THE MERGER CONTROL REVIEW

FOURTEENTH EDITION

Editor
Ilene Knable Gotts

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions such as Malaysia are continuing to consider imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, the international business community had a wake-up call when, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is imperative, therefore, that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file a notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 25 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers and nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard (China having consolidated its three antitrust agencies into one agency in 2018). Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany amended its law to ensure that it has the opportunity to review transactions in which, although the parties' turnovers do not reach the threshold, the value of the transaction is significant (e.g., social media, new economy, internet transactions). Other jurisdictions are also focused on ensuring that acquisitions involving smaller internet, online and data companies or, in other high-technology settings, a nascent competitor, do not escape review.

Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to call in transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability to review and take action in non-reportable transactions (see discussion of *Google/Fitbit* in the International Merger Remedies and Japan chapters), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has adopted potentially the most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. In one such matter, *Illumina/GRAIL*, the EC invited national competition authorities to request a referral of the transaction, even though it did not meet the review thresholds of the EU Merger Regulation or any national merger control rules (in fact, GRAIL had no sales at all in the European Union). At the time of writing, according to reports, the EC has since accepted Article 22 referral requests in three other cases (*Meta/Kustomer*, *Viasat/Inmarsat* and *Cochlear/Oticon Medical*), although in each of these the transaction triggered the national merger control thresholds in at least one EU Member State.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction; however, there are some that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be any effect on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a self-assessment of whether the transaction will meet certain levels and, if so, should notify the agency to avoid a potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Notably, the current leadership at the US antitrust authorities have similarly suggested that their mandate under the antitrust laws is broader than the traditional focus on consumers and consumer welfare to include impact on labour, diversity and other considerations. It is unclear at this point how this shift will affect enforcement decisions and judicial challenges. Although a growing number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that the merger could potentially affect national security.

Some jurisdictions are exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands, where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing firm defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed owing to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even when the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriarche group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing. In 2021, Morocco similarly imposed a fine for failure to notify a transaction in excess of US$1 million.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for late notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the EC both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as gun-jumping, even fining companies that are found to be in violation. For example, the EC imposed a €124.5 million fine on Altice and, in 2023, fined Illumina €432 million for its closing of the *Grail* transaction. Other jurisdictions have become increasingly aggressive in the imposition of fines. Brazil, for instance, issued its first gun-jumping fine in 2014 and later issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively

sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority; however, in Canada – like the United States – the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction; however, the KFTC continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. This list of jurisdictions is illustrative rather than comprehensive and is consistent with the overarching concerns expressed above regarding catching transactions that may have fallen below the radar but are subsequently deemed problematic. In the same spirit, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, it fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based on the size of the transaction; however, some jurisdictions determine the fee after filing or provide different fees based on the complexity of the transaction.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria. Finally, some jurisdictions have developed a fast-track process for transactions that are unlikely to raise antitrust concerns (e.g., because the parties' combined shares of potential relevant markets are all below a certain threshold or because of the size of the transaction). China and the EC are two such regimes in which the adoption of this fast-track process can make a significant difference to the review period.

The role of third parties also varies across jurisdictions. In some (e.g., Japan), there is no explicit right of intervention by third parties but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal; the

Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In other jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). In Hong Kong, the authority has six months post-consummation to challenge a transaction. Norway is also a bit unusual in that the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

In large cross-border transactions raising competition concerns, it is becoming the norm for the US, Canadian, Mexican, EC and UK authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has consulted with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the US Federal Trade Commission and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other

jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have raised the size threshold at which filings are mandated (e.g., Austria), others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an acquisition of control. Many of these jurisdictions, however, will include, as a reportable situation, the creation of joint control, negative (e.g., veto) control rights to the extent that they may give rise to *de jure* or de facto control (e.g., Turkey), or a change from joint control to sole control (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which an interest of only 10 per cent or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the effect that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has material influence (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers have also been the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an acquisition subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that structural remedies are preferable to behavioural conditions, a number of jurisdictions in the past few years have imposed a variety of behavioural remedies (e.g., China, the EC, France, Italy, Japan, the Netherlands, Norway, South Africa, Ukraine and Vietnam). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). Some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers*

transaction, China's Ministry of Commerce remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). It is important to note, however, that one of the areas flagged for change by the new leadership at the US antitrust authorities is the willingness to consider behavioural remedies, or, for that matter, any remedies, rather than bringing enforcement actions to challenge the transaction itself.

In many of the key enforcement regimes (e.g., the United States, Canada, China and the United Kingdom), we are at a potentially transformational point in competition policy enforcement; however, this book should provide a useful starting point in navigating cross-border transactions in this changing enforcement environment.

