GIBSON DUNN

March 21, 2014

2014 ANTITRUST MERGER ENFORCEMENT UPDATE AND OUTLOOK

To Our Clients and Friends:

Over the past year, merger enforcement has continued to be a top priority for antitrust and competition authorities around the world. In the United States, there is new leadership at the helm of the Federal Trade Commission ("FTC") and Department of Justice, Antitrust Division ("DOJ"). The President elevated sitting FTC Commissioner Edith Ramirez to be the Commission's Chairwoman, and Bill Baer completed his first full year as Assistant Attorney General of the Antitrust Division.

These leadership changes have not affected the aggressive antitrust enforcement that the agencies have pursued since the Obama administration took office. DOJ has continued to successfully challenge a number of industry-altering transactions, including US Airways' purchase of American Airlines, and the FTC has maintained its vigorous program to reign in consolidation in the health care provider and pharmaceutical sectors. In Europe, the term of the European Commission's top competition official, Joaquín Almunia, ends in November, but most observers expect his successor to continue to prioritize aggressive merger enforcement while overseeing reform of key aspects of the Commission's merger review process. Elsewhere in the world, antitrust authorities in China, Brazil, Mexico, and other jurisdictions continue to assert themselves in global and local transactions while implementing reforms that favor mandatory waiting periods and, in some cases, prolonged investigations. Companies that plan to pursue global transactions must continue to be well prepared and adopt proactive strategies to confront the increasingly complex and demanding merger enforcement environment.

Gibson Dunn's Antitrust Merger & Acquisition Practice

Gibson Dunn's Antitrust Practice Group has extensive experience representing clients in a broad range of industries on merger and acquisition matters that have been reviewed by enforcement agencies in the U.S., Europe, and other jurisdictions worldwide. Our worldwide Antitrust Practice Group numbers over 100 lawyers located throughout the United States and Europe. In addition, the Antitrust Group works closely with attorneys in Gibson Dunn's other practice groups to provide efficient service for our clients.

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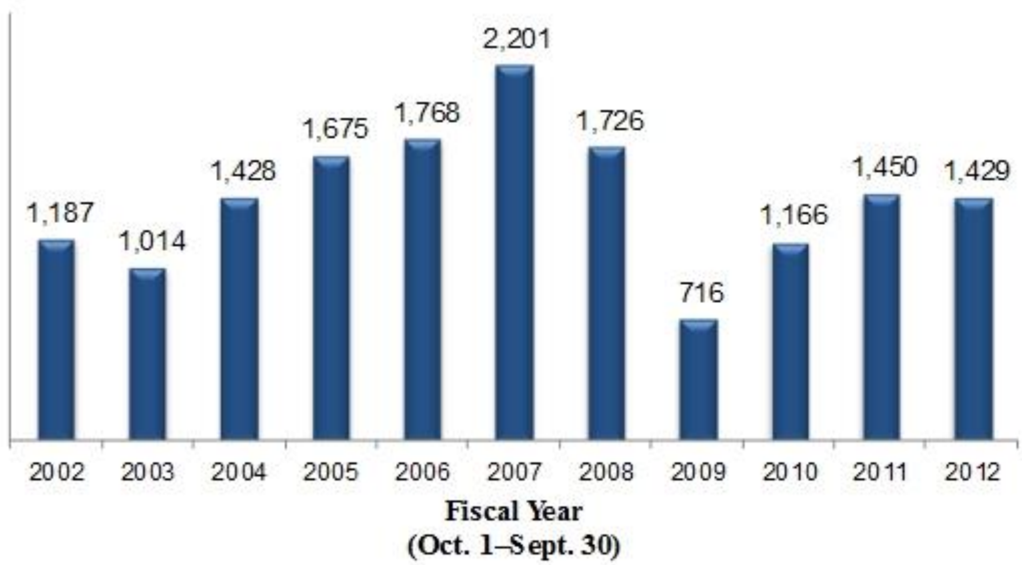
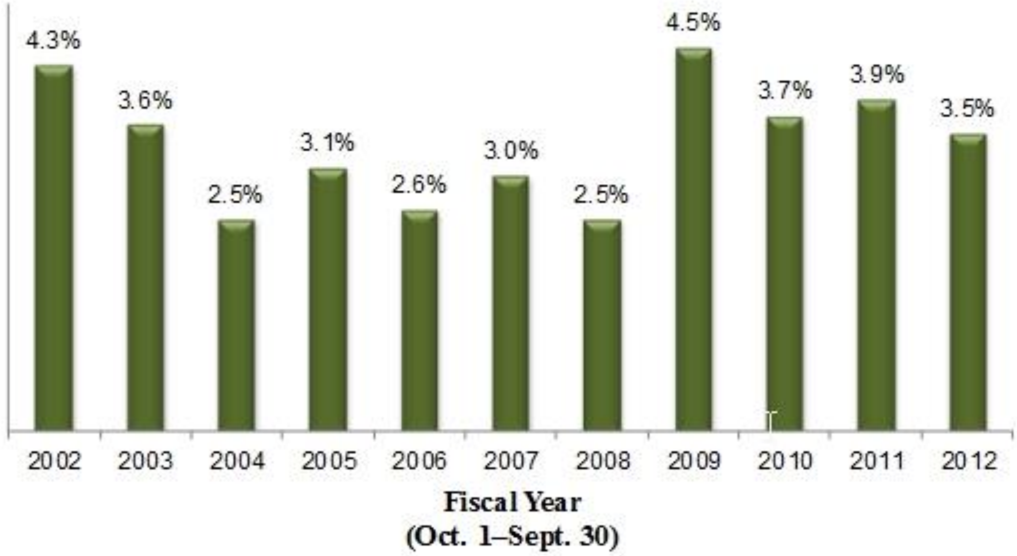
Reportable M&A Transactions Stabilize, but High Enforcement Levels Continue

