

Rules changes, merger data, and a surprising FTC loss

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The US merger control regime consists mainly of the enforcement of Section 7 of the Clayton Act¹, 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.

Statistics on the number and outcomes of HSR filings reflect a continuation of recent trends. During the fiscal year ended in 2003, 1,014 transactions were reported. The agencies issued 35 second requests—noticeably down from the previous year's 49—but ultimately challenged 36, up slightly from the previous year's 34. The Federal Trade Commission (FTC) challenged 21 transactions in the fiscal year 2003, yielding one administrative complaint, seven consent orders, and 10 abandoned transactions. The Antitrust Division of the US Department of Justice (DoJ) was likewise very active during 2003, challenging 15 transactions, leading to five consent decrees, six abandoned transactions, three restructured transactions, and one transaction still pending in court.³

Recent developments discussed below include: (i) statutory amendments to strengthen judicial review of DoJ consent decrees and proposed amendments to the HSR Rules to treat partnerships like corporations; (ii) continued enforcement targeting non-reportable transactions and HSR Act violations, particularly involving the exemption for acquisitions solely for investment purposes; and (iii) a surprising courtroom setback for the FTC in which recently released statistics on past FTC merger challenges played a big role. The trial court's decision in that case may also signal major obstacles to future merger challenges based on coordinated effects theories.

Tightened judicial review and expanded reporting obligations for partnerships and LLCs

Although the core of US merger review and enforcement policy has remained the same, the past year has seen changes and proposed changes on the margins. The basic framework for merger review and the pre-merger filing thresholds are unchanged, but Congress has amended the Tunney Act with the intent to intensify judicial review of DoJ consent decrees settling merger cases and the FTC has proposed to increase the circumstances in which transactions involving partnerships and other non-corporate entities need to be notified.

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.⁴ 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 an injunction to prevent consummation of the merger.

Amendments to the HSR Act passed in December 2000 and effective since 1 February 2001 raised the notification thresholds and instituted a graduated schedule of significantly higher filing fees.⁵ All transactions must now 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\$200 million.⁶ Furthermore, if as a result of the transaction the acquiring person will hold more than US\$50 million (but less than US\$200 million) of the voting securities and assets of the acquired person, the transaction must be reported if (a) the seller has at least US\$10 million in total assets (or, if engaged in manufacturing, annual net sales or total assets), and the buyer has at least US\$100 million in net sales or total assets, or (b) the seller has at least US\$100 million in annual net sales or total assets and the buyer has at least US\$10 million in such sales or assets.⁷ The threshold levels are now indexed to stay constant in real terms, with annual adjustments based on changes in the US gross domestic product. The first such adjustment is expected by 31 January 2005.⁸

The graduated fee schedule retained the prior US\$45,000 fee for transactions in which the acquirer will hold less than US\$100 million of stock and assets of the seller. For transactions over US\$100 million but less than US\$500 million, however, the fee is US\$125,000, and for transactions involving stock and assets of over US\$500 million, the fee is now US\$280,000. The dollar thresholds for these fees will be adjusted like the filing thresholds, although the actual fee amounts will not change.⁹

In June 2004, Congress made changes to the Tunney Act, as part of a broader law enhancing penalties for criminal antitrust violations.¹⁰ The Tunney Act specifies the procedures that the DoJ must follow whenever settling any civil antitrust enforcement action, including merger challenges. Not only must the DoJ subject its proposed consent decree to judicial review, but it must also publish the proposed decree along with a statement of the rationale behind the proposed remedies. Private parties then have 60 days to comment, and the DoJ must file the comments and its replies and any documents that were 'determinative' in formulating its proposal. The Act

authorises the court to take testimony, appoint a special master, authorise participation by interested parties or *amicus curiae*, or hold evidentiary hearings. It also identifies certain factors that the court 'may' consider when determining whether to approve the decree as 'in the public interest.'¹¹

