THE MERGER CONTROL REVIEW

NINTH EDITION

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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Chapter 42

UNITED STATES

Ilene Knable Gotts[1]

I INTRODUCTION

In 1976, the United States became the first jurisdiction with a mandatory pre-merger notification requirement when Congress promulgated the Hart-Scott-Rodino Antitrust Improvements Act (the HSR Act) to enhance enforcement of Section 7 of the Clayton Act. Under the HSR Act, the US Federal Trade Commission (FTC or the Commission) and the US Department of Justice's Antitrust Division (DOJ) (collectively, the agencies) receive such notifications concurrently and, through a clearance process, decide which agency will investigate transactions that potentially raise issues under Section 7 of the Clayton Act. The HSR Act provides both a 'size-of-transaction' test and a 'size-of-person' test for determining whether a filing is required. Subject to certain exemptions, for 2018,[2] the size-of-transaction test is satisfied if the acquirer would hold an aggregate total amount of voting securities and assets of the target in excess of $84.4 million. Transactions in which holdings post-acquisition will be valued between $84.4 million and $337.6 million are reportable only if the size-of-person threshold is also met: either the acquiring or acquired person must have total assets or annual net sales of at least $168.8 million, and at least one other person must have total assets or annual net sales of $16.9 million. Transactions valued over $337.6 million are not subject to the size-of-person test, and are reportable unless otherwise exempt.

Important exemptions are provided in the implementing regulations,[3] most notably for (1) acquisitions of goods or real property in the ordinary course of business; (2) acquisitions of bonds, mortgages and other debt obligations; (3) acquisitions of voting securities by an acquirer holding at least 50 per cent of the issuer's voting securities prior to the acquisition; (4) acquisitions made solely for investment purposes in which, as a result of the acquisition, the acquirer holds 10 per cent or less of the outstanding voting securities of the issuer; (5) intra-corporate transactions; (6) acquisitions of convertible voting securities (but not the conversion of such securities); (7) acquisitions by securities underwriters in the process of underwriting; (8) acquisitions of collateral by creditors upon default; and (9) acquisitions involving foreign persons if the assets or revenues involved fall below certain adjusted thresholds that are intended to focus on assets located in the United States or for which there are sufficient sales in or into the United States. Failure to file can result in civil penalties of up to $41,484 for every day that the person does not comply with the HSR Act.

1 Ilene Knable Gotts is a partner at Wachtell, Lipton, Rosen & Katz.

2 The jurisdictional thresholds are inflation adjusted each year. The current thresholds are available at www.ftc.gov/enforcement/premerger-notification-program/current-thresholds.

3 16 CFR Part 802.

The non-reportability of a transaction under the HSR Act does not preclude either the FTC or the DOJ from reviewing, and even challenging, a transaction under Section 7 of the Clayton Act. Nor does the expiry or termination of the HSR Act waiting period immunise a transaction from post-consummation challenge under Section 7. In addition, even in reportable transactions, state attorneys general may review transactions, typically in conjunction with the federal enforcement agency investigating the transaction. Certain industries also require pre-merger approval of federal regulatory agencies. For instance, the Federal Energy Regulatory Commission will review electric utility and interstate pipeline mergers; the Federal Communications Commission will review telecommunications and media mergers; the Board of Governors of the Federal Reserve System will review bank mergers; and the Surface Transportation Board will review railroad mergers.

State public utilities commissions may have separate authority to review telecommunications and utility mergers. Finally, under the Exon-Florio Act, the Committee on Foreign Investment in the United States may review acquisitions by foreign persons that raise national security issues.

