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Merger Control

Third Edition

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CONTENTS

Preface	Nigel Parr & Catherine Hammon, *Ashurst LLP*	
Albania	Elda Shuraja, *Hoxha, Memi & Hoxha*	1
Australia	Peter Armitage & Alice Muhlebach, *Ashurst*	8
Austria	Dr Dieter Thalhammer & Judith Feldner, *Eisenberger & Herzog*	16
Brazil	Ricardo Inglez de Souza, *De Vivo, Whitaker e Castro Advogados*	24
Canada	Randall J. Hofley, Micah Wood & Kevin H. MacDonald, *Blake, Cassels & Graydon LLP*	30
Colombia	Alfonso Miranda Londoño, *Esguerra Barrera Arriaga S.A.*	42
Cyprus	Anastasios A. Antoniou & Aquilina Demetriadi, *Anastasios Antoniou LLC*	47
Denmark	Olaf Koktvedgaard & Erik Kjær-Hansen, *Bruun & Hjejle*	53
European Union	Alec Burnside & Anne MacGregor, *Cadwalader, Wickersham & Taft LLP*	60
Finland	Arttu Mentula & Satu-Anneli Kauranen, *Merilampi Attorneys Ltd.*	75
France	Pierre Zelenko, *Linklaters LLP*	84
Germany	Peter Stauber, *Noerr LLP*	104
Greece	Emmanuel J. Dryllerakis & Cleomenis G. Yannikas, *Dryllerakis & Associates*	112
India	Farhad Sorabjee & Amitabh Kumar, *J. Sagar Associates*	122
Indonesia	Yogi Sudrajat Marsono & HMBC Rikrik Rizkiyana, *Assegaf Hamzah & Partners*	127
Ireland	Helen Kelly & Kate Leahy, *Matheson*	134
Israel	Dr David E. Tadmor & Shai Bakal, *Tadmor & Co.*	142
Italy	Francesco Carloni, *Shearman & Sterling LLP*	152
Japan	Kentaro Hirayama, *Ito & Mitomi*	161
Netherlands	Kees Schillemans & Emma Besselink, *Allen & Overy LLP*	168
New Zealand	Grant David, Neil Anderson & Laura Ashworth, *Chapman Tripp*	175
Nigeria	Folasade Olusanya, Adekunle Soyibo & Oluwaseye Ayinla, *Jackson, Etti & Edu*	183
Norway	Kristin Hjelmaas Valla & Henrik Svane, *Kvale Advokatfirma DA*	190
Pakistan	Hasan Mandviwalla, *Mandviwalla & Zafar Advocates and Legal Consultants*	200
Portugal	António Mendonça Raimundo & Sónia Gemas Donário, *Albuquerque & Associados*	205
Romania	Silviu Stoica & Mihaela Ion, *Popovici Nitu & Asociatii*	214
Singapore	Kala Anandarajah, Dominique Lombardi & Tanya Tang, *Rajah & Tann LLP*	228
Spain	Jaime Folguera Crespo & Borja Martínez Corral, *Uría Menéndez*	235
Sweden	Peter Forsberg & Liana Thorkildsen, *Hannes Snellman Attorneys Ltd*	244
Switzerland	Franz Hoffet, Marcel Dietrich & Gerald Brei, *Homburger*	254
Turkey	Gönenç Gürkaynak & Ayşe Güner, *ELIG, Attorneys at Law*	262
United Kingdom	Nigel Parr & Emily Clark, *Ashurst LLP*	272
USA	Helene D. Jaffe & Alan R. Kusinitz, *Proskauer*	289
Vietnam	Brian Ng, Vu Thi Que & Nguyen Dinh Nha, *Rajah & Tann LCT Lawyers*	302

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Introduction

2013 marked the first full year of the Obama administration's second term. True to his campaign promise made in 2007, the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") (collectively, the "Agencies") continued to "step up review of merger activity and take effective action to stop or restructure those mergers that [were] likely to harm consumer welfare, while quickly clearing those that do not".[1] This chapter reviews the Agencies' merger enforcement activities during 2013.

Overview of merger control activity

The Agencies have overlapping jurisdiction to review mergers and to enjoin those mergers which may substantially lessen competition.[2] In order to avoid the consequences of unwinding a transaction after it closes, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act" or the "Act").[3] The Act and its implementing regulations require the buyers and sellers in certain mergers and in acquisitions of voting securities or assets, including acquisitions of minority holdings, to file premerger notification and wait to close, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale), for government review. The parties may not close the transaction until the waiting period outlined in the Act expires or the Agencies grant early termination. The reporting thresholds adjust each January based on changes to the U.S. grows national product. For 2013, most transactions valued at more than $70.9m were subject to notification. For 2014, the minimum notification threshold increased to transactions where the acquiring party will hold, as a result of the transaction, voting securities and/or assets valued above $75.9m.

