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# Another Active Year for the FTC and DoJ

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The US merger control regime consists mainly of the enforcement of section 7 of the Clayton Act,<sup>1</sup> which prohibits mergers and acquisitions that may substantially lessen competition, and of the Hart-Scott-Rodino Act (the HSR Act),<sup>2</sup> 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.

The number of mergers and acquisitions has risen some 30 per cent over the past three years, and the most recent year is no exception. As reported by the Federal Trade Commission (FTC) and Department of Justice (DoJ), the number of transactions notified for premerger review under the HSR Act during the fiscal year ended 30 September 2007 rose yet again, to over 2,100.<sup>3</sup> Enforcement activity has also remained strong. The FTC challenged 20 transactions, leading to 12 consent decrees and five restructured or abandoned transactions,<sup>4</sup> while the DoJ challenged 12 transactions, resulting in four consent decrees, one abandoned transaction, and significant restructuring of seven others.<sup>5</sup> Both agencies continued enforcement against transactions that had already been consummated.<sup>6</sup> The agencies have not yet issued their official reports for the fiscal years ending in 2007 or 2008, but interim results suggest continued enforcement activity. By February 2008, five months into the current fiscal year, the FTC reported four merger challenges resolved by consent orders and one abandoned transaction.<sup>7</sup> For its part, by June 2008, the DoJ had already challenged 14 deals, of which one was restructured.<sup>8</sup>

On 30 March 2008, William E Kovacic succeeded Deborah Platt Majoras as chair of the Federal Trade Commission. Ms Majoras had served nearly four years on the Commission and as the principal deputy assistant attorney general in the Antitrust Division prior to joining the Commission. Mr Kovacic also brings exceptional experience and expertise to the position, having served at the FTC twice before – in the Bureau of Competition's Planning Office and as an attorney-adviser to a commissioner from 1979 to 1983, and as the agency's general counsel from 2001 through 2004. Between these stints in government, Mr Kovacic was a professor of antitrust law at two universities and advised numerous governments on antitrust and competition issues.

The following summarises the pre-merger review process under the HSR Act, including the most recent filing thresholds and notable cases during the past year, including the DoJ's perhaps surprising decision not to challenge the *XM/Sirius* radio merger and its efforts to police past consent decrees, and the FTC's procedural innovations in challenging a hospital merger and its appeals of two lost court challenges the year before.

## HSR pre-merger review process and filing thresholds

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 of 30 days (15 days for cash tender offers) 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.<sup>9</sup> The second request effectively extends the waiting period until 30 days (10 days for cash tender offers) 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 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 size of the transaction and of the parties,<sup>10</sup> dollar value thresholds for which are established by statute and revised annually to remain constant in real terms.<sup>11</sup> As of 28 February 2008, 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\$252.3 million.<sup>12</sup> Furthermore, if as a result of the transaction the acquiring person will hold more than US\$63.1 million (but less than US\$252.3 million) of the voting securities and assets of the acquired person, the transaction must be reported if:

- the seller has at least US\$12.6 million in total assets (or, if engaged in manufacturing, annual net sales or total assets), and the buyer has at least US\$126.2 million in net sales or total assets; or
- the seller has at least US\$126.2 million in annual net sales or total assets and the buyer has at least US\$12.6 million in such sales or assets.<sup>13</sup>

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.<sup>14</sup> For transactions in which the acquirer will hold less than US\$126.2 million of the stock and assets of the seller, the fee is US\$45,000. For transactions over US\$126.2 million but less than US\$630.8 million, the fee is US\$125,000, and for transactions involving stock and assets of over US\$630.8 million, the fee is US\$280,000.

## DoJ clears *XM/Sirius* radio merger

On March 24, 2008, the DoJ announced that it had closed its year-long investigation of the consolidation of XM Satellite Radio Holdings Inc and Sirius Satellite Radio Inc.<sup>15</sup> Combining the two most prominent satellite radio companies operating in the United States, the transaction had attracted a great deal of public attention. As has been its practice in recent years when choosing not to challenge a controversial merger, the agency explained its decision in a detailed

press release. The DoJ's analysis is notable for several reasons, all of which reflect its willingness to consider and rely upon dynamic market changes expected in the future beyond the usual two-year horizon.