The volume of mergers and acquisitions subject to the Hart-Scott-Rodino ("HSR") Act declined slightly in FY 2012—and appears to have continued to decline in FY 2013—but the larger trend points to stable volume of HSR-reportable transactions since the 2008 financial crisis. The number of reported transactions doubled between FY 2009 and FY 2011 (from 716 to 1,450), but were relatively stable between FY 2011 and FY 2012. And while official figures are not yet available, it appears likely that FY 2013 HSR transaction volume will be slightly lower than FY 2012.



The FTC and DOJ continue to issue "second requests" (formal requests for information that signal that the agencies will subject a transaction to an in-depth investigation) at an elevated rate. The percentage of HSR Act-reportable transactions subject to a second request was 3.5% in FY 2012, which is slightly lower than the rate in FY 2010 (3.7%) or 2011 (3.9%), but significantly higher than the second request rates during the second term of the Bush Administration (2.5–3.1%). While the agencies have not yet published statistics for FY 2012, we expect that these statistics will show that the agencies continue to issue second requests at the same relatively high rate, although it remains the case that over 95% of HSR-reportable transactions are not subject to a second request. In addition, over the past several years, the FTC and DOJ appear to have increased significantly investigations of "below the radar" transactions to which HSR Act reporting does not apply, a trend that appears to have continued.



Percentage of HSR Act Transactions Resulting in a Second Request FY 2001–2012

Enforcement rates are also somewhat higher than historical levels. Between FY 2006 and FY 2008, the agencies brought an average of 34 merger enforcement actions (i.e., mergers resulting in court challenges, abandonment in response to agency opposition, or agency-demanded divestitures or remedies) per year. By contrast, between FY 2010 and FY 2012, the agencies averaged 41 challenges annually, even though M&A volume was considerably lower. FY 2012 itself saw 44 merger enforcement actions, up from 37 in FY 2011 and the highest number, on an absolute basis, since FY 2000. We expect that the data for FY 2013, when it is published, will show that agencies continue to challenge transactions at a relatively high rate, although, in keeping with the past, the vast majority of HSR Act-reportable transactions are not subject to enforcement.

Second requests also continue to lead to a lengthy investigations and closing delays in many cases. Publicly available information regarding mergers announced in 2012 and 2013 indicates that the median time between the public announcement of a transaction that receives a second request and the end of the second request investigation is approximately six months for the DOJ, and seven months for the FTC (excluding litigated matters). This data is not comprehensive, but does show that the issuance of a second request results in considerable delay for merging parties.