Table 1: 2014 HSR Filing Thresholds

Size of transaction	Notification
$75.9m or less	Not required.
Between $75.9m and $303.4m	Required if "size of person" test met, unless subject to an exception.[4] The size of the person test is met: • if the acquiring person has assets or annual net sales of $151.7m and the acquired person has $15.2m in (i) total assets or annual net sales from manufacturing, or (ii) total assets if not engaged in manufacturing; or • the acquiring person has $15.2m in total assets or annual net sales and the acquired person has $151.7m in total assets or annual net sales.
More than $303.4m	Required unless subject to an exception.

Merger notification filings by numbers

The Agencies received approximately 1,350 premerger notification filings during FY 2013, about 5% less than for FY 2012.[5] (As of this writing, FY 2012 is the last year for which complete results are available.) This compares to 1,429 filings for FY 2012 and 1,450 for FY 2011.[6] Of the 1,429 transactions filed in FY 2012, 49, or 3.5%, resulted in the Agencies extending the initial waiting period by seeking additional information, known as a "Second Request". This was fairly close to the historic average and the number of second requests issued in FY 2013 is likewise expected to be within historic norms. Over one-third of all second requests issued were for transactions valued at over $1bn, though several also were issued for transactions valued at less than $100m, indicating that the size of the transaction is an important, but not determinative, factor.

Table 2: Summary of DOJ and FTC merger Activity (2010-2013)[7]

FY	Transactions reported	Combined DOJ/FTC Second Requests Issued	Percentage of DOJ/ FTC Second Requests Issued	FTC Challenged Transactions	DOJ Challenged Transactions
2013	1,350 (est.)			17 (est.)	5 (est.)
2012	1,429	49	3.5%	25	19
2011	1,450	55	3.9%	17	20
2010	1,166	42	3.8%	22	19

The foregoing statistics demonstrate that challenges to mergers and acquisitions are the exception, not the rule. In fact, early termination of the waiting period was requested and granted in the majority of transactions. In FY 2012, early termination was requested in 78% (1,094) of the transactions reported; in FY 2011, early termination was requested in 82% (1,157) of the transactions reported. The percentage of early termination requests granted increased from 77% in FY 2011 to 82% in FY 2012.

HSR rule changes

Two significant rule changes were implemented in 2013. The first rule change formalised a practice called "pull and refile". Under the strict letter of the statute and rules, the reviewing Agency must close its investigation after the initial waiting period or issue a Second Request. Thus, in transactions where the parties are working actively with Agency staff during the initial waiting period to satisfy substantive concerns, the approaching end of the initial HSR waiting period could force the issuance of a Second Request if the Agency were not otherwise prepared to close the investigation. To potentially avoid the need for an extended Second Request investigation, which can last between 4 and 12 months, the Agencies informally allowed the parties to withdraw ("pull") the notification and refile within two business days without having to pay a new filing fee. Upon refiling, a new HSR waiting period begins, allowing the investigating Agency additional time to analyse the transaction. "Pulling and refiling" is thus typically used in transactions that do not have significant antitrust issues, but require more than the initial waiting period (30 or 15 days) to get the Agency what it needs to close its investigation. The practice was formalised under a new rule in 2013. Consistent with the prior informal practice, parties may withdraw their premerger notification filing by notifying the FTC and the DOJ in writing. A new filing fee will not be required as long as the refiling is completed within two business days of the withdrawal. The rule, however, adds a new provision in

the case of tender offers, and deems an HSR filing automatically withdrawn under certain circumstances when the tender offer expires or the deal terminates.

The second new rule expands HSR reporting and waiting period obligations for certain medical, pharmaceutical, biological and botanical manufacturing licences. Under the HSR Act, patent transfers or assignments are treated as asset acquisitions and are potentially reportable. Previously, the transfer of a patent licence was reportable only if it involved the exclusive right to "make, use, or sell" the product covered by the patent, without restriction. Thus, a premerger filing arguably was not required where the licensee was not granted exclusive manufacturing rights. Under the new rule, however, the transfer of exclusive rights to a patent or part of a patent in the pharmaceutical industry is a reportable asset transfer when "all commercially significant rights" are transferred. Such transfers occur even when the licensor retains limited manufacturing rights, such as the right to manufacture patent-covered products for the licensee, or rights to co-develop, co-promote, co-market or co-commercialise the product. According to the FTC, an estimated 30 transactions per year previously not subject to reporting will be captured by the rule change.