The DoJ focused on three customer segments: (i) those who had already purchased satellite radios from either company; (ii) car manufacturers that install such radios; and (iii) retail radio purchasers. During its investigation, the DoJ had found that customers who had already purchased a system from either of the companies very rarely switched, because the hardware involved is not interoperable and not likely soon to become so. Similarly, the two companies effectively no longer compete to sell factory-installed car radios to automobile manufacturers, because past competition had led them to enter long-term supply contracts with financial discounts. That left only the retail channel of distribution. Although it accounts for a large portion of the companies' sales, the parties claimed that mass-market retail distribution was declining. In any event, the DoJ concluded that a proper relevant market could not be limited to the two satellite radio companies, because of existing competition from alternative sources of audio entertainment, such as traditional radio, MP3 players, and wireless telephones. The DoJ noted some concern that the combined company might profitably raise prices, but found that the companies could not discriminate in prices to target customers for whom one company was the closest substitute of the other, without affecting other customers who would be satisfied by these other alternatives. It found additional comfort in the existence of likely and substantial variable costs savings and in the prospect of technological changes leading to new and improved competitive offerings in the longer term.

In addition to the conclusion about market definition, which surprised some observers, the DoJ's analysis also is notable in several respects:

- the agency considered sales of factory-installed car radios protected from adverse effects by the companies' long-term sales contracts. Although such contracts obviously can form a critical part of the competitive landscape, the merging companies' apparent shift away from mass-market retail distribution toward the factory-installed segment seems to suggest that the merging companies, at least, are in the middle of heightened, not dampened competition for such sales;
- the agency was comfortable with at least some of the proffered 'efficiencies' even though they could not be quantified, notwithstanding the usual requirement to provide verifiable quantification of claimed cost savings.<sup>16</sup> Interestingly, particularly in light of the next point about technological change, the credited savings included reduced costs by consolidating (ie, shutting down one party's) product development efforts; and
- the agency emphasised the likelihood of technological change over the 'longer term' of 'several years' as important to its analysis.

These three aspects suggest that, at least in the current administration, the DoJ is willing to engage in searching analysis of the dynamic realities of contemporary markets.

### **FTC takes a matter in the hands of its one of its own**

On 6 June 2008, two hospital systems in the suburbs of Washington, DC abandoned their planned merger after procedural decisions reflecting a key difference between the powers of the DoJ and those of the FTC.<sup>17</sup> The proposed merger would have combined two hospital systems operating in the Northern Virginia suburbs of Washington, DC. Because of its long experience reviewing hospital mergers, the FTC reviewed this transaction, rather than the DoJ. Finding that Inova Health System already dominated a market for general acute

care in-patient services in the region and would end up with more than a three-quarters share of the market, the FTC decided to challenge the merger. In May 2008, it joined the Virginia attorney general in filing a complaint in federal district court to secure a preliminary injunction to block the merger. Unlike the DoJ, however, which can only act by going to court, the FTC also has the power to issue its own order outlawing a merger after holding adjudicatory hearings in which its staff files and prosecutes a complaint and final decision is made by the Commission. Consequently, as it usually does when challenging a merger, the FTC also initiated such an administrative proceeding against the hospital merger.

In most cases, the FTC's administrative proceeding is overshadowed by the results of the district court's decision on the request for a preliminary injunction. That is because, in most cases, the district judge agrees to an expedited schedule that results in a rapid decision, while the administrative proceeding takes place before an administrative law judge and lasts far longer than the district court proceeding. If the district judge declines to enjoin the merger, then the parties are free to close, subject to the threat of losing the longer-running administrative proceeding, at least in principle. In practice, the court's preliminary injunction proceedings often are decided after a nearly complete airing of the facts and legal theories, and the FTC often abandons its challenge if it loses in court.

In the Virginia hospital merger, however, these usual procedures were not followed, in two respects. First, and very significantly, the Commission appointed one of its own members, Commissioner J Thomas Rosch, to preside over and decide the administrative proceeding.<sup>18</sup> The FTC claimed the authority to designate one of its own members to hear the facts and make an initial determination about the case,<sup>19</sup> but has not done so in recent memory. The merging parties asked Commissioner Rosch to withdraw from the case for various reasons, including that he had participated in the staff's investigation to the extent of having received a (traditional) briefing by the parties and staff prior to the Commission's vote to challenge the merger. He declined, laying out in detail his understanding of the law permitting a sitting commissioner to preside over an adjudication.<sup>20</sup>

The second unusual procedural event was that the district court declined to expedite its consideration of the governments' preliminary injunction request.<sup>21</sup> Most district judges hearing FTC (or DoJ) requests for a preliminary injunction to block a merger agree to some sort of expedited schedule, with limited discovery. This is particularly true for the district court involved in this case, which has a long-established policy of expediting all cases, giving the reputation of keeping a 'rocket docket.' Without a quick resolution of the preliminary injunction, however, the parties could not count on knowing that result before the FTC's administrative proceeding would be concluded, which could easily last two years, based on past cases. As a result of the two unusual procedural decisions, the parties faced greater uncertainty, and they decided to abandon the transaction very soon after the court's scheduling decision.