II YEAR IN REVIEW

The agencies entered into a number of enforcement actions during 2017.[4] The FTC uniquely possesses the ability to seek a preliminary injunction to block completion of a proposed merger in federal district court and to challenge both proposed and completed mergers in its own administrative proceeding. In addition, the FTC can enter into a binding consent decree with the transaction parties without judicial intervention. In contrast, the DOJ must bring its challenges (and file any consents) in federal district court, with a judge ultimately deciding the case. The duration of the administrative process is sufficiently long that rarely will a pending transaction survive the appeals process. For instance, the FTC's administrative challenge of a completed acquisition by Polypore International, Inc that commenced in September 2008[5] resulted in a March 2010 ruling by the administrative law judge that the acquisition violated the law.[6] The transaction parties appealed the ruling to the full Commission, which held an oral argument on 28 July 2010 and unanimously affirmed the decision on 8 November 2010 (over two years after the challenge commenced); the Eleventh Circuit affirmed the Commission's decision almost two years later (i.e., over four years after it challenged the merger).[7] The US Supreme Court denied *certiorari* in 2013.[8]

During 2017, the FTC continued to have an impressive track record in its federal court activities. The FTC won both of its pending healthcare cases.[9] In June 2017, the FTC filed suit

4 See Ilene Knable Gotts, Antitrust Report 1 (May 2018), for a more detailed discussion of enforcement activities.

5 Press release, FTC, 'FTC Issues Administrative Challenge to Polypore International, Inc.'s Consummated Acquisition of Microporous Products L.P. and Other Anticompetitive Conduct' (10 September 2008), available at www.ftc.gov/news-events/press-releases/2008/09/ftc-issues-administrative-challenge-polypore-international-incs.

6 *FTC v. Polypore International, Inc*, 2010 WL 866178 (FTC, 1 March 2010) (initial decision), available at www.ftc.gov/enforcement/cases-proceedings/081-0131/polypore-international-inc-matter.

7 *Polypore Int'l, Inc v. FTC*, 688 F3d 1208 (11th Cir 2012).

8 *Polypore Int'l, Inc v. FTC*, 12-1016, cert denied (24 June 2013).

9 See press release, FTC, 'Statement from Federal Trade Commission's Bureau of Competition Acting Director on District Court Ruling to Enjoin Advocate/NorthShore Hospital Merger' (7 March 2017),

to block the merger of two fantasy sports sites, DraftKings and FanDuel;[10] a month later, the parties abandoned the transaction. In December 2017, the FTC brought an administrative action challenging Tronox's acquisition of National Titanium Dioxide Company Limited, alleging that the deal would combine the two largest producers of titanium dioxide.[11] That case remains pending. In addition, the FTC challenged in administrative court Otto Bock's consummated acquisition of rival microprocessor prosthetic knee manufacturer FIH Group Holdings d/b/a Freedom Innovations.[12]

In 2017, the FTC entered into 14 consents involving proposed mergers. In the *Walgreens/Rite Aid* matter, in June 2017, the parties abandoned their original deal after almost 20 months of FTC investigation and announced a significantly smaller transaction instead. In a rare split decision by the two seated Commissioners, the restructured transaction was permitted to proceed subject to a further reduction in the number of stores and distribution centres acquired.[13]

At the beginning of 2017, the DOJ had four merger cases pending in district court.[14] The parties abandoned one of these transactions prior to trial[15] and, in the other three, the DOJ prevailed at trial.[16] In September 2017, the DOJ filed a suit challenging the consummated

available at https://www.ftc.gov/news-events/press-releases/2017/03/statement-federal-trade-commissions-bureau-competition-acting; Memorandum of Decision, Findings of Fact, Conclusions of Law, and Order, *FTC v. Sanford Health*, et al; Case No. 1:17-cv-00133-ARS (D.N.D. 15 December 2017) (on appeal).

10 Press release, FTC, 'FTC and Two State Attorneys General Challenge Proposed Merger of the Two Largest Daily Fantasy Sports Sites, DraftKings and FanDuel' (19 June 2017), available at www.ftc.gov/news-events/press-release-/2017/06/ftc-two-state-attorneys-general-challenge-proposed-merger-two.

11 Press release, FTC, 'FTC Challenges Proposed Merger of Major Titanium Dioxide Companies' (5 December 2017), available at https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-proposed-merger-major-titanium-dioxide-companies.