HSR rule enforcement

Failure to comply with the HSR Act can result in a maximum penalty of $16,000 per day for each violation. The Agencies brought two HSR enforcement actions in 2013, both for failure to make required filings. The first resulted in a fine of $720,000 and the second resulted in a fine of $480,000. Both cases involved the complicated HSR rules applicable when a company acquires the stock of the target company at two or more different times. The rule in question permits companies to make subsequent stock acquisitions of the same target for up to five years while relying on a previously filed HSR notification. In both cases, a second reportable acquisition of stock was made after the expiration of the five-year grace period, but the acquirers failed to make the required notification of the second stock acquisition.[8]

Key factors in merger investigations

In January 2013, in order to "promote transparency in merger enforcement", the FTC issued "Horizontal Merger Investigation Data Fiscal Years 1996-2011", a staff report analysing the horizontal merger investigations that the Agency conducted during FY 1996 through 2011 (hereinafter "Staff Report").[9] Although the Staff Report does not review investigations by the DOJ, given that both Agencies follow the same Horizontal Merger Guidelines,[10] it provides insight into some of the factors both Agencies found most significant in their review of mergers.

The Staff Report concentrated on 264 merger investigations evaluating horizontal competitive effects during which the FTC Staff issued Second Requests for information. According to the Report, these 264 merger investigations concerned 1,372 markets. The Staff Report compiled data regarding structural variables (*e.g.*, premerger and post-merger concentration, reduction of significant competitors, entry conditions) and qualitative factors (*e.g.*, existence of bad documents, customer complaints) associated with an enforcement action, defined as either a consent decree or a court challenge.[11]

Structural factors

Structurally, the data showed that some enforcement action is likely (between 71%-89%) when the post-merger concentration, as measured by the Herfindahl-Hirschman Index (HHI) of market concentration, is between 2400 and 6900. An enforcement action is far more likely when the change in HHI is more than 300 points.[12] However, changes in HHI have minimal predictive value as the enforcement actions likely are based on a combination

of other factors as well, such as the reduction of the number of significant competitors. A significant competitor is a competitor whose independence could affect the ability of the merged firms to achieve an anticompetitive end (*e.g.*, a close rival or a required participant in a collusive group). Where the number of significant competitors dropped from 4 to 3, some enforcement action occurred in 77% of the markets examined, and when the number of significant competitors dropped from 3 to 2 and 2 to 1, an enforcement action resulted in 89% and 98% of the markets, respectively. Again there was significant variation among industry sectors. An enforcement action resulted in 98% of the pharmaceutical markets that lost a significant competitor. An enforcement action also was very likely when chemical markets (87%) and grocery markets (86%) lost significant competitors. On the other hand, an enforcement action resulted in only 40% of the hospital markets that lost a significant competitor.[13] However, since 2011 when hospital consolidation reached a 10-year high of 86 deals, scrutiny of hospital mergers has become a priority (discussed *infra*). Finally, the Staff Report notes that an enforcement action is highly likely in mergers with three or fewer markets when a significant competitor is lost and entry is difficult.[14] For example, enforcement actions resulted in 92% of the investigations where the number of significant competitors dropped from 2 to 1, 3 to 2, and 4 to 3. By contrast, there were no enforcement actions where entry was deemed easy.[15]

Hot documents and strong consumer complaints

The discovery of "hot documents" and/or "strong consumer complaints" during a second request investigation is highly correlated with some type of enforcement action.[16] The Staff Report defined "hot documents" as "one or more party documents clearly predicting merger-related anticompetitive effects[.]"[17] In analysing the incidence of hot documents in enforcement actions, the Staff Report examined a sample of 186 horizontal merger cases involving only transactions affecting three or fewer markets. The FTC sought a remedy in all but three of the markets where hot documents were discovered. In comparison, the FTC sought a remedy only in 65% of the markets when a hot document was not found. The majority of these enforcement actions occurred in markets with HHIs over 3000 and HHI changes over 500 points.[18]

In mergers involving three or fewer markets, an enforcement action is highly likely to result when the FTC receives a "strong" customer complaint, *i.e.*, "where customers expressed a credible concern that a significant anticompetitive effect would result if the transaction were allowed to proceed".[19] Enforcement actions resulted in 111 of 114 markets where the FTC learned of strong customer complaints. In contrast, when the FTC did not receive strong customer complaints, an enforcement action resulted in only 43% of the markets.