Over the years, courts have recognised that they may not second-guess DoJ's settlement decisions, and some commentators have complained that courts have construed their role too narrowly. Initial drafts of the recent law would have increased judicial scrutiny significantly, among other ways by forcing courts to decide whether to approve the decree 'based on substantial evidence and reasoned analysis'. Commentators, including the ABA's Antitrust Section, argued forcefully that such a change might injure the merger review process by effectively requiring courts to hold full evidentiary hearings and possibly requiring them to develop a traditionally extensive administrative record, which could drastically slow merger review.¹²

In the end, Congress chose not to enact the most troublesome of these provisions, but it did make some changes that could be interpreted to increase judicial scrutiny of proposed decrees. As amended, the Tunney Act now requires—no longer merely permits—the consideration of specific factors. The list of factors has also been expanded slightly to include whether the decree's terms are ambiguous and its impact on competition in the relevant markets. Helpfully, however, the final amendments also include language clarifying that the court is not required to hold an evidentiary hearing or to allow third parties to intervene in the action.¹³ The overall effect of these changes is yet to be seen in merger cases.

The FTC has also been active. In March 2004, the FTC proposed changing how partnerships, limited liability companies and other non-corporate entities are treated when deciding whether transactions involving them must be notified under the HSR Act.¹⁴ The treatment of these entities has changed over time and continues to differ from that of corporations in many respects. In essence, the FTC has historically looked through a partnership to its assets and ignored any transaction that did not result in acquisition of 100 per cent of the rights to those assets. Its treatment of LLCs has changed over time and now focuses essentially on whether, in formation, two separate businesses will be combined or, in transfer of less than 100 per cent interests, new assets will be contributed in such a fashion that a new LLC participant will have effective control over them. In contrast, the acquisition of corporate shares up to 50 per cent is always reportable, without regard to control of the entity, so long as value thresholds are met or exceeded. The different approaches currently lead to very different outcomes, depending on the form of the entity involved. Thus, for instance, under the current rules, the formation of a partnership is never reportable, whereas the formation of an LLC can be reportable if two formerly separate businesses are combined and someone controls the LLC; and the formation of a corporation can be reportable if it will have assets above certain threshold values. Similarly, the acquisition of anything less than 100 per cent of a partnership's interests has long been treated as non-reportable, again in contrast to LLCs and corporate stock.

The FTC proposes to recast the HSR Rules to shift its approach for partnerships and LLCs much closer to the share-based approach underpinning its treatment of corporations. Over 20 changes would be made, including new rules governing control of non-corporate entities, the definition of non-corporate interests, when the formation of non-corporate entities is reportable, and when acquisitions of such interests are reportable.¹⁵ Under the new rules, the formation of a non-corporate entity is reportable whenever the formation of a corporation would be, so long as some person will control the new entity. Similarly, the acquisition of non-corporate interests would be reportable if at least one person controls the entity. Corresponding changes to the HSR Notification and Report Form would also be

made. Public comments on the proposal were collected by 4 June 2004, but final rules changes have not yet been promulgated.

Continued enforcement against non-reportable transactions and HSR violations

During the past year, the agencies have continued to target both anti-competitive transactions that did not need to be reported under the HSR Act and violations of the Act. Since the implementation of the higher notification thresholds, the enforcement authorities have made clear that transactions falling below the thresholds are not immune from antitrust scrutiny. As noted in last year's update, the FTC and DoJ have acted against several transactions that were not reportable under the HSR Act, including two acquisitions by MSC Software¹⁶, Meade's acquisition of Celestron International¹⁷, and SGL Carbon's attempted acquisition of Carbide/Graphite Group.¹⁸ Indeed, during the fiscal year 2003, more than one quarter of the FTC's merger enforcement actions involved non-reportable transactions.¹⁹

The agencies have also pursued transactions after their consummation. In April 2003, the DoJ sued the Dairy Farmers of America to divest interests it acquired in Southern Belle Dairy, in a non-reportable transaction in 2002.²⁰ The complaint alleged that the acquisition eliminated or reduced competition in the supply of milk to school districts in areas of Kentucky and Tennessee. The case is still pending.