Merging parties will watch closely to see whether the FTC's decision to designate one of its own members to adjudicate this hospital merger challenge is an aberration or a harbinger of things to come. Certainly the FTC's original order designating Commissioner Rosch was based on very general principles that could apply to mergers in any industry, as was Commissioner Rosch's detailed explanation for refusing to withdraw. Yet again, the FTC may have wanted to reach in directly in this case because of its very mixed record in challenging hospital mergers. In any event, the Commission's decision to reach in sends a strong signal that it is comfortable innovating when it sees a legitimate need to strengthen its enforcement process.

## FTC appeals to improve 2007 court record

Last year, the FTC went to federal district court three times to block mergers it opposed and lost each time. In an effort to rewrite that poor record, it appealed two of those losses this year, with some success so far.

In the first of the two cases, the FTC had challenged the proposed acquisition by Equitable Resources Inc of two natural gas utility subsidiaries of Dominion Resources Inc. In addition to initiating an administrative proceeding, the FTC sought a temporary restraining order in federal district court to prevent the deal. In May 2007, about one year after the deal was originally announced, the court dismissed the FTC's complaint, shortly after (and, indeed, relying upon) the April 2007 decision of the Pennsylvania Public Utility Commission to permit the transaction. The FTC, however, appealed the court decision and sought an injunction pending the appeal, which the Court of Appeals for the Third Circuit granted in June 2007.<sup>22</sup> Meanwhile, the other public utility commission reviewing the merger, that of West Virginia, continued to review the transaction, and the FTC continued its administrative challenge. By January 2008, however, the parties concluded that the continued delays were too much, and they abandoned the transaction.<sup>23</sup>

The second FTC merger challenge revived by an appeal is the acquisition by Whole Foods Market Inc of Wild Oats Markets Inc. The agency had challenged that acquisition in both federal district court and administrative proceedings in June and July of 2007. After winning a temporary restraining order to allow for a more fulsome preliminary injunction hearing in August, the FTC was not able to persuade the district court to block the transaction. Despite incendiary evidence from Whole Foods's own CEO about wanting to remove a head-to-head competitor, the court ultimately rejected the FTC's definition of a 'premium natural and organic supermarket' product market. The FTC immediately appealed and sought an injunction pending appeal, which the Court of Appeals denied. The parties very quickly closed their deal at the end of August 2007.<sup>24</sup> But both the FTC's appeal and its administrative proceeding continued. In a surprising and deeply divided decision nearly one year later, a three-judge panel of the Court of Appeals reversed the district court's decision and remanded to it for further proceedings to determine whether a preliminary injunction should issue after all.<sup>25</sup>

## Policing consent decrees

This past year, the DoJ repeatedly reminded merging parties to keep their commitments when agreeing to divestitures and other conditions in exchange for agency permission to close their deals.

In November 2007, the DoJ secured a US\$2 million penalty from Cal Dive International Inc and its parent, Helix Energy Solutions Group, for their failure to abide by an October 2005 consent decree relating to the acquisition of assets from Stolt Offshore Inc and S&H Diving LLC.<sup>26</sup> That consent decree included a requirement to divest certain assets used to enable deep-sea divers to remain underwater longer and at deeper depths. The DoJ alleged that the merged company delayed the sale of some of these assets, allowing it to profit from increased demand during the cleanup after Hurricane Katrina in the Gulf of Mexico. The court was forced to appoint a trustee to complete the divestiture, and even then, according to the DoJ, Cal Dive sold a key asset in a condition different from that it was in when it acquired it in the transaction. The DoJ therefore asked the court that entered the original consent decree to find Cal Dive and its successor-in-interest, Helix Energy Solutions, in civil contempt for violating the court's decree. According to the DoJ, the US\$2 million civil penalty agreed by Cal

Dive and Helix Energy Solutions represented disgorgement of the profits gained by the delay, plus the DoJ's costs of investigating the violation.

One week later, the DoJ announced a second action to enforce a merger consent decree. In this case, wireless telephone company ALLTEL Corporation agreed to pay US\$580,000 to the US government and \$745,000 to the state of Minnesota for violating a consent decree and a court order relating to its acquisition of Midwest Wireless Holdings LLC.<sup>27</sup> The two orders required ALLTEL to divest wireless businesses in four rural areas in Minnesota and to preserve them pending the sales. The preservation orders included adhering to existing plans for maintenance and capital investments in the four markets and making regular reports to a management trustee about the plans and the capital expenditures. The DoJ alleged that ALLTEL failed to adhere to its capital and maintenance plans and filed misleading reports with the trustee about the plans and their implementation. As in the *Cal Dive* case, the DoJ (and the attorney general of Minnesota) thus asked the court to find ALLTEL in civil contempt.