Notable investigations, litigations and consents in 2013

Settlements

US Airways and AMR

2013 witnessed the creation of the world's largest airline, after a merger between American Airlines' parent corporation, AMR Corp. ("American"), and US Airways Group, Inc. ("US Airways") was approved by the DOJ in November 2013.[20] On August 13, 2013, the DOJ, six state attorneys general and the District of Columbia filed a complaint in the U.S. District Court for the District of Columbia to enjoin the merger.[21] The allegations in the complaint made clear that the government believed the proposed $11bn merger had significant anticompetitive effects. According to the complaint, the combination of US Airways and American would result in four airlines controlling more than 80% of domestic

scheduled passenger service.[22] In particular, the complaint highlighted the potential harm to passengers to and from the Washington D.C. area, where the combined firm would have a monopoly over 63% of the nonstop routes served out of Ronald Reagan Washington National Airport.[23] Further, the complaint alleged that the loss of American was not just the loss of a significant competitor, but the loss of a "maverick", a firm that plays a disruptive role in the market to the benefit of customers. The Agencies pay special attention to the potential loss of a "maverick" firm, and the complaint alleged that the merger would eliminate the economic rationale for US Airways' strategic pricing program, "Advantage Fares", a lower-cost option in the market on non-direct flights.[24] The complaint asserted that "Advantage Fares have proven highly disruptive to the industry's overall coordinated pricing dynamic."[25] This disruption would be eliminated because "[t]he merged airline's cost of sticking with US Airways one-stop low price strategy would increase."[26] In sum, "the merged airline would likely abandon Advantage Fares, eliminating significant competition and causing consumers to pay hundreds of millions of dollars more."[27] On November 12, 2013, the DOJ, the state attorneys general and the District of Columbia reached a settlement (subject to court approval) allowing the deal to go forward subject to divestitures of 104 air carrier slots at Reagan National Airport in Washington D.C., 34 slots at LaGuardia Airport in New York, and two gates at each of five other airports.[28]

Anheuser-Busch and Grupo Modelo

In January 2013, the DOJ contested the merger of two non-U.S.-owned beer companies, Anheuser-Busch ("ABI") and Grupo Modelo ("Modelo"). The transaction would have allowed ABI to purchase $20.1bn worth of shares of Modelo that it did not already own.[29] The DOJ complaint alleged that the transaction, if consummated, would increase concentration in an already highly concentrated industry led by ABI and SAB Miller, by combining the largest and third-largest brewers of beer sold in the United States.[30] ABI, the largest beer brewer in the United States, had a 39% market share while Modelo, the third-largest beer brewer, had a 7% market share.[31] Modelo was a maverick in the U.S. beer market as it "aggressively competed head-to-head with ABI in the United States... result[ing] in lower prices and product innovations[.]"[32] The complaint alleged Modelo, as supported by its own documents, constrained the yearly price increases that ABI and MillerCoors annually initiated.[33] The complaint also alleged that Modelo spurred ABI to broaden its product portfolio. ABI launched Bud Light Lime in 2008 to challenge Modelo's Corona brand and its internal documents reveal that ABI also considered launching other brands to compete head-to-head against Corona and other Modelo brands and capture market share among the rapidly growing U.S. Latino population. Finally, the complaint noted that Modelo was building the Piedras Negras brewery, the world's largest brewery, in Mexico along the Texas-Mexico border – a facility that likely would have increased its ability and incentive to compete on price. After a three-month investigation, the parties entered into a settlement agreement that required ABI and Modelo to divest the Piedras Negras brewery and all of Modelo's U.S. brands to Constellation Brands, Inc., located in Victor, NY.[34] ABI and Modelo were required to divest perpetual and exclusive licences to: the Modelo brand beers for distribution and sale in the United States; Modelo's current interest in Crown Imports LLC, the joint venture established by Modelo and Constellation to import, market and sell certain Modelo beers into the U.S.; and "other assets, rights and interests necessary to ensure that Constellation is able to compete in the U.S. beer market using Modelo brand beers" without a relationship with ABI or Modelo.[35] Finally, the settlement required that ABI enter into a supply and transition agreement with Constellation to ensure that Constellation becomes a fully independent competitor.[36]

Successfully litigated cases

FTC v. Phoebe Putney Health System, Inc.