Similarly, in August 2003, the FTC brought an administrative complaint alleging that Aspen Technology's 2002 acquisition of Hyprotech harmed competition in the market for process engineering simulation software by combining two of the three largest firms in the market.²¹ Aspen acquired Hyprotech for US\$106 million, in an acquisition that was exempt from the reporting requirements of the HSR Act. In July 2004, shortly before the scheduled evidentiary hearing, Aspen agreed to a consent order granting essentially the relief sought by the FTC, that is, divestiture of the overlapping Hyprotech software, intellectual property, contract rights, and other assets.²²

In February 2004, the FTC brought an administrative complaint against Evanston Northwestern Healthcare Corp ('ENH') and its affiliated ENH Medical Group alleging both an illegal merger with a competing hospital in January 2000 and subsequent price fixing on behalf of independent physicians formerly associated with but not employed by the other hospital.²³ The merger had combined ENH's two non-profit hospitals in and near Evanston, Indiana, with a third non-profit hospital known as Highland Park, valued at almost US\$234 million. Shortly after the merger, ENH allegedly increased its prices to insurers and other health plans and its affiliate, the ENH Medical Group began negotiating higher prices for all physicians associated with the new hospital system, including hundreds of independents not employed by any ENH hospital. The FTC is seeking injunctive relief including both divestiture of Highland Park and cessation of joint negotiations on behalf of independent physicians. The case is still pending, with evidentiary hearings expected in the fall of 2004.

The agencies' willingness to 'unscramble the eggs' by challenging mergers after consummation requires that practitioners exercise great care in advising and defending clients involved in non-reportable transactions.²⁴ Parties to non-reportable deals that have foreseeable antitrust concerns may be inclined to avoid contacting customers or the agencies about the transaction, lest such contacts arouse seemingly unnecessary scrutiny. Yet such a strategy is often short-sighted. By not contacting customers early in the process, the parties may miss an opportunity to address customer concerns and to explain the pro-competitive benefits of the transaction. Furthermore, in many instances it may be assumed that the agencies are likely to learn about the deal, through any number of information

sources including complaining customers, complaining competitors, and/or media sources such as newspapers or trade press. Because of the hardship and uncertainty created by post-closure enforcement actions, in many circumstances the parties may wish to approach the enforcement authorities voluntarily, so that antitrust issues can be addressed prior to closing. The best strategy, of course, will depend on the specific facts and circumstances presented in each case.

In addition to non-reportable transactions, the agencies have also pursued fines for violations of the HSR Act, even when not opposing the transaction itself. In April 2004, for instance, the Canadian insurance and financial services company Manulife Financial consummated its high-profile cross-border acquisition of US insurer John Hancock without opposition from the US antitrust agencies. A few days later, however, Manulife agreed to pay a US\$1 million civil penalty to settle DoJ charges that it had failed to make a required filing for acquiring John Hancock stock before announcing the final acquisition in September 2003. It turns out that Manulife had acquired as much as 1.5 per cent of John Hancock's stock, valued at about US\$150 million, throughout the spring of 2003, crossing the lowest HSR Act filing threshold of US\$50 million sometime in March. None of these earlier acquisitions had been reported to the agencies. The civil penalty could have been more than twice as high, but Manulife discovered the error and brought it to DoJ's attention itself, and then helped to investigate it and settled quickly.²⁵

The FTC has also been actively prosecuting failures to file. The same day that the DoJ announced the *Manulife* consent decree, the FTC announced a consent decree with Bill Gates also for failing to file. This was Mr Gates' second violation in half a year. In November of 2001, he had increased his holdings of Republic Services Inc stock above 10 per cent, in mistaken reliance upon the HSR Act exemption for holdings—up to 10 per cent—for acquisitions solely for the purpose of investment. Having discovered and reported the error himself within two weeks, Mr Gates received only a warning for this first violation. But six months later he acquired stock in a different company called ICOS Corporation and again mistakenly relied upon the investment-only exemption. Although his holding was less than 10 per cent of ICOS stock, the acquisition was not exempt because Mr Gates participated in the management as a director, precluding any claim that his only purpose was investment. Nonetheless, due to his cooperation, the FTC agreed to a civil fine of only US\$800,000.²⁶

Merger data used to defeat FTC

Early in the Bush Administration, the heads of the FTC and DoJ pledged to increase the transparency of their merger review processes. One of the fruits of these efforts was the publication, during the winter of 2003–2004, of statistical data about merger investigations and challenges during the past several years in conjunction with a three-day workshop on the topic in February 2004. These data will help businesses and practitioners to understand better the significance of industry concentration and, at least for the FTC, of 'hot documents' and the number of remaining competitors in the agencies' deliberations. For its pains, the FTC saw these data thrown back at it less than nine months later and relied upon to deliver a surprising trial-court defeat when it sought a preliminary injunction to stop a merger pending its administrative challenge of the transaction.

