholds for the different levels were also adjusted upward.¹⁰ For transactions in which the acquirer will hold less than US\$113.4 million of the stock and assets of the seller, the fee is US\$45,000. For transactions over US\$113.4 million but less than US\$567 million, the fee is US\$125,000, and for transactions involving stock and assets of over US\$567 million, the fee is US\$280,000.

In June 2006, the FTC and DoJ introduced an internet website to allow the electronic submission of HSR filings.¹¹ Parties may continue to file HSR reporting packages in hardcopy form, but now also have the option of completing and submitting the form and all attachments in completely electronic form at this new, secure website.¹² Critically, the electronic filing requires that the individual signing the form and affidavit for the filing party (not the legal representative) must acquire – in advance – an External Certification Authority Business Representative Certificate from the VeriSign company. The process to acquire such a certificate includes the signing, notarisation, and mailing of a paper form to VeriSign and the processing of that form, which can take up to four days. Filing out the electronic HSR form also requires installation of certain software on the signer's computer. In addition to creating this electronic filing option, the FTC also has amended the HSR form to permit the use of internet references instead of complete copies for certain financial documents in the HSR filing.

In February 2006, the FTC also announced reforms to its merger review process, intended to reduce the burgeoning burdens of 'sec-

ond requests' for information at the beginning of more in-depth investigations of HSR-notified transactions.¹³ Four new policies are central to the reforms. First, the FTC will henceforth presumptively limit the number of employees whose files must be searched to 35 per transaction party, but only if the party agrees to various conditions including completing the response to the second request 30 days before formally certifying compliance and agreeing, in any court action opposing the transaction, to a scheduling order that would allow the FTC 60 days to conduct additional discovery. The benefit of this new presumption may be significant, as the cost of second request compliance correlates very closely to the number of 'custodians' to be searched and heretofore investigating staff has often insisted on 100 or more custodians. The two conditions on timing, however, effectively grant the FTC significantly more time and a second bite at the apple which courts may not always grant in typical cases. Second, the FTC shortened the standard time period for which parties must provide documents from three to two years prior to the issuance of the second request until 45 days prior to substantial compliance. Data requests will not be so limited, however. Third, rather than require review of all computer backup tapes, the FTC will allow parties to preserve backup tapes for two days designated by FTC staff and will require production of documents from those tapes only if responsive documents are not available from more accessible sources. This reform largely codifies practice in recent years. Fourth, the FTC has significantly reduced the amount of information that must be provided in order to withhold documents on the grounds of legal privilege. Rather than describe each such document in a detailed 'complete privilege log', parties may now provide a 'partial log' merely counting the withheld documents for each custodian plus a complete log for five custodians (or 10 per cent of the total number of custodians, if greater) designated by the staff. Although it does not reduce the main cost of searching for and identifying privileged documents, this technical reform may save significant costs of completing the detailed information for most custodians. Overall these and other reforms announced by the FTC should contribute to less costly merger investigations in the future.

Although it has publicly indicated that it, too, is considering process reforms, the DoJ has not indicated that it will adopt the FTC's initiative regarding second requests. The DoJ's approach to second requests has historically differed from the FTC's in many respects, and it remains to be seen whether it will pursue its own reforms, if any.

Commentary on Horizontal Merger Guidelines

In March 2006, the FTC and DoJ published a joint commentary on their Horizontal Merger Guidelines (commentary).¹⁴ The Horizontal Merger Guidelines (HMG) state the agencies' official enforcement policy concerning mergers and acquisitions between and among competitors.¹⁵ They articulate in some detail the analytical process and initial presumptions that the agencies purport to apply when reviewing horizontal transactions. The commentary is the latest in a long line of such public statements and constitutes one of the principle outputs of the agencies' joint Merger Enforcement Workshop in February 2004, in which economists, practitioners and others provided testimony about merger enforcement over three days. Unlike prior statements, the commentary neither revises nor adds to the HMG. Instead, the agencies concluded that the HMG needed only further explanation, along with short summaries of public transactions to show how specific analytical elements were applied to specific facts.