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July 2023

Chapter 27

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 2023,[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 US$111.4 million. Transactions in which holdings post-acquisition will be valued between US$111.4 million and US$445.5 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 US$222.7 million, and at least one other person must have total assets or annual net sales of US$22.3 million. Transactions valued over US$445.5 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:

a acquisitions of goods or real property in the ordinary course of business;

b acquisitions of bonds, mortgages and other debt obligations;

c acquisitions of voting securities by an acquirer holding at least 50 per cent of the issuer's voting securities prior to the acquisition;

d 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;

e intra-corporate transactions;

f acquisitions of convertible voting securities (but not the conversion of such securities);

g acquisitions by securities underwriters in the process of underwriting;

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2 The jurisdictional thresholds are adjusted for inflation each year. The current thresholds are available at www.ftc.gov/enforcement/premerger-notification-program/current-thresholds (accessed 8 June 2023).

3 16 CFR Part 802 – Exemption Rules.

h acquisitions of collateral by creditors upon default; and

i 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 US$46,517 for every day that the person does not comply with the HSR Act.

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.[4] Nor does the expiry or termination of the HSR Act waiting period immunise a transaction from post-consummation challenge under Section 7.[5] In addition, even in reportable transactions, state attorneys general may review, and even challenge, transactions, typically, but not always, in conjunction with the federal enforcement agency handling the transaction.[6] Certain industries also require pre-merger approval from 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;[7] the Board of Governors of the Federal Reserve System will review bank mergers;[8] and the Surface Transportation Board will review railway mergers.

State public utilities commissions may have separate authority to review telecommunications and utilities 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.

In the United States, there are two agencies that have concurrent jurisdiction over merger review. 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

4 For instance, on 3 January 2020, the Federal Trade Commission (FTC) challenged Axon Enterprise, Inc's May 2019 acquisition of VieVu, LLC. Press Release, FTC, 'FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments' (3 January 2020), available at www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn (accessed 8 June 2023).

5 For instance, in April 2020, the FTC challenged Altria's 35 per cent investment in Juul, even though the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act (the HSR Act) had expired more than a year prior to commencement of the administrative action. Complaint, *In the Matter of Altria Group, Inc.*, FTC Docket No. 9393 (1 April 2020), available at www.ftc.gov/system/files/documents/cases/d09393_administrative_part_iii_complaint-public_version.pdf (accessed 8 June 2023).

6 In the *T-Mobile/Sprint* transaction, 16 state attorneys general unsuccessfully challenged the combination despite the US Department of Justice (DOJ) and the Federal Communications Commission having approved the transaction after lengthy reviews and commitments. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

7 See, e.g., Memorandum Opinion and Order, Declaratory Ruling, Order Proposing Modification, *In the Matter of Applications of T-Mobile US, Inc., and Sprint Corporation*, WT Docket No. 18-197, 34 FCC Rcd. 10578 (2019), available at https://docs.fcc.gov/public/attachments/FCC-19-103A1.pdf (accessed 8 June 2023).

8 See, e.g., Order Approving the Merger of Bank Holding Companies, BB&T Corp., FRB Order No. 2019-16 (19 November 2019), available at www.federalreserve.gov/newsevents/pressreleases/files/orders20191119a1.pdf (accessed 8 June 2023).

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.

II YEAR IN REVIEW

Current enforcement policy is part of a growing broader political consensus that antitrust laws should promote societal goals beyond market efficiencies or consumer welfare, to include labour, privacy, sustainability and equities. To some extent, this new approach is consistent with what competition authorities in other key jurisdictions have adopted.

At the beginning of 2022, the FTC had pending one merger challenge at the appellate court level (which it subsequently won),[9] one merger challenge pending in federal district court (in which the parties abandoned the transaction shortly after the filing of the complaint) and two consummated merger challenges in its administrative court. Rarely has the FTC lost in its challenges before the administrative court, but in 2022, the FTC lost both of the following pending cases: on 15 February 2022, in *Altria/Juul*, which the FTC has now appealed to the full Commission;[10] and on 9 September 2022, in *Illumina/Grail*,[11] which the FTC appealed to the full Commission and, on 3 April 2023, the Commission reversed.[12]

During 2022, the Commission authorised staff to challenge in district court three preliminary injunction cases (with the accompanying administrative court cases) challenging hospital system mergers, each of which resulted in the parties abandoning their deal shortly after the suit was filed.[13] The FTC brought three additional district court cases not involving healthcare: (1) *Lockheed/Aerojet*, a vertical deal in the defence sector in which the parties

9 *FTC v. Hackensack Meridian Health, Inc.*, No. 2:20-cv-18140, 2021 WL 4145062 (D.N.J. 4 August 2021), aff'd, 30 F.4th 160 (3d Cir. 2022).