In December 2003, the agencies jointly published statistical data about their merger challenges in fiscal years between 1999 and 2003 inclusive.²⁷ The FTC supplemented this data with additional statistical information about its investigations of more than 280 horizontal mergers or acquisitions in which it had issued second requests from 1996 to 2003.²⁸ Commentators quickly remarked that these data demonstrated what many had long believed—that the agencies rarely investigate or challenge mergers at the levels of industry

concentration held out as triggers in the joint Horizontal Merger Guidelines.²⁹ Purporting to reflect enforcement intentions, the Guidelines indicate that for acquisitions resulting in an HHI of 1800 or less, an increase in the HHI of 100 points or more may raise significant competitive concerns.³⁰ The data show, however, that other than in the petroleum and banking sectors there were no challenges in sub-1800 markets with HHI increases less than 500. The second-request data from the FTC also showed that it closed all seven second requests outside the petroleum industry that involved increases of less than 500 points and final HHIs of 1800 or less. The Guidelines also indicate that transactions yielding HHIs above 1800 and HHI increases of more than 100 points are presumed to create or enhance market power. Yet the data show only one challenge in markets other than petroleum or banking with a post-acquisition HHI of 1800 to 1999 and an increase less than 500. Interestingly, the supplemental FTC data also indicate that in most industries reducing the number of competitors from four to three may be the trigger for enforcement decisions.³¹

The disclosure of these data may yet return to haunt the agencies, if a recent trial-court defeat for the FTC proves to be a guide. The defeat arose in the FTC's attempt to secure a preliminary injunction to block Arch Coal Inc's acquisition of a competing coal mine in the Southern Powder River Basin. Arch owns two coal mines in the Basin and agreed in May 2003 to acquire two other coal mines there from one of its six other competitors. During the FTC's investigation, Arch agreed to sell one of these mines to another large competitor operating a smaller mine in the Basin. On 1 March 2004, the FTC and six states sued for a preliminary injunction to block the merger pending an administrative challenge before the FTC, but in August the trial court declined to issue the requested relief.³²

An important element of the court's reasoning was its conclusion that the concentration and the change in concentration that FTC had shown were lower than in most other merger challenges. Following the analytic framework mandated by the Court of Appeals for the DC Circuit in the seminal *Baker Hughes* case, the trial court first considered whether the FTC had shown a sufficiently concentrated market to warrant a rebuttable presumption that the merger was likely to injure competition. After considering various definitions of the relevant market and various measures of concentration, the court found a range of post-acquisition HHIs from 2,103 to 2,365 and HHI increases of 49 to 224. In light of the Horizontal Merger Guidelines, the court found this showing sufficient to establish the rebuttable presumption but then emphasised that 'the FTC's prima facie case [was] not strong' and required 'less of a showing' for Arch to rebut the presumption. The reason: 'Such HHI increases are far below those typical of antitrust challenges brought by the FTC and DOJ.' The court supported its conclusion by discussing four recent merger cases and then citing the agencies' own merger challenge data, which it characterised as demonstrating that only 26 of 1,263 (2 per cent) merger challenges since 1999 had involved concentration levels comparable to those in Arch's markets.³³ Relying on this observation, the court readily found that Arch had rebutted the initial presumption and proceeded to a full-scale review of market evidence, which it found undercut the FTC's case. The FTC and the states have appealed the decision.