These two cases reflect the antitrust agencies' vigilance against cheating on consent decrees that resolve merger challenges.

## Conclusion

This past year has seen the president designate a new chair of the FTC, the FTC designate one of its own to preside over an administrative challenge to a hospital merger, and the DoJ pass on a merger of the two main satellite radio companies. It also saw somewhat successful efforts by the FTC to resurrect two failed merger challenges, and very successful efforts by the DoJ to penalise failures by merging parties to abide by consent decrees required to permit their transactions. In other words, another active year.

## Notes

- 1 15 USC, section 18.
- 2 Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), 15 USC, section 18a, as amended, Pub L No. 106-553, 114 Stat 2762 (21 December 2000).
- 3 See FTC, *The FTC in 2008: A Force for Consumers and Competition*, at 8 (28 March 2008) (reporting 2,108 HSR Act filings), [www.ftc.gov/os/2008/03/ChairmansReport2008.pdf](http://www.ftc.gov/os/2008/03/ChairmansReport2008.pdf); DoJ, *Antitrust Division Workload Statistics FY 1998-2007* (reporting 2,201 HSR Act filings received), [www.usdoj.gov/atr/public/workstats.htm](http://www.usdoj.gov/atr/public/workstats.htm).
- 4 FTC, *Performance and Accountability Report Fiscal Year 2007*, at 56 (March 2008), [www.ftc.gov/opp/gpra/2007parreport.pdf](http://www.ftc.gov/opp/gpra/2007parreport.pdf).
- 5 See DoJ, *Antitrust Division Workload Statistics FY 1998-2007*, [www.usdoj.gov/atr/public/workstats.htm](http://www.usdoj.gov/atr/public/workstats.htm).
- 6 See *In re Evanston Northwestern Healthcare Corp*, FTC Dkt No. 9315, (opinion and final order to remedy 2000 merger of two hospitals in Illinois) (28 April 2008), [www.ftc.gov/opa/2008/04/evanston.shtm](http://www.ftc.gov/opa/2008/04/evanston.shtm); *US v Daily Gazette Co*, No: 2:07-0329 (SD WVa, filed 22 May 2007) (complaint challenging 2004 merger of two daily newspapers in Charleston, West Virginia), [www.usdoj.gov/atr/cases/f223400/223469.htm](http://www.usdoj.gov/atr/cases/f223400/223469.htm); *Chicago Bridge & Iron Company v FTC*, No. 05-60192 (5th Cir, 25 January 2008) (upholding FTC's 2005 administrative decision and order that 2001 acquisition violated the Clayton Act).
- 7 FTC Bureau of Competition, *Antitrust Enforcement Activities Fiscal Year 2003 - 29 February 2008*, at 1 (March 2008), [www.ftc.gov/reports/aba/abaspring2008.pdf](http://www.ftc.gov/reports/aba/abaspring2008.pdf).
- 8 Thomas O Barnett, *Current Issues in Merger Enforcement: Thoughts on Theory, Litigation Practice, and Retrospectives* (26 June 2008), [www.usdoj.gov/atr/public/speeches/234537.htm](http://www.usdoj.gov/atr/public/speeches/234537.htm).