Although no changes were intended to be conveyed, the commentary does emphasise what the agencies characterise as three principles: (i) the agencies focus on competitive effects generally, and do not view themselves as limited to the specific examples

referred to in the HMG; (ii) investigations are intensely fact-driven and iterative, potentially leading to the development, testing, and rejection or acceptance of a series of hypotheses, not just an initial one; and (iii) evidence is often relevant to multiple elements of the analysis. Overarching these principles is a fourth point emphasised by the agencies, that the five analytical elements outlined by the HMG – market definition, identification of potential anticompetitive effects, entry analysis, efficiencies, and failing or exiting assets – are part of an 'integrated analysis', not addressed in a linear, step-by-step progression.

Whether and how the commentary reflects changes in enforcement policy, however subtle, or will contribute to more predictable merger enforcement remains to be seen. There is no question, however, that they constitute mandatory reading alongside the HMG itself. At the very least, combined with the agencies' recent efforts to publish explanations for noteworthy decisions not to challenge particular transactions,¹⁶ the commentaries offer another glimpse into the rationales for agency action in specific cases.

Whirlpool and Maytag

On 29 March 2006, DoJ announced that it was closing its six-month investigation of Whirlpool's proposed acquisition of rival appliance manufacturer Maytag.¹⁶ That announcement was greeted with dismay by some who had argued that the transactions would combine the two dominant manufacturers of laundry washers and driers, particularly top-loading washers, to create a behemoth with up to 75 per cent of total sales in the United States. Others who favoured the transaction, such as the Wall Street Journal, considered it evidence of significantly reduced antitrust enforcement. Contrary to both these views, however, although the data and underlying evidence have not been made public, the DoJ's merger investigation appears to exemplify precisely the sort of integrated, careful analysis under traditional merger principles that the HMG commentary highlighted just a few days before the Whirlpool and Maytag announcement.

As it has after a few other mergers, the DoJ issued a 'background statement' explaining its decision not to challenge the Whirlpool and Maytag merger. Several aspects are of note. First, the DoJ's statement referred to several potential products, including household appliances, laundry products, high-efficiency laundry products, laundry washers and driers, and top- versus front-loading laundry washers; nowhere did the statement affirmatively define a relevant product market. Nor did the statement assign market shares or refer to any mathematical measure of industry concentration. Reflecting the integrated approach highlighted by the commentary, the DoJ evidently realised that other facts meant that finally adopting a formal definition and discussing concentration measures was not necessary. Second, imports and recent entrants, particularly from Mexico and Asia, were clearly pivotal. Although the DoJ identified a total of six competing manufacturers in addition to Whirlpool and Maytag, it emphasised two Korean firms that had recently entered or expanded sales in the US. Third, so-called 'big-box retailers' also played a role, as the DoJ found that two of the four retailers accounting for almost two-thirds of all sales in the US had successfully introduced products of one of the Korean firms, demonstrating that these large purchasers could protect themselves (and consumers) if the merged entity were to try to raise prices unduly. Fourth, as promised by the commentary, the DoJ focused on the central question of anti-competitive effects, ultimately concluding that "any attempt by the merged entity to raise prices in the sale of conventional top-load washers likely would be checked by the threat of additional US production, the threat that top-load washers made in Mexico or overseas could be sold into the United States, and the loss of sales to suppliers of front-load washing machines". Finally, the DoJ also

credited the parties' substantiated claims that the merger would lead to significant economic efficiencies. In other words, the analysis reflected in the DoJ's statement touched on all the major elements of the traditional analysis except for what it has long considered merely a starting point, namely market shares and mathematical measures of concentration. Rather than augur a period of relaxed merger enforcement, Whirlpool and Maytag may only reflect the importance of careful preparation, attention to detail, and focus on the elements of the traditional merger analysis that cut to the core question of anti-competitive effects.

