The Mergers & Acquisitions Review

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Mark Zerdin

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PREFACE

While the previous edition of *The Mergers & Acquisitions Review* highlighted some causes for optimism for growth in the M&A market, the resilience of companies has been severely tested in 2020 in light of the covid-19 pandemic. Political uncertainty and economic shifts have taken a back seat to the wide-reaching global effects of the pandemic, which are leaving many jurisdictions and sectors in dire straits.

The figures for the first half of 2020 reflect this, as global deal value fell by 53 per cent and deal volume by 32 per cent (compared with the first half of 2019), while megadeals (over US$10 billion) were down by 48 per cent.[1] The global deal value figure is the lowest half-yearly total since the first half of 2010. The priority for many businesses in the wake of the crisis has been to conserve cash and protect their revenue streams rather than seeking to invest in M&A.

The Americas saw the largest fall in share of global M&A, as its value fell to 33.4 per cent from 52.8 per cent in 2019.[2] The US is facing not only political uncertainty with the upcoming presidential election and protests across the country, but also a sharp decline in economic productivity due to the lockdown enforced by the covid-19 crisis. M&A deal activity in the US fell to lower levels than the 2008 global financial crisis, with higher value deals particularly affected. Despite the bleak figures for the first half of 2020, though, there are signs that some sectors, notably the technology sector, are rebounding. This is perhaps unsurprising as the future of many industries will depend on technology services.

European M&A saw its lowest quarterly value since 2009 in the second quarter of 2020 of just US$83.6 billion. There was also a drop of 30.6 per cent in the value of European M&A in the first half of 2020 when compared with the figures in the first half of 2019. With economies beginning to open up towards the end of the first half of 2020, there are early signs as to where the focus of M&A activity will likely be in the aftermath of the crisis. Private equity buyouts have accounted for almost 20 per cent of deals targeting Europe, up from 18.9 per cent in 2019.[3] In Europe, as in the Americas, the tech sector is continuing to attract interest and reached a total of US$27.8 billion across 477 deals in the first half of 2020. By contrast, the consumer sector has been severely impacted and has fallen to its lowest value since 2009.

Looking forward to the remainder of 2020 and beyond, there are some reasons to be optimistic that the global M&A market will show some signs of recovery. There has already

1 Mergermarket, 'Global & Regional M&A Report 1H20'.
2 ibid.
3 ibid.

been a resurgence since the first half of 2020, with the third quarter seeing 36 deals worth US$5 billion-plus, making it the busiest third quarter on record.[4] The challenges caused by restricted international travel, less physical diligence and almost no face-to-face meetings are, for the most part, being surmounted. It is also anticipated that private equity funds will begin to put their dry powder to use as further clarity emerges on the duration and effects of the pandemic.

I would like to thank the contributors for their support in producing the 14th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 42 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
December 2020

4 *Financial Times*, 'Dealmaking rebound drives busiest summer for M&A on record'.

Chapter 4

UNITED STATES ANTITRUST OVERVIEW

Richie Falek, Neely Agin, Conor Reidy and Johanna Rae Hudgens[1]

I INTRODUCTION

Before reviewing key developments in the antitrust enforcement of M&A in the United States over the past year, it is helpful to begin with some brief background on US antitrust law and process.

Section 7 of the Clayton Act, the primary standard for the competitive review of mergers, acquisitions, joint ventures and other transactions in the US, is deceptively simple.[2] It prohibits M&A where the effect 'may be substantially to lessen competition, or tend to create a monopoly'.[3] The more-than-80 years since the Clayton Act was established, however, have given rise to a litany of case law interpreting this very broad standard. While most of those cases remain nominally good law, many decisions arguably are inconsistent with the continually evolving economic and commercial environment. Indeed, there are many newer industries for which there is little applicable case law: only imperfect analogies that can be drawn from more mature industries.