- 9 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.
- 10 15 USC, sections 18a and 19(a)(5).
- 11 See FTC, Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 73 Fed Reg 5,191, at 5,192 (29 January 2008).
- 12 See 15 USC, section 18a(a)(2)(A), as revised annually by the FTC.
- 13 See id.
- 14 See 15 USC, section 18a, note entitled 'Assessment and Collection of Filing Fees'.
- 15 DoJ, Statement on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc's Merger With Sirius Satellite Radio Inc (24 March 2008); [www.usdoj.gov/atr/public/press\\_releases/2008/231467.htm](http://www.usdoj.gov/atr/public/press_releases/2008/231467.htm).
- 16 DoJ & FTC, Horizontal Merger Guidelines, section 4 (1992, as amended 1997), [www.usdoj.gov/atr/public/guidelines/hmg.htm](http://www.usdoj.gov/atr/public/guidelines/hmg.htm); see also DoJ & FTC, Commentary on the Horizontal Merger Guidelines (March 2006) ('Efficiency claims that are vague, speculative, or unquantifiable and, therefore, cannot be verified by reasonable means, are not credited'), [www.usdoj.gov/atr/public/guidelines/215247.htm](http://www.usdoj.gov/atr/public/guidelines/215247.htm).
- 17 Statement from Inova Health System and Prince William Health System about the proposed merger (6 June 2008), [www.inova.org/news/2008/inovapwhsmergerstatement.jsp](http://www.inova.org/news/2008/inovapwhsmergerstatement.jsp).
- 18 *In re Inova Health System Foundation and Prince William Health System Inc*, FTC Dkt No. 9326 (9 May 2008) (order designating administrative law judge), [www.ftc.gov/os/adjpro/d9326/080509order.pdf](http://www.ftc.gov/os/adjpro/d9326/080509order.pdf).
- 19 See id at 1 (citing the Administrative Procedure Act, section 556(b)(2); 15 USC, section 556(b)(2); and the FTC's Rules, 16 CFR, section 3.42).
- 20 *In re Inova Health System Foundation and Prince William Health System Inc*, FTC Dkt No. 9326 (29 May 2008) (order certifying respondents' motion to recuse), [www.ftc.gov/os/adjpro/d9326/080529ordercert.pdf](http://www.ftc.gov/os/adjpro/d9326/080529ordercert.pdf).
- 21 *FTC v Inova Health System Foundation*, No. 1:08-cv-00460-CMH-JFA (E.D. Va. 2 June 2008) (oral order denying motion for expedited schedule).
- 22 *FTC v Equitable Resources Inc*, No. 07-cv-00490 (3rd Cir. 21 May 2007) (order enjoining merger pending appeal), [www.ftc.gov/os/caselist/0610140/070601order.pdf](http://www.ftc.gov/os/caselist/0610140/070601order.pdf).
- 23 Equitable Resources Inc, Dominion, Equitable Terminate Agreement for Sale of Peoples, Hope Gas Utilities (15 January 2008), <http://ir.eqt.com/releasedetail.cfm?ReleaseID=287239>.
- 24 Whole Foods Market Inc, Whole Foods Market closes acquisition of Wild Oats Markets, secures \$700 million senior term loan to fund merger and signs new five-year \$250 million revolver (28 August 2007), [www.wholefoodsmarket.com/investor/pr07\\_08-28.html](http://www.wholefoodsmarket.com/investor/pr07_08-28.html).
- 25 *FTC v Whole Foods Market Inc*, No. 07-5276 (DC Cir 29 July 2008), <http://pacer.cadc.uscourts.gov/docs/common/opinions/200807/07-5276-1130154.pdf>.
- 26 DoJ, 'Justice Department settles civil contempt claim against Cal Dive International Inc and Helix Energy Solutions Group Inc' (26 November 2008), [www.usdoj.gov/atr/public/press\\_releases/2007/227959.htm](http://www.usdoj.gov/atr/public/press_releases/2007/227959.htm).
- 27 DoJ, 'Justice Department settles civil contempt claim against ALLTEL Corporation' (3 December 2007), [www.usdoj.gov/atr/public/press\\_releases/2007/228160.htm](http://www.usdoj.gov/atr/public/press_releases/2007/228160.htm).

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

First, Step toe 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 Step toe's experience in defending merger and non-merger investigations in the European Union and elsewhere.

Second, owing to its Washington roots, Step toe has represented clients in many regulated industries. As these industries have been deregulated in recent decades, many have lost their antitrust exemptions and Step toe 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 Step toe'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, Step toe has also increasingly represented clients in state court class actions based on unfair trade practice and consumer protection theories.

Finally, Step toe's white-collar criminal practice has grown to be one of the most significant in Washington. Step toe'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.

# About the Authors



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Kenneth P Ewing is a partner and leader of the antitrust group. Mr Ewing regularly advises US and non-US clients about the antitrust implications of proposed mergers, acquisitions, joint ventures and strategic alliances under the competition laws of the United States and the European Union. He also counsels clients about other business initiatives such as long-term, exclusive or reciprocal supply or distribution arrangements, responses to industry deregulation and antitrust compliance programmes. His antitrust litigation experience includes defending treble damages suits alleging conspiracies under the Sherman Act, investigations by the Federal Trade Commission and US Department of Justice's antitrust division and administrative litigation regarding mergers in regulated industries. Industries of particular focus include international airlines, industrial chemicals, travel reservation systems, express package delivery services, gas and oil pipelines, medical equipment, construction equipment, telecommunications and electric power. Mr Ewing is a member of the International Competition Network's group of private sector advisers. He has served in various leadership positions in the American Bar Association antitrust section including the editorial board of *Antitrust Law Developments* and currently as vice chair of the books and treatises committee. ■