12 Press release, FTC, 'FTC Challenges Consummated Merger of Microprocessor Prosthetic Knees' (20 December 2017), available at https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-consummated-merger-companies-make-microprocessor.

13 See Walgreens press release, 'Walgreens Boots Alliance Secures Regulatory Clearance for Purchase of Stores and Related Assets from Rite Aid' (19 September 2017), available at http://www.walgreensbootsalliance.com/newsroom/news/walgreens-boots-alliance-secures-regulatory-clearance-for-purchase-stores-and-related-assets-from-rite-aid.htm.

14 Press release, US Dep't of Justice, 'Justice Department and State Attorneys General Sue to Block Anthem's Acquisition of Cigna, Aetna's Acquisition of Humana' (21 July 2016), available at www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s; Complaint, *U.S. v. Deere & Co.*, No. 1:16-cv-08515 (N.D. Ill. 31 August 2016), available at www.justice.gov/opa/file/889071/download; Complaint, *U.S. v. EnergySolutions, Inc.*, No. 1:16-cv-01056-SLR (D. Del. 11 November 2016), available at https://www.justice.gov/atr/case-document/file/911051/download.

15 Chelsea Naso, 'Monsanto Drops Planting Unit Deal With Deere A Month Ahead Of DOJ Trial', Law360 (1 May 2017), www.law360.com/articles/919288/print?section=competition.

16 Press release, US Dep't of Justice, 'U.S. District Court Blocks Aetna's Acquisition of Humana' (23 January 2017), available at www.justice.gov/opa/pr/us-district-court-blocks-aetna-s-acquisition-humana. Press release, US Dep't of Justice, 'U.S. District Court Blocks Anthem's Acquisition of Cigna' (8 February 2017), available at www.justice.gov/opa/pr/us-district-court-blocks-anthem-s-acquisition-cigna. Press release, US Dep't of Justice, 'D.C. Circuit Affirms Decision Blocking Anthem's Acquisition of Cigna' (28 April 2017), available at www.justice.gov/opa/pr/dc-circuit-affirms-decision-blocking-anthem-s-acquisition-cigna; *United States v. EnergySolutions, Inc.*, No. 1:16-cv-0156-SER, 2017 WL 2991799 at *20 (D. Del. 13 July 2017), available at https://www.justice.gov/atr/case-document-file/1007831/download.

acquisition of CLARCOR Inc by Parker-Hannifin Corporation.[17] On 18 December 2017, the DOJ entered into a settlement with Parker-Hannifin that required the divestiture of Parker-Hannifin's Facet filtration business.

On 20 November 2017, the DOJ filed suit challenging AT&T Inc's proposed acquisition of Time Warner Inc.[18] Although the agencies have raised antitrust concerns in vertical mergers, these concerns are typically settled by the parties' entering into a consent decree. This time, however, a settlement could not be reached. A six-week trial commenced in March 2018. The district court issued its decision on 12 June 2018, ruling for the defendants. The transaction closed on 14 June 2018. It is unclear whether the DOJ will appeal. Regardless, the case remains important in providing the current DOJ leadership's views toward the efficacy and appropriateness of behavioural remedies.

The DOJ also entered into seven consents involving proposed transactions and into one consent involving a consummated transaction in 2017.

III THE MERGER CONTROL REGIME

Parties may approach the agencies prior to the filing of an HSR Act notification (or, in transactions that are not notifiable but that may raise antitrust concerns, in lieu of filing under the HSR Act), and the agencies can extend confidentiality to any substantive discussions by officially commencing an investigation. In contrast with many other jurisdictions, such consultations are not common prior to the public announcement of a transaction.

An acquisition that is subject to an HSR Act notification may not be completed until the requisite HSR forms have been filed with the agencies and the applicable waiting period has expired or has been terminated early. In most transactions, the acquired and the acquiring parties must file separate HSR forms, and the waiting period will not commence until both parties make their filings. In tender offers, the waiting period commences with the filing of the HSR form by the acquirer.