In 2011, the FTC sought to enjoin the merger of two private hospitals, Phoebe Putney Memorial Hospital and Palmyra Park Hospital, in the District Court for the Middle District of Georgia, alleging that the transaction was a merger to monopoly. Both the district court and the Eleventh Circuit Court of Appeals held that, by granting local hospital authorities the power to acquire health care facilities, the Georgia legislature had articulated a clear intent to displace competition in hospital services because it reasonably could have anticipated that such hospital acquisitions could result in a monopoly or other anticompetitive effects.[37] The transaction, therefore, was immune from federal antitrust liability under the state action doctrine. In *FTC v. Phoebe Putney Health System, Inc.*, the U.S. Supreme Court unanimously reversed the Court of Appeals and held that a local hospital authority's general corporate powers were insufficient, on their own, to insulate anticompetitive conduct from federal antitrust liability under the "state action" doctrine.[38] Because the merger between Phoebe Putney and Palmyra Park hospitals already had been consummated and the hospital authority had a surplus of beds, divestiture was not a viable remedy. Therefore, the FTC imposed an unusual behavioural remedy that only requires Phoebe Putney to notify the FTC, in advance, of planned acquisitions for five years and prohibits Phoebe Putney from opposing a competitor's application for a certificate of need (which is required to obtain state hospital licensure) during the next five years.[39]

FTC v. St. Luke's Health System, Ltd.

The FTC's focus on health care during 2013 resulted in its successful challenge to an Idaho hospital system's acquisition of a large primary-care physicians' practice group. In *FTC v. St. Luke's Health System, Ltd*,[40] St. Luke's purchased the Saltzer Medical Group, a 41-physician primary care group, for $28m in a transaction that did not trigger HSR filing requirements. Following a four-week bench trial, the district court found that the acquisition would result in St. Luke's controlling nearly 80% of the adult primary care services market in Nampa, Idaho.[41] The court concluded that "it appears highly likely that health care costs will rise as the combined entity obtains a dominant market position."[42] Among other evidence, the court relied on St. Luke's internal analyses predicting price increases. To remedy the likely anticompetitive effects, the court ordered the divestiture of the Saltzer group from St. Luke's.[43]

Table 3: Hospital Merger Challenges (2011-2013)

Transaction	Agency	Enforcement Theory	Result
ProMedica Health System/St. Luke's Hospital	FTC	Acquisition reduced number of competing hospitals in market for general acute-care inpatient hospital services from 4 to 3, allowing ProMedica to increase bargaining power with commercial heath care plans, which would pass on rates to consumers.	ProMedica forced to divest St. Luke's after FTC, in March 2012, upholds findings of Administrative Law Judge that merger would substantially lessen competition.

Transaction	Agency	Enforcement Theory	Result
OSF Healthcare System/Rockford Health System	FTC	Acquisition gave OSF 64% of general acute-care inpatient services, leaving only one competitor, giving the two systems control of 60% of primary care physician services.	Transaction abandoned, after preliminary injunction issued in April 2012.
Universal Health Services, Inc./Ascend Health Corp.	FTC	Monopoly in the provision of acute inpatient psychiatric services to commercially insured patients in the El Paso/Santa Teresa area.	Divest acute inpatient psychiatric facility in El Paso, Texas/Santa Teresa, NM to Strategic Behavioral Health, LLC.
Phoebe Putney Hospital System/ Palmyra Medical Center	FTC	Merger to monopoly.	Behavioural remedies imposed after U.S. Supreme Court overturns district court dismissal of FTC action.
St. Luke's Health Care System and Saltzer Medical Group	FTC	Acquisition resulted in hospital having 80% of the primary care doctors in relevant market.	Divestiture ordered after trial.

United States v. Bazaarvoice, Inc.

In *United States v. Bazaarvoice, Inc.*, the DOJ successfully challenged Bazaarvoice's already-consummated $168m acquisition of PowerReviews, Inc., a competing online reviews and ratings platform ("R&R").[44] R&R platforms typically are embedded in retailer's websites, allowing consumers to post product reviews.[45] The Northern District of California, following a three-week trial, found that "Bazaarvoice violated Section 7 of the Clayton Act by purchasing its closest and only serious competitor, creating the likelihood of an anticompetitive effect in the R&R market."[46] The court focused on what it described as "overwhelming" evidence of Bazaarvoice's premerger understanding that the acquisition would eliminate a smaller, lower-priced competitor. The court cited numerous pre-acquisition "bad" documents indicating that Bazaarvoice considered the R&R market to be a duopoly, PowerReviews routinely undercut Bazaarvoice's prices, and the elimination of PowerReviews would result in significant barriers to entry.[47] Then, relying on the government's market analysis, the court found that together Bazaarvoice and PowerReviews controlled 68% of the R&R market.[48] At the time of publication, the court had yet to order a remedy.