Tougher Tunney Act review?

Two recent mega-mergers in the telecommunications industry, SBC's acquisition of AT&T and Verizon's acquisition of MCI, have presented the question of whether Congress's 2004 amendment of the Tunney Act will lead to stricter judicial review of the DoJ's consent judgments negotiated with merging parties to resolve perceived antitrust concerns.

Originally enacted in 1974 after a public scandal involving allegations of improper political interference in the DoJ antitrust investigations, the Tunney Act requires all DoJ consent judgments to be reviewed and found 'in the public interest' by a district court before going into effect.¹⁷ Over time courts had interpreted the Tunney Act to require only minimal oversight. Seeking to overturn that precedent, some sought to amend the Tunney Act to require much more searching review of all DoJ consent judgments, ultimately leading, after significant compromise, to an amendment in 2004 that, among other changes, replaced the word 'may' with the word 'shall' before a list of issues to be considered by the court when reviewing a proposed consent judgment.¹⁸ Most courts reviewing DoJ consent judgments since the amendment have not appeared to conduct noticeably stricter reviews.

The SBC and AT&T, and Verizon and MCI may change that. During the DoJ's investigation of these two major transactions, and in the formal merger proceedings before the Federal Communications Commission (FCC), various critics had challenged both mergers as severely anti-competitive. By the time of the Tunney Act proceeding, however, the FCC had approved the mergers and very few critics were continuing to press their arguments. Yet in the summer of 2006, the Federal District Court for the District of Columbia, in which the DoJ filed its proposed consent judgments, signalled an interest in conducting a more searching review. Several critics then sought to intervene or file briefs *amici curiae* to convince the court to read the 2004 amendment as a mandate for stricter review that, they contended, should lead to more divestitures and other, tougher remedial measures than agreed to by the DoJ in these cases. As this article went to press, the district court had not decided the significance of the 2004 amendment or ruled out holding some additional evidentiary hearings to test the proposed remedies.

Should the district court ultimately decide that the proposed remedies, as embodied in the DoJ's proposed consent judgments, fall short of the 'public interest', several difficult issues with potentially far-reaching implications would need to be resolved. These include the court's constitutional authority to compel the DoJ to continue its investigation or to dictate an alternative resolution. Because both mergers have already been consummated, any change to the judgment might also require unravelling part or all of these combinations.

Conclusion

Merger filings and investigations continue their upswing. HSR filings may now be made electronically, but at the cost of complicated new procedures that require some advance planning and close coordination between parties and their counsel. The FTC's second request

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Steptoe & Johnson has a diversified antitrust and competition law practice based in both Washington and Brussels, with four major areas of focus.

First, Steptoe has long represented clients in merger and non-merger investigations before the Antitrust Division of the Justice Department and the Federal Trade Commission. A majority of the partners in the antitrust practice group have worked for these agencies. In addition, as competition law enforcement has spread around the globe, so has Steptoe's experience in defending merger and non-merger investigations in the European Union and elsewhere.

Second, due to its Washington roots, Steptoe has represented clients in many regulated industries. As these industries have been deregulated in recent decades, many have lost their antitrust exemptions and Steptoe lawyers have become highly knowledgeable about the application of antitrust law to the electric utility and power generation, telecommunications, airline, railroad, trucking, pipeline, maritime, insurance and financial services industries.

A third branch of Steptoe's antitrust practice has been representation of clients as defendants in private class actions, other complex treble damage litigation, and *parens patriae* cases brought by state attorneys general. Over the past decade, Steptoe has also increasingly represented clients in state court class actions based on unfair trade practice and consumer protection theories.

Finally, Steptoe's white-collar criminal practice has grown to be one of the most significant in Washington. Steptoe's lead lawyers in this area have had extensive experience in the Justice Department before entering private practice. They have defended corporations and top management in several recent high profile criminal antitrust investigations and prosecutions.