Court Challenges Continue to Take Center Stage in DOJ Merger Enforcement

In 2013, under Bill Baer's leadership, DOJ continued to aggressively investigate and pursue enforcement actions against mergers across major sectors of the economy. Following successful challenges to *AT&T/T-Mobile* and *H&R Block/2SS* in 2011, DOJ won the liability phase of its case against Bazaarvoice's consummated acquisition of PowerReviews and used litigation challenges to negotiate settlements requiring significant divestitures in two major transactions: *US Airways/American* and *InBev/Grupo Modelo*. These mergers and the resulting remedies will have a substantial impact on the merging parties and their respective industries for many years to come. The *US Airways* transaction was particularly notable because it demonstrated DOJ's willingness to depart from its own precedents and bring a comprehensive challenge to the underlying competitive fabric of the airline industry.

These actions also send a strong signal that DOJ will continue to devote substantial resources to litigating merger cases, even where the litigation is settled before trial. DOJ maintains a high-level of litigation readiness, recently adding David Gelfand as Deputy Assistant Attorney General for Litigation. Gelfhand had a fast start, taking on a leadership role on the DOJ's *US Airways* litigation team.

DOJ's Air Attack: United States v. US Airways

Most emblematic of DOJ's aggressive litigation strategy—as well as its evolving views of competition in certain industries—was DOJ's challenge to the $11 billion merger between US Airways Group, Inc. ("US Airways") and AMR Corporation ("American"). Shortly after the merging parties reportedly offered to divest approximately 30 slots at Reagan National Airport in Washington, DC—a remedy similar to the divestiture package that DOJ accepted when it closed its investigation into the United/Continental deal—DOJ sued to enjoin the transaction. On November 12, 2013, a few weeks before trial, the parties settled the DOJ's suit by agreeing to a divestiture package that, while significantly larger than their original offer, focused primarily on Reagan National.

DOJ Alleges Competitive Harm in Concentrated Airline Market Dominated by "Legacy" Carriers

As in past airline merger enforcement cases, DOJ's complaint in US Air/American addressed alleged competitive harms in routes for air passenger service between specific pairs of cities, or "city pairs." The complaint relied heavily on allegations of harm to competition in city pairs where one or both parties offered connecting service (i.e., service between cities involving two or more flights). According to the complaint, American and US Airways competed directly on only seventeen routes where they both offered nonstop flights. But DOJ alleged harm to consumers in over a thousand markets, meaning that 98% of the routes in which DOJ alleged harm to competition involved overlaps where one or both of the parties offered only connecting service.

DOJ also alleged harm in a relevant market for "slots" (government-issued rights to take off and land) at a specific airport. DOJ claimed that US Airways owned 55% of the slots at Reagan National, while American owned 14%. According to the complaint, allowing the post-merger airline to control 69% of the slots at Reagan would harm competition for flights to or from the airport, in part by eliminating head-to-head competition between the parties.

In a departure from its prior airline cases, DOJ claimed the merger would result in widespread, nationwide competitive harm by increasing the airlines' ability to coordinate to reduce capacity, forestall service innovation, and increase fares and ancillary fees, such as fees for checking backs or changing tickets. The complaint painted a bleak picture of an airline industry dominated by a few large "legacy" players, where pricing was transparent and the legacy carriers regularly engaged in coordinated behavior by, for example, using publicly-available price filings as a signaling device to facilitate tacit agreements on fares. Significantly, DOJ alleged that competition from low cost carriers (LCCs), such as Southwest and JetBlue, would not effectively disrupt tacit coordination between legacy carriers because they follow different business models, target distinct customer groups, and do not compete with legacy carriers on a sufficient volume of routes. For these reasons, DOJ characterized the merger as a "four to three" in the sense that only three so-called legacy carriers would remain post-merger (US Airways/American, United, and Delta).

The specific lynchpin of DOJ's theory of competitive harm focused on a prediction that the merger would eliminate US Airways' discounted "Advantage Fares," which would further reduce competition among the legacy carriers. DOJ alleged that, in city pairs in which it only offered connecting service, US Airways attempted to compete with other carriers' non-stop service by offering significant discounts on its connecting service in an effort to entice customers from rivals' non-stop flights. DOJ cited internal documents suggesting the combined airline would discontinue Advantage Fares, ending US Airways role as a disruptive competitor.