Consent decrees

The Agencies resolved 18 merger investigation (five of which related to consummated transactions) in 2013. All the consent decrees resolved competitive concerns resulting from horizontal mergers with divestiture orders except for: (i) Honeywell International, Inc.'s acquisition of Intermec Inc., which resolved the competitive concern through Honeywell's agreement to license all of its U.S. patents necessary to make 2D scan engines to Datalogic S.p.A.; and (ii) General Electric Co.'s ("GE") acquisition of the AeroEngine division of Avio S.p.A., a vertical merger resulting in behavioural remedies.

Table 4: 2013 Consent Decrees in Non-Consummated Transactions

Transaction	Agency	Product Market	Remedy
Actavist, Inc./Warner Chilcott PLC	FTC	Four generic pharmaceutical products	Divest Actavis's rights and assets relating to generic versions of Femcon FE, Loestrin 24 FE, Lo Loestrin FE, and Atelvia; also enter into a supply agreement for two years.
Nielson Holdings N.V./ Arbitron Inc.	FTC	National syndicated cross-platform audience measurement services	Divest or license technological assets to an approved buyer.
Honeywell Int'l, Inc./ Intermec Inc	FTC	2D scan engines	License all of the U.S. patents necessary to make 2D scan engines to Datalogic S.p.A.
Mylan, Inc./Agila Specialties Global Pte. Ltd.	FTC	11 generic pharmaceutical products	Divestiture order for 11 generic injectable drugs.
Service Corp. Int'l/ Stewart Enterprises, Inc.	FTC	Funeral homes and cemeteries	Divest 53 funeral homes and 38 cemeteries.
General Elec. Co./Avio S.p.A.	FTC	Engine sales on A320neo aircraft	Agreement not to interfere with Avio's design and development work on accessory gearbox on the Pratt & Whitney PW1100G engine for the Airbus S.A.S. A320neo aircraft.
Tesoro Corp./Chevron Corp	FTC	Terminals for petroleum products	Divest Tesoro terminal in Boise, ID.
Albertson's Supermarkets/United Supermarkets LLC	FTC	Grocery stores	Divest two stores; prohibition of interfering with hiring or employment of current employees in the two stores for one year.
Fidelity Nat'l Financial, Inc./Lender Processing Serv.	FTC	Title information services in Oregon	Divest a copy of LPS's title plants serving 6 counties in Oregon.
Pinnacle Entertainment, Inc./Ameristar Casinos, Inc.	FTC	Casinos in St. Louis and Lake Charles, Ill.	Divest two casino properties.
Cinemark Holdings Inc./ Rave Holdings LLC	DOJ	Movie theatres	Divest 19 theatres where the parties are the other's closest competitors.
Ecolab Inc./Permian Mud Services Inc.	DOJ	Production chemical management services to deepwater wells in U.S. Gulf of Mexico	Divest production chemical management services to Clariant Corp., including exclusive licence to all production chemicals and patents.

Transaction	Agency	Product Market	Remedy
Gannett Co. Inc./Belo Corp.	DOJ	TV stations	Divest interests in KMOV-TV in St. Louis; purchaser not to have any agreements with Gannett concerning the divested station.

Consummated mergers

As noted, only certain large mergers and acquisitions are subject to the notification requirements of the HSR Act. However, the Agencies have concurrent jurisdiction to challenge consummated mergers that may substantially lessen competition even if the transactions were not subject to premerger notification and waiting requirements of the HSR Act. Since the beginning of the Obama administration, the DOJ and the FTC have challenged 20 consummated mergers, compared with just 15 such challenges during the prior administration. In 2013, the Agencies challenged seven consummated mergers and obtained a divestiture remedy in another that had been challenged several years earlier.