In spring 2004, Steptoe enlarged its Brussels office to serve its clients' ever-growing EU regulatory needs, thus broadening and deepening its EU practice. The Brussels legal team has a long and distinguished history of working with the EU institutions. The team's regulatory competence is diverse, including EU/international trade, biotechnology and chemicals regulation, financial services and insurance, environment, technology and communications, competition, and litigation. Supplementing the EU regulatory practice, the Brussels office also offers well-qualified counsel on Belgian corporate, financial and commercial issues, and on international tax and structuring.

reforms hold some promise of significantly reducing the costs of these very burdensome steps in merger review, but only time will tell whether they outbalance the required concessions by merging parties. The DoJ has yet to announce any initiative of its own in this area. The two agencies did, however, collaborate on a commentary to their joint Horizontal Merger Guidelines. As cases like Whirlpool and Maytag demonstrate, the commentary appears not to signal any major changes in enforcement policy but may reflect subtle changes in emphasis. Finally, the 2004 amendments to the Tunney Act may lead a federal court into uncharted waters in its review of the SBC and AT&T, and Verizon and MCI mergers.

Notes

- 1 15 USC § 18.
- 2 Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), 15 USC § 18a, as amended, Pub. L. No. 106-553, 114 Stat. 2762 (21 December 2000).
- 3 FTC, The FTC In 2006: Committed to Consumers and Competition, available at www.ftc.gov/os/2006/03/ChairmanReportFinal2006.pdf.
- 4 DoJ, Antitrust Division Workload Statistics FY 1996-2005, available at www.usdoj.gov/atr/public/workstats.htm.
- 5 Government investigations into transactions that do not require a pre-merger filing under the HSR Act can often be similar in scope and content to second requests.
- 6 15 USC §§ 18a and 19(a)(5).
- 7 See FTC, Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. 2,943 (18 January 2006).
- 8 See 15 USC § 18a(a)(2)(A), as revised annually by the FTC.
- 9 See 15 USC § 18a(a)(2)(B), as revised annually by the FTC.
- 10 See 15 USC § 18a, Note entitled 'Assessment and Collection of Filing Fees.'
- 11 See FTC press release (20 June 2006), available at www.ftc.gov/opa/2006/06/premerger.htm.
- 12 The secure website and the detailed instructions may be accessed at <https://www.hsr.gov> (with an 's' after 'http').
- 13 See FTC press release (16 February 2006), available at www.ftc.gov/opa/2006/02/merger_process.htm.
- 14 US DoJ and FTC, commentary on the Horizontal Merger Guidelines (March 2006), available at www.usdoj.gov/atr/public/guidelines/215247.htm.
- 15 US DoJ and FTC, Horizontal Merger Guidelines (as revised 8 April 1997), available at www.usdoj.gov/atr/public/guidelines/hmg.htm.
- 16 See, eg, DoJ Press Release re Whirlpool and Maytag (29 March 2006), available at www.usdoj.gov/atr/public/press_releases/2006/215326.htm; FTC press release re Comcast / Time Warner Cable / Adelphia Communications (Jan. 31, 2006), available at www.ftc.gov/opa/2006/01/fyi0609.htm.
- 17 See 15 U.S.C. § 16(e). The act also requires the DoJ to publish the proposed consent judgment and a statement of the competitive impact of the merger and proposed remedy; to collect and reply to comments from the public during a specified waiting period; and to file in court any communications between the DoJ and the merging parties, with certain exceptions. See *id.* at § 16(b) through (h). The FTC's consent decrees are not subject to similar judicial review, but its own procedures require publication of a complaint and an explanation of the reasons for the proposed decree, in a form roughly comparable to what the DoJ must publish.
- 18 See Pub. L. 108-237 §221(b)(1) (2004).