To help address these issues, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) – the two agencies that share responsibility for competitive enforcement in the US – have issued guidelines to help practitioners better predict the potential risk that a transaction may be challenged.[4] Here, too, however, there are limitations: the guidelines are a decade old and provide only general guidelines pursuant to which the agencies will review a transaction. As a result, many US transactional lawyers take deep, expensive dives into case law and guidelines, only to make inconclusive predictions regarding the likelihood of government opposition to a proposed transaction.

For this reason, it is often a wiser course of action to begin with examining how the DOJ and FTC have treated similar transactions under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act),[5] rather than case law or guidelines. The HSR Act provides the FTC and DOJ an opportunity to review transactions before the parties close the transaction and the proverbial 'eggs are scrambled'. While the HSR Act introduced some delay owing to one or more waiting periods, the result – along with the FTC's and DOJ's enforcement – actually has created tremendous transparency and much higher levels of certainty.

1 Richie Falek, Neely Agin and Conor Reidy are partners and Johanna Rae Hudgens is an associate at Winston & Strawn LLP.

2 Clayton Antitrust Act of 1914, 15 USCA § 18 (West 2018).

3 id.

4 Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (2010).

5 Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 USC § 18a (West 2018).

The FTC and DOJ annually publish detailed statistics regarding the HSR clearance process.[6] Virtually without exception in each year since the passage of the HSR Act, this quantitative analysis demonstrates that the HSR process is fast and almost always results in positive outcomes for parties. As discussed below, this year is no different.

As such, while antitrust litigation is no doubt time-consuming and very expensive, it is very rarely necessary. Having said that, there are various ways in which parties can help ensure a positive outcome from the HSR process.

i Numbers trump case law

Very generally, under the HSR Act, a transaction that exceeds certain value and party-size thresholds requires that each party make an HSR filing and then observe a 30-day waiting period before consummating the transaction.[7] This initial waiting period can be shortened if the parties request and the agencies grant early termination of the waiting period. On the other hand, the waiting period may be lengthened if one of the agencies issues a Request for Additional Information and Documentary Material, or Second Request, which requires a more extensive production of documents, data and interrogatory responses; depositions of individual representatives of the parties; and interviews and document requests issued to relevant third parties such as customers, suppliers and competitors. A Second Request typically will add months to the HSR clearance process.

Once a Second Request is issued, there are three potential outcomes after the parties comply: the reviewing agency can clear the transaction; the parties and the agency can enter into a settlement (consent decree), which typically requires the divestiture of one party's businesses to an approved buyer as a condition of allowing the broader transaction to be consummated; or the agency can seek to block the transaction in federal court for violating Section 7 of the Clayton Act.

Every year, the DOJ and FTC jointly issue statistics covering the HSR process for the prior government fiscal year.[8] The most recently released report, for Fiscal Year 2019,[9] found the following:

a just like the last two years, there were over 4,000 filings;[10]

b 97 per cent of transactions were cleared without a Second Request, within 1 per cent of clearance ratios in the past 10 years;[11]

c most transactions were resolved within the first 30 days, with early termination (typically shortening the period to between 10 to 14 days) granted almost 75 per cent of the time it was requested (down about 5 per cent from the previous year);[12]

6 Federal Trade Commission and Department of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2019 (2019), www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf. The Report for fiscal year 2020 is not yet available.

7 15 USCA § 18a; Premerger Notification Office Staff, HSR Threshold Adjustments and Reportability for 2019, Federal Trade Commission: Blogs – Competition Matters (7 March 2019), www.ftc.gov/news-events/blogs/competition-matters/2019/03/hsr-threshold-adjustments-reportability-2019.

8 Hart-Scott-Rodino Annual Report Fiscal Year 2019, footnote 6.

9 Covering the period from 1 October 2018 to 30 September 2019.

10 id at 25, Appendix B. Both the acquiring and the acquired party must make a separate filing. Thus, these approximately 4,000 filings equate to approximately 2,000 transactions in total.

11 id at 6.