Table 5: Challenges to Consummated Transaction 2013

Transaction	Agency	Enforcement Action	Time Between Closing And Complaint	Deal Value
In the matter of Oltrin, LLC and JCI Jones Chemicals, Inc.	FTC	Consent Decree	35 months	$5.5m
In the matter of Charlotte Pipe and Foundry Co. and Randolph Holding Co., LLC	FTC	Consent Decree	33 months	$19m
In the matter of Graco, Inc. (Gusmer Corp.)	FTC	Consent Decree	96 months	$65m
In the matter of Graco, Inc. (GlasCraft, Inc.)	FTC	Consent Decree	60 months	$35m
In the matter of Solera Holdings, Inc.	FTC	Consent Decree	14 months	$8.7m
St. Luke's Heath Care System and Saltzer Medical Group	FTC	Trial	Three months	$16m
Bazaarvoice, Inc. and PowerReviews, Inc.	DOJ	Trial	Seven months	$168.2m
Polypore International and Microporous Products, L.P.	FTC	Trial on February 22, 2010; divestiture approved December 17, 2013	Seven months	$76m

The road ahead

The Agencies' 2014 enforcement priorities are unlikely to substantially deviate from 2013. Accordingly, mergers in the health care, pharmaceutical, and technology sectors will continue to receive heightened scrutiny. The FTC repeatedly has stated that the antitrust laws have an important role in reducing healthcare costs in the U.S., and it will continue to carefully scrutinise the activities of the health care industry.[49] *Phoebe Putney* and *St. Luke's* continued the FTC winning streak against hospital mergers dating back to 2004. The FTC has stated that it views its enforcement role as consistent with the goals of the Affordable Care Act.[50] Likewise, the pharmaceutical industry also will remain in the Agencies' crosshairs. As noted, between 1996 and 2011, the FTC imposed a remedy in 119 out of 122 pharmaceutical markets investigated.[51] In 2013, the FTC imposed divestiture remedies in another 15 pharmaceutical markets. Finally, both the FTC and DOJ will continue to focus on mergers in hi-tech and network industries, as illustrated by the *Bazaarvoice* litigation and the Honeywell/Intermec and Solera Holdings Inc. consent decrees, as well as DOJ's investigation of T-Mobile's acquisition of MetroPCS (which was closed without a remedy). In addition, the Agencies continue to be outspoken concerning the misuse of standard essential patents.[52] For example, although the FTC did not block or seek a remedy relating to Google's acquisition of Motorola Mobility in January 2013, it reached a consent decree with Google under which Google is barred from seeking an injunction against a willing licensee to block the use of any standard essential patents that Motorola had previously committed to license on fair, reasonable and nondiscriminatory terms (FRAND).[53]

Acknowledgment

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* * *

Endnotes

1. Senator Barack Obama, Statement for the American Antitrust Institute (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%20907_09272007 1759.pdf.
2. 15 U.S.C. § 18 (2012).
3. 15 U.S.C. § 18a (2012).
4. The Act and its implementing rules provide numerous exemptions and carve-outs that relate to the location and type of assets underlying the transaction, to business form (*e.g.*, corporations versus partnerships), and to transaction structure. Given the technical nature of the Act, counsel should be consulted to determine whether a filing is required.
5. Final figures for the FY ended September 30, 2013 were not available at the time of publication.
6. Edith A. Ramirez & William J. Baer, Hart-Scott-Rodino Annual Report: Fiscal Year 2012, *available at* http://www.ftc.gov/sites/default/files/documents/reports_annual/35th-report-fy2012 /130430hsr report_0.pdf.
7. *Id*. at Appendix A.
8. Press Release, Dep't of Justice, "Barry Diller to Pay $480,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements" (July 2, 2013), *available at* http://www.justice.gov/atr/public/press_releases /2013/299173.htm; Press Release, Dep't of

Justice, "MacAndrews and Forbes Holdings Inc. to Pay $720,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements" (June 20, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/298792.htm.