Although the detailed analysis of circumstances in the marketplace was crucial to the negative result, there is no doubt that, deprived of its usual presumption based on concentration data, the FTC had a significantly greater burden to carry than it was accustomed to. Surprisingly, however, the FTC's brief on appeal did not dispute the trial court's observation that past cases have only rarely been brought at comparable levels of concentration. Indeed, the brief did not even mention the joint FTC/DoJ data discussed by the trial court. Nor did the brief address the trial court's consequent conclu-

sion that the usual rebuttable presumption was weak. Whether this omission was purely tactical or an implicit recognition that the trial court was correct about the data and perhaps also about the weakness of presumed antitrust injury based on such low concentration levels, only future cases can tell.

What the FTC did choose to challenge was the trial court's separate imposition of a higher burden on the FTC regarding the full-scale analysis of competitive effects.³⁴ The FTC's theory of the case was that the merger would facilitate coordination among the leading competitors of their coal output. The trial court, however, observed that all the recent merger challenges alleging some form of coordinated output effect had also involved direct coordination of price increases. That observation led the trial court to characterise the FTC's current theory as 'novel', making the FTC's burden 'more difficult'.³⁵ On appeal, the FTC argued that the trial court had erroneously failed to recognise that output is the 'flip side of price' and should not have imposed a higher evidentiary burden. It also charged error for failing to give due weight to customer complaints³⁶ and for reviewing the transaction in light of Arch's pre-trial sale of one of the target's two mines to a competitor, thereby effectively allowing the parties to avoid the FTC's supervision had the divestiture been ordered by the FTC.³⁷ The case remains on appeal.

If nothing else, the trial court's treatment of statistical data and historical merger enforcement cases demonstrate the power of the agencies' recently increased transparency to the public about their decision-making. In addition, all of the alleged errors involve issues that can determine outcomes in merger challenges. A defeat on appeal on any one of these grounds could prove a significant obstacle to the agencies' future merger enforcement.

Conclusion

Although the total number of transactions reviewed dipped slightly this past year, merger enforcement continues at roughly the same intensity and pace as in recent years. Amendments to the Tunney Act

may signal tightened judicial review of DoJ consent decrees. The FTC, meanwhile, has proposed changing the HSR Rules to treat non-corporate entities much more like corporate entities, which would expand reporting obligations for partnerships and LLCs. Enforcement against non-reportable transactions and HSR Act violations continued apace. Finally, statistical data released by the agencies about merger investigations and challenges contributed significantly to the FTC's surprising trial-court rebuff in *Arch Coal*. The FTC's appeal in that case also merits close attention in the coming year as it raises several additional issues that could affect enforcement in a wide range of future cases.

Notes

- 1 15 USC § 18.
- 2 Hart-Scott-Rodino Antitrust Improvements Act of 1976 ('HSR Act'), 15 USC § 18a.
- 3 FTC & DoJ, Annual Report to Congress, Fiscal Year 2003 (31 Aug. 2004), available at <http://www.ftc.gov/os/2004/09/040903hsrrpt03.pdf>.
- 4 Government investigations into transactions that do not require a pre-merger filing under the HSR Act can often be similar in scope and in content to second requests.
- 5 15 USC § 18a, as amended, Pub. L. No 106-553, 114 Stat. 2762 (21 Dec. 2000).
- 6 See 15 USC § 18a(a)(2)(A).
- 7 See 15 USC § 18a(a)(2)(B).
- 8 See 15 USC § 19(a)(5).
- 9 See 15 USC § 18a, Note entitled 'Assessment and Collection of Filing Fees.'
- 10 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub L. 108-237, 188 Stat 661, title II, subtitle B (22 Jun. 2004) [hereinafter ACPER], amending the Tunney Act, 15 USC § 16.
- 11 See 15 USC § 16(b)-(h).
- 12 See, eg, Comments of the ABA Section of Antitrust Law on H.R. 1086

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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.