The initial waiting period is 30 days (or 15 days, in the case of a cash tender offer or bankruptcy filing). If the period expires on a weekend or holiday, then it will be extended until the following business day. At the parties' request, the waiting period can be terminated earlier by the agencies. Technically, the waiting period may not be extended other than by the issuance of a request for additional information and documentary material (second request). In practice, however, the merging parties may withdraw and refile their HSR forms (recommencing the waiting period), agree not to complete the transaction to grant the antitrust enforcement agencies additional time, or agree with the enforcement agency out of court that compliance with the HSR Act will not occur until a further submission is made.

The FTC and the DOJ have concurrent jurisdiction over HSR Act notifications. A clearance process exists between the agencies whereby one of the agencies can get 'cleared' to investigate the transaction. Once an agency is cleared, it can contact the parties (and

17 Press release, US Dep't of Justice, 'Justice Department Files Antitrust Lawsuit Against Parker-Hannifin Regarding the Company's Acquisition of CLARCOR's Aviation Fuel Filtration Business' (26 September 2017), available at https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-against-parker-hannifin-regarding-company-s.

18 Press release, US Dep't of Justice, 'Justice Department Challenges AT&T/DirectTV's Acquisition of Time Warner' (20 November 2017), available at https://www.justice.gov/opa/pr/justice-department-challenges-attdirectv-s-acquisition-time-warner.

third parties) for information relating to the transaction. The agencies have adopted policies to facilitate the investigation of transactions during the initial waiting period, aimed at decreasing the number of transactions in which second requests are issued and developing more precise second requests. The ability to engage in meaningful review of a transaction during this initial waiting period, however, depends on the transaction parties' being willing to provide certain documents and information quickly and voluntarily.

If, prior to the expiry of the initial waiting period, the reviewing agency issues a second request (typically on the last business day of the waiting period), then the clock stops until the transaction parties comply with the second request. Unless terminated earlier or otherwise agreed to by the parties, the second waiting period ends on the 30th day (or, in the case of a cash tender offer or bankruptcy, the 10th day) following substantial compliance with the second request. Again, if the waiting period expires on a weekend or holiday, it is extended to the following business day. In tender offers, the waiting period is determined according to when the acquiring party substantially complies with the second request. It is not unusual for the parties to agree to extend the waiting period in exchange for a dialogue with the agency about the concerns presented, particularly if the parties are willing to resolve any remaining concerns with a consent decree.

In merger investigations, the agencies typically seek information from third parties (competitors, customers, suppliers, etc.) that is relevant to the review of the transaction. The information may be requested or required. Both agencies can also seek interviews or depositions. Generally, the information provided by the merger parties and third parties is not subject to public disclosure. State attorneys general can also review mergers – a process has been in place for about a decade that facilitates their participation in the HSR review. With the consent of the merger parties, the agencies will discuss the information received by them and coordinate their investigations with the state enforcers. Ultimately, if the transaction is challenged, the state attorneys general often, but not always, join with the agency as plaintiffs. In some transactions, the state attorneys general will seek additional relief. State attorneys general sometimes will also require transaction parties to pay 'attorneys' fees' for their review of the transaction as part of the settlement. In addition, US antitrust authorities regularly consult with their foreign counterparts during a merger investigation. Such coordination and dialogue require consent from the transaction parties. The US authorities recently signed a cooperation agreement with China to facilitate such cooperation.

A high percentage of the transactions for which an agency issues a second request will result in some type of enforcement action (i.e., court challenge, consent decree or restructuring). The agencies have a strong preference for structural relief, and require either upfront buyers or short (i.e., 60 to 90 days) divestiture periods. The DOJ will sometimes forgo the need for a consent decree if the merger parties eliminate the potential anticompetitive problems through a voluntary restructuring of the transaction or a sale of assets (a 'fix-it-first' solution). The DOJ also uses 'pocket consent decrees' (decrees that are entered into by the parties and the DOJ but not filed with the court unless either the agency decides that it needs relief or the parties fail to implement the remedy or obtain a regulatory order). These pocket consent decrees can also be used to permit a transaction to proceed before the agency completes its investigation; for instance, in a hostile tender offer situation where the target is uncooperative and seeks to use the HSR review as a means of delay or process denial. Both the FTC and the DOJ permit the transaction to close once they provisionally accept the consent decree and publish it for comment. The FTC approves the final consent decree after the public comment period expires and the staff sends its recommendation to

the Commission; the DOJ files the proposed judgment with a federal district court and seeks approval and entry of the judgment by the judge following the public comment period provided under the Tunney Act.[19]