9. Fed. Trade Comm'n, Horizontal Merger Investigation Data, Fiscal Years 1996–2011, 1 (Jan. 2013), *available at* http://www.ftc.gov/os/2013/01/130104horizontalmergerreport.pdf [hereinafter *Staff Report*].
10. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010).
11. *Staff Report*, *supra* note 10, at 2.
12. *Id*. at Tables 3.1-3.8.
13. *Id*. at Tables 4.1-4.6.
14. The *Staff Report* defined entry as difficult if the Staff determined that entry would have been unlikely or untimely or insufficient. Staff Report, *supra* note 10, at 5; *see also* Horizontal Merger Guidelines, *supra* note 11, at § 9.
15. *Staff Report*, *supra* note 10, at Tables 9.1-10.2.
16. *Id*. at Tables 6.1-7.2
17. *Id*. at 4.
18. *See Staff Report*, *supra* note 10, at Tables 5.1-5.2.
19. *Id*. at 4.
20. Complaint at 3, *United States v. U.S. Airways Group, Inc.,* No. 1:13-cv-01236 (D.D.C. Aug. 13, 2013).
21. *Id*. at 2.
22. *Id*. at 14.
23. *Id*. at 6.
24. *Id*. at 5.
25. *Id*. at 21.
26. *Id*. at 5.
27. *Id*.
28. Proposed Final Judgment at 5-12, *United States v. U.S. Airways Group, Inc.,* No. 1:13-cv-01236 (D.D.C. Nov. 12, 2013). Although the parties already have consummated the merger, the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (2012) (the Tunney Act), institutes a review period before a final judgment may be entered and the settlement may take effect. During the Tunney Act period, the government must accept, consider, and respond to public comments on the settlement, and a court must determine whether the settlement is in the public interest. If the court, or the government upon further reflection, determines the settlement is not in the public interest, the settlement may be terminated at any time prior to entry of final judgment.
29. Complaint at 8, *United States v. Anheuser-Busch InBev SA/NV,* No. 1:13-cv-00127 (D.D.C. Jan. 31, 2013); Press Release, Dep't of Justice, "Justice Department Files Lawsuit Challenging Anheuser-Busch InBev's Proposed Acquisition of Grupo Modelo" (Jan. 31, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/292096.htm.
30. Complaint, *supra* note 30, at 2.
31. *Id.*
32. *Id.*
33. *Id*. at 3.
34. Press Release, Dep't of Justice, "Justice Department Reaches Settlement with Anheuser-Busch InBev and Grupo Modelo in Beer Case" (April 19, 2013), *available at* http://www.justice.gov/opa/pr/2013/April/13-at-452.html.

35. *Id*.
36. *Id*.
37. *FTC v. Phoebe Putney Health Sys.*, 663 F.3d 1369, 1376 (11th Cir. 2011); *FTC v. Phoebe Putney Health Sys.*, 793 F. Supp. 2d 1356, 1372 (M.D. Ga. 2011).
38. *FTC v. Phoebe Putney Health Sys.,* 133 S. Ct. 1003, 1014-16 (2013).
39. In the Matter of Phoebe Putney Health System, Inc., FTC Decision and Order, Dkt. No. 9348 (Aug. 22, 2013).
40. *St. Alphonsus Med. Ctr. Nampa, Inc. v. St. Luke's Health System, Ltd.,* Case No. 1:12-CV-00560, 2014 U.S. Dist. LEXIS 9264 (D. Idaho Jan. 24, 2014).
41. Findings of Fact and Conclusions of Law at 2-3, Findings of Fact ¶¶ 18, 48, 80, *St. Luke's Health System*, Civ. No. 12-CV-00560 (Jan. 24, 2014) (Dkt. No. 464).
42. *St. Luke's Health System*, 2014 U.S. Dist. LEXIS 9264, at *7.
43. Conclusions of Law ¶¶ 50-62, *St. Luke's Health System*, Civ. No. 12-CV-0560 (Jan. 24, 2014) (Dkt. No. 464).
44. *United States v. Bazaarvoice, Inc.,* Case No. 13-CV-00133, 2014 U.S. Dist. LEXIS 3284 (N.D. Cal. Jan. 8, 2014).
45. *Id.* at *8.
46. *Id.* at *261.
47. *Id.* at *36-60.
48. *Id.* at *116.
49. Maureen K. Ohlhausen, Comm'r., Fed. Trade Comm'n, Keynote Address at the 2013 National Policy Forum America's Health Insurance Plans: "Hospital Consolidation: The Good, The Bad, and the Ugly" (Mar. 13, 2013); *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the S. Subcomm. on Antitrust Competition Policy & Consumer Rights*, 113 Cong. (2013) (Statement of William J. Baer, Assistant Attorney Gen. Antitrust Div.).
50. *See, e.g.*, Julie Brill, Comm'r., Fed. Trade Comm'n, 2013 National Summit on Provider Market Power Catalyst for Payment Reform: "Promoting Healthy Competition in Health Care Markets: Antitrust, the ACA, & ACOS" (June 11, 2013).
51. *Staff Report*, *supra* note 10, at Table 4.5.
52. Renata B. Hesse, Deputy Assistant Attorney Gen. for Criminal and Civil Operations, Dep't of Justice, Remarks as Prepared for the Conference on Competition and IP Policy in High-Technology Industries: "At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement" (Jan. 22, 2014).
53. *See* Press Release, Fed. Trade Comm'n, "Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games, Tablets, and in Online Search" (Jan. 3, 2013).

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