10 Initial Decision, *In the Matter of Altria Group, Inc.*, FTC Docket No. 9393 (15 February 2022), available at www.ftc.gov/system/files/ftc_gov/pdf/d09393altriainitialdecisionpublic.pdf (accessed 8 June 2023); Complaint Counsel's Notice of Appeal, *In the Matter of Altria Group, Inc.*, FTC Docket No. 9393 (16 February 2022), available at www.ftc.gov/system/files/ftc_gov/pdf/d09393ccnoticeappeal.pdf (accessed 8 June 2023).

11 Initial Decision, *In the Matter of Illumina, Inc.*, FTC Docket No. 9401 (9 September, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf (accessed 8 June 2023).

12 Opinion of the Commission, *In the Matter of Illumina, Inc.*, FTC Docket No. 9401 (3 April 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf (accessed 8 June 2023). The transaction parties have appealed the Commission's decision to the Fifth Circuit. Petition for Review, *Illumina, Inc. v. FTC*, No. 23-60167 (5th Cir. 5 April 2023).

13 Dave Muoio, 'Lifespan, Care New England call off merger following regulatory roadblocks', Fierce Healthcare (24 February 2022), available at https://www.fiercehealthcare.com/hospitals/ftc-rhode-island-move-block-lifespan-care-new-england-merger (accessed 8 June 2023); Press Release, FTC, 'Statement of Bureau of Competition Director Holly Vedova Regarding the Decision of Utah Healthcare Competitors HCA Healthcare and Steward Health Care System to Abandon Their Proposed Merger' (16 June 2022), available at https://www.ftc.gov/news-events/news/press-releases/2022/06/statement-bureau-competition-director-holly-vedova-regarding-decision-utah-healthcare-competitors (accessed 8 June 2023).

abandoned the deal after the suit was filed;[14] (2) *Meta/Within*, in which the FTC narrowed its case to loss of potential competition in the still developing virtual reality marketplace, but then lost the case;[15] and (3) *Microsoft/Activision*, a vertical deal that involves development and publishing of high-end games for gaming systems and online platforms and the effects of the combination on cloud gaming.[16]

Outside litigation, the FTC obtained remedies as a condition for clearance in seven proposed transactions. All the consents provide for divestitures to an identified up-front buyer.

The DOJ began 2022 with three active litigation merger challenges: one involving an alliance (*American Airlines/JetBlue*, which the DOJ argues is tantamount to a merger); a vertical case that included a long-term distribution arrangement (*US Sugar/Imperial Sugar*); and a monopsony case involving top-selling authors (*Penguin/Simon & Schuster*). In all three cases, the DOJ focused on the existence of a small category of top firms, with a competitive moat around them, and the elimination of a rival maverick through the transaction. In these pending cases, the DOJ lost one (*US Sugar*),[17] won one (*Penguin*)[18] and, as at the end of 2022, had the remaining case tried but with a court decision outstanding (*JetBlue*).

In 2022, the DOJ brought four challenges in district court: the parties abandoned one of the challenges soon after it was brought (*Verzatec/Crane*);[19] the DOJ lost two after trial, namely *Booz Allen/EverWatch*,[20] which involved competition over a single contract, and *UnitedHealth/Change*,[21] which involved a remedy to eliminate the horizontal overlap and behavioural safeguards to address vertical theories of harm; and one case, *Assay Abloy/Spectrum*, which remained pending at the end of the year, but ultimately settled during trial. Notably absent after many decades of agency practice, the DOJ did not enter into any consents to resolve concerns in either proposed or consummated transactions.

Both agencies have shown an increased willingness to challenge mergers on potential competition and vertical concerns, particularly in high-technology and healthcare sectors. In addition, monopsony theories, particularly relating to labour markets, are currently at the forefront of the agencies' reviews of mergers.

14 Press Release, Lockheed Martin Corp., 'Lockheed Martin Terminates Agreement to Acquire Aerojet Rocketdyne' (13 February 2022), available at https://news.lockheedmartin.com/2022-02-13-Lockheed-Martin-Terminates-Agreement-to-Acquire-Aerojet-Rocketdyne (accessed 8 June 2023).

15 *FTC v. Meta Platforms, Inc.*, No. 3:22-CV-04325, 2023 WL 2346238 (N.D. Cal. 3 February 2023).

16 Press Release, FTC, 'FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.' (8 December 2022), available at https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc (accessed 8 June 2023).

17 *United States v. United States Sugars Corp.*, C.A. No. 1:21-cv-01644, 2022 WL 4535621 (D. Del. 28 September 2022).