12 id.

d of these thousands of filings, the FTC issued 30 Second Requests and the DOJ issued 31;[13] and
e the agencies issued 18 consent decrees,[14] prosecuted five lawsuits, and 15 transactions were abandoned by the parties.

II STRATEGIES TO INCREASE TRANSPARENCY AND PREDICTABILITY

i Focus on the current competitive landscape

Despite the fact that the overwhelming majority of transactions continue to be cleared, each transaction presents its own facts and circumstances, and thus a positive outcome is not guaranteed. Careful preparation is thus always necessary. Preparation should begin with an assessment of the current competitive landscape gleaned from discussion with the parties, ordinary course documents and public sources. This assessment should include:
a whether and the extent to which the parties compete against one other;
b if the parties compete, for what specific products or services, and in which specific geographies;
c identification of actual and potential competitors and their market shares, as well as the strengths and weaknesses of each;
d whether new competitors recently have entered the market; and
e how likely market entry is in the future.

This assessment of the competitive landscape provides the context to guide the application of past enforcement and case law to the current transaction.

ii Anticipating customer reactions

After assessing the competitive landscape, counsel should then investigate likely customer reaction. The agencies' first substantive step after reviewing an HSR filing often is to contact the parties' top customers to get their perspectives on the transaction. Since these inquiries are not publicly disclosed, and the agencies provide no relevant statistics, it is not possible to precisely gauge the impact of customer reaction on the likelihood of further review.

Nonetheless, it is axiomatic that the antitrust laws are designed to protect competition and customers, not competitors. Thus, it follows that a lack of customer complaints (or, even more so, an indication of favourable customer reaction) will lessen the potential for further review or possible litigation. If no customer is willing to submit an affidavit or testify in court that the transaction will hurt its business, then it will be very difficult for the government to prove that competition or customers are likely to be harmed.

ideally, antitrust counsel should gather this information before the parties execute the underlying transaction agreement so that the parties can make an informed decision regarding what antitrust-related commitments they are willing to undertake. The problem, of course, is that a proposed transaction almost certainly is not public at that point, and direct

13 id at 5.
14 id at 2. While a complaint was filed initiating a lawsuit, a proposed settlement decree was simultaneously filed with each complaint.

customer outreach thus often is not feasible. Nevertheless, counsel should work directly with the parties to gauge customer reactions as best they can. For example, the parties may be able to anticipate likely reactions of key, longstanding customers without asking them directly.

iii Make informed contractual commitments

While there is no guarantee that any transaction will clear the HSR process, a careful analysis of the competitive landscape and possible customer reaction, followed by analysis of past enforcement and case law, helps maximise the possibility of success. It also helps the parties make informed decisions regarding the contractual commitments they will be willing to undertake.

For example, targets typically request a hell or high water provision, most often at the outset of negotiations. Such provisions require an acquirer to divest any assets or to take any action the agencies require (such as licensing intellectual property) to alleviate their antitrust concerns. If counsel's review has indicated that certain assets may be likely to cause antitrust concerns, and those assets are critical to the underlying economics of the transaction, an acquirer will be less likely to make such a commitment. Conversely, if counsel's review has indicated that issues are unlikely, an acquirer will be more willing to agree to a hell or high water provision, perhaps in exchange for a concession on a provision not related to antitrust.

There are numerous other potential provisions that may also arise over the course of negotiations, such as divestiture caps (limiting the dollar amount or type of assets the acquirer is willing to divest) and reverse break-up fees (giving the acquirer the right to pay a fee and abandon the transaction if the agencies' demands are too onerous). Understanding the larger context of the transaction will help both sides more clearly determine their positions on these matters.