- (Jan. 2004), available at <http://www.abanet.org/antitrust/comments/2004/increasedcriminalpenalties.pdf>.
- 13 See ACPER at § 221(b).
 - 14 See FTC Proposed Rule, 69 Fed Reg 68 (8 Apr 2004), available at <http://www.ftc.gov/os/2004/03/premergerfrn.pdf>.
 - 15 To help sort through the changes, the FTC has published 'Highlights of Proposed Rule Changes,' at <http://www.ftc.gov/os/2004/03/premergerfrnhighlights.pdf>.
 - 16 See *In re MSC Software*, FTC Docket No. 9299 (final consent order, 1 Nov. 2002), available at <http://www.ftc.gov/opa/2002/11/fyi0257.htm>.
 - 17 See FTC Press Release (29 May 2002), available at <http://www.ftc.gov/opa/2002/05/meadecelestron.htm>.
 - 18 See *United States v SGL Carbon AG*, Civil Action No. 03-521 (WD Pa.) (complaint filed 15 Apr. 2003), available at <http://www.usdoj.gov/atr/cases/f200900/200935.htm>.
 - 19 See FTC, Performance & Accountability Report for Fiscal Year 2003, at Part II, page 14, available at <http://www.ftc.gov/opp/gpra/2003pareport.pdf>.
 - 20 See *United States v Dairy Farmers of America Inc*, Civil Action No. 6:03-206 (ED Ky., complaint filed 24 Apr. 2003), available at <http://www.usdoj.gov/atr/cases/f200900/200972.htm>.
 - 21 See *In re Aspen Tech Inc*, Docket No. 9310 (administrative complaint filed 6 Aug. 2003), available at <http://www.ftc.gov/os/2003/08/aspencomp.pdf>.
 - 22 See *In re Aspen Tech*, Docket No. 9310 (decision and order published 15 Jul. 2004), available at <http://www.ftc.gov/os/adjpro/d9310/040715do.pdf>.
 - 23 See *In re Evanston Northwestern Healthcare Corporation*, FTC File No. 011 0234, Docket No. 9315 (Complaint dated 10 February 2004), available at <http://www.ftc.gov/os/caselist/0110234/040210emhcomplaint.pdf>.
 - 24 See generally Dionne C Lomax, 'Perspectives on Counseling and Defending Non-HSR Reportable Transactions', *Mergers and Acquisitions Newsletter* (ABA Section of Antitrust Law), Summer 2003, at 44.
 - 25 See DOJ Press Release (3 May 2004), available at http://www.usdoj.gov/atr/public/press_releases/2004/203532.htm.
 - 26 See FTC Press Release (3 May 2004), available at <http://www.ftc.gov/opa/2004/05/gates.htm>.
 - 27 FTC & DOJ, 'Merger Challenges Data, Fiscal Years 1999-2003' (Dec. 2003), available at <http://www.ftc.gov/os/2003/12/mdp.pdf>.
 - 28 FTC, 'Horizontal Merger Investigation Data, Fiscal Years 1996-2003' (Feb. 2004), available at <http://www.ftc.gov/os/2004/02/040202horizmergereffects.pdf>.
 - 29 See, eg, See William J Baer, Deborah L Feinstein & Randal M Shaheen, 'Taking Stock: Recent Trends in US Merger Enforcement,' 18 *Antitrust* 15, 17 (Spring 2004) [hereinafter 'Taking Stock'].
 - 30 FTC & DOJ, '1992 Horizontal Merger Guidelines' § 1.51, available at <http://www.ftc.gov/bc/docs/horizmer.htm>.
 - 31 See 'Taking Stock' at 17 (noting that FTC enforcement action is about 50 per cent likely for 4-to-3 transactions, but significantly lower if 4 are left and significantly higher if less than 3 are left).
 - 32 *FTC v Arch Coal Inc*, Slip op., Civ. No. 04-0534 (D.C.D.C. Aug. 13, 2004), available at <http://www.dcd.uscourts.gov/04-534.pdf>.
 - 33 *Id.*, slip op. at 30.
 - 34 FTC Brief on Appeal, *FTC v. Arch Coal, Inc.* at 2, 11-12 (D.C. Cir., dated 17 Aug. 2004), available at <http://www.ftc.gov/os/caselist/0310191/0310191archcoal.htm>.
 - 35 *Arch Coal Inc*, slip op. at 35.
 - 36 FTC Brief on Appeal, at 13-15. Interestingly, here the FTC did cite its Horizontal Merger Investigation Data, Fiscal Years 1996 to 2003, to support its contention that customer complaints matter.
 - 37 FTC Brief on Appeal, at 15-17.