If the parties and the reviewing agency are unable to reach an agreement that resolves the agency's concerns, then the agency can seek a preliminary injunction from a federal district court to block the transaction's completion. The DOJ can also challenge a completed merger in federal district court. The FTC, regardless of whether it seeks a preliminary injunction, can also challenge a proposed or consummated merger in its own administrative court.

The agencies can challenge a transaction at any time post-consummation. There is no statute of limitations barring the challenge or suspensory effect from the expiration of the HSR waiting periods. State attorneys general can bring challenges as well, on their own behalf or as *parens patriae* of citizens. Private parties can bring challenges, although, in most jurisdictions, the standing requirements may be difficult to meet.

IV OTHER STRATEGIC CONSIDERATIONS

Although providing the state attorneys general with an active role in the HSR review may complicate the process and potentially delay the resolution of the review at the agency, it is generally advisable that transaction parties consent to such a request. Most states have compulsory process authority and, absent the protocol, can issue subpoenas for information, documents and even testimony. States can also bring challenges. Having the states work with the agency eliminates confusion, an additional burden of compliance with requests and potentially diverging outcomes. In some recent DOJ consents and challenges, for instance, state attorneys general joined in the DOJ's decisions.

Similarly, many transactions meeting the jurisdictional thresholds of the HSR Act will also require notification in a number of other jurisdictions.[20] The trend is for the FTC and the DOJ to cooperate with other jurisdictions in reviewing cross-border mergers. In that regard, the US agencies have entered into several bilateral and multilateral cooperation agreements. The agencies have cooperated extensively with Canada, Mexico and the European Commission on several mergers, and this cooperation is likely to continue. Parties should consider agreeing to such cooperation for the same reasons as with the states: to avoid confusion, the burden of compliance with requests and potential diverging outcomes. Such coordination is particularly crucial when remedies are likely to be required that affect assets or businesses in more than one jurisdiction. Even with such cooperation, however, geographic and analytical differences can exist among reviewing jurisdictions. It is more likely that divergence will occur between the established competition authorities (e.g., the United States' and the European Commission's) and the newer competition authorities (e.g., India's and China's).

V OUTLOOK & CONCLUSIONS

From the very outset of the Obama administration, the antitrust leadership of the federal antitrust agencies had a clear objective of influencing antitrust policy and establishing

19 Antitrust Procedures and Penalties Act, 15 USC Sections 16(b)-(h), Section 2(b).

20 See Ilene Knable Gotts, 'Navigating Multijurisdictional Merger Reviews: Suggestions from a Practitioner', *Competition Law International*, 149 (October 2013).

precedent. The FTC and the DOJ issued new horizontal merger guidelines on 19 August 2010.[21] These guidelines marked the first major revision of the guidelines in over 25 years. On 17 June 2011, the DOJ issued an updated policy guide to merger remedies. The merger remedies guide considers not only the components that constitute an effective structural remedy, but also the role of behavioural provisions, particularly in vertical mergers and in transactions involving intellectual property. On 3 February 2017, the FTC released a staff study analysing the effectiveness of certain FTC consents entered into between 2006 and 2012.[22] The report finds that the vast majority of the Commission's remedies protect or restore competition.[23] The study underscored the desirability of structural remedies and upfront buyers. Also, as evidenced in the *Anthem/Cigna* challenge, 'natural' market theories remained in vogue in enforcement challenges to the very end of the Obama administration's term.