III US ANTITRUST ENFORCEMENT: THE YEAR IN REVIEW

There were two trends that emerged in M&A antitrust enforcement this past year: continued resolution of most enforcement actions through negotiated settlements requiring divestitures; and new guidelines for the review and settlement of mergers. In addition, last year marked the first time that the DOJ invoked procedures available under the Administrative Dispute Resolution Act and submitted a legal issue to binding arbitration.

i Negotiated divestiture settlements

Between 1 October 2018 and 30 September 2019, the FTC and DOJ continued to settle a significant number of enforcement actions via negotiated consent agreements that involved partial divestment of one party's business or assets. For example, in a challenge initiated in October 2018, the DOJ, joined by state attorneys general from California, Florida, Hawaii, Mississippi and Washington, filed a complaint in the District of the District of Columbia seeking to enjoin CVS Health Corporation's proposed acquisition of Aetna on the basis that it would substantially lessen the sales of individual Medicare Part D PDP in 16 regions across the US. After extensive public comments and a hearing in open court, a final consent decree was entered ordering CVS Health Corporation and Aetna Inc to divest Aetna's individual prescription drug plan business (PDP) on 4 September 2019.[15]

In another challenge initiated by state and federal government authorities, on 26 July 2019, the DOJ and state attorneys general from Kansas, Nebraska, Ohio, Oklahoma, South Dakota, Louisiana, Florida, Colorado, Arkansas and Texas challenged the proposed merger of T-Mobile and Sprint. The DOJ and states alleged that T-Mobile and Sprint were two of only four national retail wireless mobile service providers in the United States. The complaint alleged that the proposed merger would eliminate one of those four competitors and likely would have incentivised the merged company to compete less aggressively with the other two remaining competitors. Further, the reduced number of competitors in the national market would give the mobile wireless carriers the opportunity to collude and fix prices or otherwise coordinate on promotions and service. The consent decree similarly went through an extensive Tunney Act process and was entered as final judgment on 1 April 2020.[16]

ii Updated Merger Guidelines and proposed rules

In 2020, on the heels of the negotiated divestitures the prior year, the DOJ and FTC released revised Vertical Merger Guidelines. In addition, the DOJ released a revised Merger Remedies Manual, and the FTC announced proposed changes to the implementing rules of the HSR Act. All of these changes, foreshadowed by past antitrust agencies' actions, will change enforcement practices in 2021 and beyond.

In June 2020, the DOJ and FTC released new Vertical Merger Guidelines, which marked the first revision in 35 years.[17] The new Guidelines outline how vertical mergers may result in competitive harm and how federal antitrust agencies evaluate that impact and potential violations of US antitrust law. The Guidelines provide greater transparency into the process used by antitrust agencies, including techniques and main types of evidence used to predict competitive effects. The Guidelines recognise at the outset that vertical mergers often benefit consumers but are not 'invariably innocuous'. Although the Guidelines do not provide bright-line rules to determine whether a vertical merger raises antitrust issues, they do help businesses and antitrust practitioners evaluate potential vertical mergers for potential red flags identified in the Guidelines, including foreclosure, raising rivals' costs, access to competitively sensitive information and increased risk of marketplace coordination.

In September 2020, the DOJ issued the Merger Remedies Manual, which supersedes the 2004 Policy Guide to Merger Remedies.[18] The Manual states that structural remedies are strongly preferred both in horizontal and vertical merger cases because they are 'clean and certain, effective, and avoid ongoing government regulation of the market'.[19] The Manual raises concerns for practitioners and businesses seeking to proffer conduct remedies to

15 *United States et al v. CVS Health Corp and Aetna Inc*, No. 1:18-cv-02340 (DDC 10 October 2018); Hart-Scott-Rodino Annual Report Fiscal Year 2019 at 10.

16 *United States et al v. Deutsche Telekom AG, T-Mobile US, Inc, Softbank Group Corp and Sprint Corp*, No. 1:19-cv-02232 (DDC 26 July 2019); Hart-Scott-Rodino Annual Report Fiscal Year 2019 at 12.

17 Dep't of Justice & Federal Trade Commission, Vertical Merger Guidelines (30 June 2020), available at www.justice.gov/atr/page/file/1290686/download.

18 Dep't of Justice, Merger Remedies Manual (3 September 2020), available at www.justice.gov/atr/page/file/1312416/download.