The complaint also contained general allegations that the merger would block American's stand-alone expansion plans, which absent the merger would allow American to be an even more effective competitor than it was prior to its bankruptcy. Citing internal documents, DOJ alleged that American planned to emerge from bankruptcy by expanding domestically and internationally (including adding service on nearly 115 new routes). DOJ further argued that the merger would thwart those plans, quoting US Airways documents that suggested that it would replace American's expansion plans with an emphasis on "capacity discipline" in order to prevent other carriers from reacting "with their own enhanced growth plans [that would] destabiliz[e the] industry."

Although the evidence in support of DOJ's claims was not tested at trial, DOJ's complaint heavily relied on the parties' documents and statements—mostly authored by US Airways' senior management—stating that past consolidation had allowed the airlines to reduce capacity, increase fares, and implement ancillary fees.

Analysis: Viability of DOJ's Nationwide Competitive Effects Theories

DOJ's complaint has been criticized on a number of grounds. Among its more controversial allegations was DOJ's claim that the merger would enhance the ability of legacy carriers to coordinate fares and fees a nationwide basis, leading to higher prices for consumers. DOJ appeared to have abandoned nationwide competitive effects theories in recent years, focusing instead on city pairs (or in some cases, airport pairs) where the merging parties offer competing nonstop routes. Most notably, DOJ declined to challenge the 2010 merger between United Airlines and Continental Airlines, citing the fact that the transaction would "result in overlap on a limited number of routes where United and Continental offer competing nonstop service." DOJ's public statement did not mention nationwide competitive effects. And in 2008, DOJ closed its investigation into the merger of Delta Air Lines and Northwest Airlines, again without mentioning the possibility for nationwide competitive effects.

DOJ officials have also repeatedly rejected the concept of a nationwide airline market, stating, for example, that "[i]f all carriers flying Washington to Myrtle Beach merge and raise prices, the passenger cannot turn to American Eagle's Buffalo service or Horizon's Santa Barbara-Portland service for a competitive alternative." In addition, any nationwide airline market may not be highly concentrated: in the private litigation regarding the US Airways/American merger, defendants' expert concluded that, post-merger, a nationwide airline market would be moderately concentrated (HHI of 1768).[i]

The Airlines Settlement

Two weeks before trial, DOJ announced it had reached a settlement with the parties, ending the litigation. The settlement requires American and US Airways to divest 104 carrier slots at Reagan National, 34 slots at New York's LaGuardia Airport in New York, and two gates (and associated ground facilities) each at Chicago's O'Hare International Airport, Los Angeles International Airport, Boston Logan International Airport, Miami International Airport, and Dallas Love Field. Preliminary reports indicate that the majority of the slots will likely be sold to LCCs like Southwest and JetBlue. According to DOJ, entry by LCCs has proven to be more effective constraint on legacy carriers' pricing than entry by other legacy carriers.

Critics argue that DOJ's position with respect to the settlement is difficult to square with the sweeping allegations in its complaint. The majority of the slot divestitures relate to Reagan National (and, to a lesser extent, LaGuardia), with less significant divestitures at other airports, while the complaint included allegations of nation-wide harm. On the surface, the remedy appears to ignore the alleged competitive harms to passengers flying on dozens of city-pairs that do not include Reagan or LaGuardia.

The settlement, however, likely reflects recognition by both sides that DOJ's allegations of harm relating to Reagan and LaGuardia were stronger than those relating to nationwide coordination. As discussed, DOJ's litigation theory was challenging because it relied heavily on the allegations that the merger would lead to nationwide harm, a departure from DOJ's own precedents in airline mergers. In contrast, DOJ's allegations of anticompetitive effects in markets involving Regan National or LaGuardia are much more conventional. At least according to a GAO report, the merging parties competed on a non-top basis on three routes involving Reagan or LaGuardia. They were the only competitors on two of the three routes; on the third route, they had roughly 90% of the market. Moreover, both airports are subject to slot constraints, while Reagan was also a US Airways hub, suggesting that the existence of entry barriers might have made competitive harm more likely.

DOJ Prevails in District Court Decision Relating to Bazaarvoice's Acquisition of PowerReviews

While negotiating its settlement with the airlines, DOJ was litigating in California in connection with its challenge to Bazaarvoice's consummated acquisition of PowerReviews. Bazaarvoice and PowerReviews both sold online ratings and reviews ("R&R") platforms, which are comprised of software and services that manufacturers and retailers use to collect, organize, and display consumer-generated product reviews and ratings online. Bazaarvoice acquired PowerReviews on June 12, 2012 through a transaction that did not trigger the HSR Act's reporting requirements. DOJ later opened an investigation and filed suit on January 10, 2013. After a bench trial, Judge Orrick found that the merger violated Section 7 of the Clayton Act.