The simultaneous district court and administrative court litigation strategy being used by the FTC raises the question of whether there should be different standards for the FTC and the DOJ in merger cases. Section 13(b) of the FTC Act authorises the FTC in a 'proper case' to seek permanent injunctive relief against entities that have violated or threatened to violate any of the laws it administers.[24] The statute provides that an injunction may be granted only 'upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest'.[25] In contrast, under traditional equitable standards, a plaintiff must show a likelihood of success on the merits. The circuit courts have not reached an agreement on what the FTC's burden of proof should be. Reference to a public interest criterion has resulted in some circuits relaxing the standard imposed on the FTC from the traditional equitable standards applicable to the DOJ and other plaintiffs in an injunctive proceeding. There is a bill pending in Congress that would conform the process and standard applied to the two agencies. There are also pending in Congress bills that would potentially radically reform the burdens of proof and standards applied in merger reviews; it is by no means clear that these bills will pass in Congress.

United States antitrust enforcement continues unabated as of the date of this Chapter. United States antitrust agencies' leadership changes have just recently been implemented. Nonetheless, the change in the leadership is expected potentially to result in some policy changes – and enforcement activity – particularly in close calls in which the parties proffer remedies. It is, however, simply too early to tell how significant these changes will be and how long it will be before these changes take place.

21 Press release, US Dep't of Justice, 'Department of Justice and Federal Trade Commission Issue Revised Horizontal Merger Guidelines' (19 August 2010), available at www.justice.gov/opa/pr/2010/August/10-at-938.html.

22 Press release, US Dep't of Justice, 'Lam Research Corp. and KLA-Tencor Corp. Abandon Merger Plans' (5 October 2016), available at www.justice.gov/opa/pr/lam-research-corp-and-kla-tencor-corp-abandon-merger-plans.

23 Press release, FTC, 'FTC Releases Staff Study Examining Commission Merger Remedies Between 2006 and 2012' (3 February 2017), available at www.ftc.gov/news-events/press-releases/2017/02/ftc-releases-staff-study-examining-commission-merger-remedies.

24 15 USC Section 53(b).

25 Id.

Appendix 1

ABOUT THE AUTHORS

ILENE KNABLE GOTTS

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A member of Wachtell, Lipton, Rosen & Katz's antitrust department, Ilene Knable Gotts represents and counsels clients on a range of antitrust matters, particularly those relating to mergers and acquisitions. Ms Gotts began her career as a staff attorney at the Bureau of Competition of the Federal Trade Commission in conduct and merger investigations.

In 1995, Ms Gotts served as the president of the Washington Council of Lawyers. She was the chair of the antitrust and trade regulation section of the Federal Bar Association from 1995 to 1997 and the chair of the antitrust section of the New York State Bar Association from 2005 to 2006.

Ms Gotts is currently a member of the Board of Governors of the American Bar Association, having served as the chair of the ABA Section of Antitrust Law from 2009 to 2010 and in a variety of other leadership positions in the Section, including as the international officer and on the council. Ms Gotts is regularly recognised as one of the world's top antitrust lawyers, including being selected in the 2007 through 2018 editions of *Who's Who Legal*, as one of the top 15 global competition lawyers, in the first-tier ranking of *Chambers Global Guide* and *Chambers USA Guide*, and as one of the 'leading individuals' in PLC's *Which Lawyer? Yearbook*.

Ms Gotts served as the editor of the ABA's treatise on the antitrust merger review process for 25 years, and has had over 200 articles published on antitrust issues relating to mergers and acquisitions and Hart-Scott-Rodino compliance. She is also a frequent lecturer on antitrust topics.

Ms Gotts received her bachelor's degree, *magna cum laude*, from the University of Maryland in 1980, where she was elected to Phi Beta Kappa. Her law degree was awarded, *cum laude*, by Georgetown University Law Center in 1984. She currently serves on the Counsel's Council of Lincoln Center. In 2011, the New York State Bar Association antitrust section awarded Ms Gotts the William T Lifland Service Award for her service to the antitrust bar.

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