19 Merger Remedies Manual, Section III.B.

a transaction's antitrust issues. The Manual nonetheless recognises that conduct remedies may be useful in limited circumstances where they are tailored to facilitating structural relief, including temporary arrangements, restriction on the right to compete and firewall provisions. Under the Manual, standalone conduct remedies are only appropriate where, among other requirements, it will completely cure the anticompetitive harm and can be enforced effectively.

Finally, capping off a year of change and revised guidance, on 21 September 2020, the FTC announced a Notice of Proposed Rulemaking that proposes significant changes to the implementing rules of the HSR Act. The proposed changes include the expansion of the definition of 'persons', which, if implemented, would likely require more filings from investment funds. On the other hand, the proposed rules expand the de minimus exemption to allow hedge funds and other investors to hold board seats and otherwise actively participate in the management of the target so long as they continue to hold 10 per cent or less of a target entities' voting securities, but only in limited circumstances. If adopted as written, these proposed changes have the potential to significantly affect the types of transactions that are required to be reported under the HSR Act. The public comment period on the proposed rules ends 20 November 2020.

iii Binding arbitration

Last year marked the first time that the DOJ used binding arbitration to resolve a proposed merger challenge. On 4 September 2019, the DOJ filed suit in the Northern District of Ohio to block Novelis's acquisition of Aleris.[20] The DOJ alleged that Novelis and Aleris were two of only four suppliers of aluminium automotive body sheet in the US and that the proposed transaction would combine approximately 60 per cent of total production capacity and the majority of open capacity. Before the DOJ filed its complaint, the parties and DOJ agreed that the transaction's legality was dependent on whether aluminium automotive body sheet was a properly defined product market. The parties engaged in fact discovery and, after its completion, agreed to submit the issue of product market definition to binding arbitration. After 10 days of arbitration, the arbitrator ruled in favour of the DOJ on 9 March 2020.[21] On 12 May 2020, the DOJ filed a proposed final judgment requiring Novelis to divest Aleris's entire automotive body operations in North America.[22]

Although this arbitration was the first of its kind, the DOJ going forward may again invoke the procedures available under the Administrative Dispute Resolution Act when a party is willing to submit a legal issue to binding arbitration. Practitioners therefore should be aware of and consider the potential time and cost savings in submitting legal issues to arbitration as an alternative to a full trial.

It remains to be seen whether the above trends will continue into 2021; however, practitioners should keep these issues in mind when advising their clients.

20 *United States v. Novelis, Inc and Aleris, Corp*, No. 1:19-cv-02033 (ND Ohio 4 September 2019).

21 Hart-Scott-Rodino Annual Report Fiscal Year 2019 at 13.

22 id.

Appendix 1

ABOUT THE AUTHORS

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Richie Falek, a partner in Winston's New York office, has been lead antitrust counsel in hundreds of domestic and multinational transactions covering myriad industries including numerous multi-billion dollar transactions. He has closed transactions representing more than US$1 trillion in value. Richie's primary goal is to get transactions closed with as little impact and distraction caused by the antitrust process as possible. He takes a holistic approach, overseeing all aspects of a transaction, beginning with the analysis of potential antitrust issues before the transaction is structured, through the negotiation of asset purchase or similar agreements, and then through the completion of the Hart-Scott-Rodino process and any other regulatory approvals. He has extensive experience with the Department of Justice, the Federal Trade Commission, and state and foreign regulators.

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Neely Agin, a partner in Winston's Washington, DC, office, focuses her practice on antitrust and competition matters. She has steered hundreds of transactions through the US and global merger control review process and regularly represents clients in merger and other antitrust investigations by the Department of Justice, the Federal Trade Commission and state attorneys general, as well as in Hart-Scott-Rodino matters. Neely uses her deep experience to counsel clients on a variety of antitrust issues, including distribution restrictions, the formation and operation of joint ventures, trade association activities, information exchanges and pricing practices. She also advises clients in developing, implementing and enforcing global antitrust compliance programmes.

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