18 Press Release, DOJ, 'Justice Department Sues to Block Verzatec's Proposed Acquisition of Crane' (17 March 2022), available at https://www.justice.gov/opa/pr/justice-department-sues-block-verzatec-s-proposed-acquisition-crane (accessed 8 June 2023).

19 Order, *United States v. Booz Allen Hamilton Inc.*, C.A. No. CCB-22-1603 (D. Md. 11 October 2022).

20 *United States v. UnitedHealth Group Inc.*, -- F.Supp.3d --, 2022 WL 4365867 (D.D.C. 21 September 2022).

21 Complaint, *United States v. ASSA ABLOY AB*, C.A. No. 1:22-cv-02791 (D.D.C. 15 September 2022), ¶ 33.

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, these 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 Act notification has 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 Act notifications, 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 Act notification 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 Saturday, Sunday or public holiday, then it will be extended until the next 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 acquiring party may withdraw and refile its HSR notification (recommencing the waiting period), agree not to complete the transaction to grant the antitrust enforcement agency 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 be 'cleared' to investigate the transaction. Once an agency is cleared, it can contact the parties (and 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' willingness 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 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 Saturday, Sunday or public holiday, it is extended until the next 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 regarding 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 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 will sometimes also require transaction parties to pay 'attorneys' fees' for their review of the transaction as part of the settlement. In addition, the US antitrust authorities regularly consult with their foreign counterparts during a merger investigation. This coordination and dialogue requires consent from the transaction parties.

A high percentage of the transactions for which an agency issues a second request will result in some type of enforcement action (court challenge, consent decree or restructuring). The agencies have a strong preference for structural relief, and require either up-front 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 the consent decree is provisionally accepted and published for public 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.[22]

If the parties and the reviewing agency are unable to reach an agreement that resolves the agency's concerns, 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.

For instance, the FTC's administrative challenge of a completed acquisition by Polypore International, Inc that commenced in September 2008 resulted in a March 2010 ruling by the administrative law judge that the acquisition violated the law. The transaction parties appealed the ruling to the full Commission, which held 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). The US Supreme Court denied certiorari in 2013. Similarly, in the challenge of the September 2017 *Otto Bock/Freedom Innovations* transaction, the FTC brought its administrative challenge in December 2017, the administrative law judge ruled in May 2019 that the transaction violated the law, and the full Commission unanimously affirmed the decision on 30 December 2019. Otto Bock petitioned the DC Circuit to review the Commission's decision, but pending the DC Circuit's

22 Antitrust Procedures and Penalties Act, 15 USC §§16(b)–(h) and 2(b).

decision, agreed to settle with the FTC by divesting Freedom's microprocessor-equipped prosthetic knee business to Proteor on 9 October 2020 (almost three years after the FTC had commenced its challenge).

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 expiry of the HSR Act waiting periods. State attorneys general can bring challenges as well, on their own behalf or as *parens patriae* of their 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 Act 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. Although the *T-Mobile/Sprint* transaction provided an example of where some states may diverge with a federal antitrust agency, in a number of FTC challenges, state attorneys general have joined with the FTC in the matter.

Similarly, many transactions meeting the jurisdictional thresholds of the HSR Act will also require notification in a number of other jurisdictions.[23] 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. Transaction parties should consider agreeing to cooperate for the same reasons as with the states: to avoid confusion, the burden of compliance with requests and potential diverging outcomes. 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, geographical and analytical differences can exist among reviewing jurisdictions. It is more likely that divergence will occur between the established competition authorities (e.g., those of the United States and the European Commission) and the newer competition authorities (e.g., in India and China).

V OUTLOOK AND CONCLUSIONS

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 reviewing merger cases. Section 13(b) of the Federal Trade Commission 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

23 See Ilene Knable Gotts, 'Navigating Multijurisdictional Merger Reviews: Suggestions from a Practitioner', 9 *Competition Law International* 149 (October 2013).

24 15 USC §53(b).

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.

US antitrust enforcement continues unabated at the time of writing. US antitrust agencies have continued actively to investigate and take enforcement actions – through consents and legal challenges – in both proposed and consummated transactions. The matters include vertical mergers, minority interests and acquisitions of nascent or potential competitors. Even prior to the 2020 presidential elections, Congress and the federal antitrust agencies had debated the adequacy and usage of the antitrust laws and enforcement to address broader industry and societal policy objectives. Antitrust was a part of the political debate in the 2020 presidential elections and remains of interest to Congress, the Biden administration and the state attorneys general. The leadership appointments made at both agencies suggest a very active enforcement agenda during the next few years, with some uncertainty in the outcomes until precedent is adopted in some of the areas currently being included as part of merger review.

25 id.