The court concluded that the relevant market is the sale of R&R platforms in the United States. According to the court, other "social commerce" products—such as forums, blogs, and social networks—cannot be included in the market because they "serve a different purpose than R&R and are not substitutes for R&R." R&R "provides potential consumers with product-specific feedback from other consumers at the point of purchase" while other social commerce products "are often focused on brand advertising rather than driving the sale of individual products."

The court also rejected Bazaarvoice's argument that the market should include rapid entrants like Google or Facebook, as well as a number of other competitors that provide R&R services. According to the court, "no rapid entrants [were on] the horizon" and "all remaining R&R companies are substantially weaker than PowerReviews." The court did, however, determine that in-house R&R platforms provide "an option for customers that are not interested in the full feature set offered by Bazaarvoice," and certain other customers.

Based on this market definition, the court found that post-merger Bazaarvoice's market share was "significantly above the Merger Guidelines' thresholds," invoking "the presumption that the transaction would significantly reduce competition." The Court noted that "[t]he data that exist regarding this market are imperfect" but concluded that the government's proffered measures for market share "each . . . revealed the same basic market structure: Bazaarvoice and PowerReviews are the two largest companies; a significant number of customers choose in-house solutions; and there are some small fringe competitors with very little market share." For example, according to data from the Internet Retailer 500, Bazaarvoice allegedly had a pre-merger share of 40%, while PowerReviews had a 28% share, and in-house solutions comprised 28% of the market. The court found that, under this measure, the merger increased the market's HHI from 2674 to 3915.

The court then determined that "[t]he merger of Bazaarvoice and PowerReviews is likely to result in significant anticompetitive unilateral effects." According to the court, "win/loss data in Bazaarvoice's Salesforce database" and "data compiled from 'how the deal was done emails' created by Bazaarvoice sale people" support the theory that "the merger will result in significant unilateral effects for customers that viewed Bazaarvoice and PowerReviews as the most attractive suppliers of R&R platforms." The court concluded that "Bazaarvoice can effectively price discriminate against such customers because it collects detailed information about a customer's requirements and budget constraints during the sales process."

Finally, the court noted that "[s]ome maintain that antitrust law is ill-suited to . . . dynamic markets" where "market power is transitory" and intervention could "undermine[] high-tech innovation." It concluded, however, that "[i]t is not the Court's role to weigh in on this debate . . . while Bazaarvoice indisputably operates in a dynamic and evolving field, it did not present evidence that the evolving nature of the market itself precludes the merger's likely anticompetitive effects."

While the value of the transaction was relatively small, DOJ's litigation win is significant. It demonstrates that the agency remains willing to bring "full-stop" litigation challenges in fast-moving technology markets. In addition, the case is DOJ's first merger case in the Northern District of California since the agency decisively lost its challenge to Oracle's acquisition of Peoplesoft in 2004. Merging parties in technology deals had often used Judge Walker's opinion in the *Oracle* case to try to deter DOJ from bringing cases in the Northern District and elsewhere. DOJ will no doubt view Judge Orrick's decision as a useful counterbalance to the *Oracle* opinion when it evaluates future challenges to California-based technology companies.

DOJ Settles with Anheuser-Busch InBev and Grupo Modelo

As reported in the 2013 update, DOJ challenged the Anheuser-Busch InBev ("ABI")/Grupo Modelo ("Modelo") transaction and filed a civil complaint on January 31, 2013 in the U.S. District Court for the District of Columbia seeking to enjoin ABI's proposed acquisition of Modelo.

DOJ's Allegations

DOJ alleged that the merger "threatens competition by combining the largest and third-largest brewers of beer in the United States." According to DOJ, even though ABI already had a partial ownership interest in Modelo, Modelo functioned as an independent competitor.

In an attempt to address the potential antitrust concerns, the parties offered a proposed remedy and announced that they had agreed to sell Modelo's 50% stake in Crown Imports LCC ("Crown"), an importer that sells Corona and other Modelo beer brands through the United States, to Constellation Brands Inc. ("Constellation"), which owned the other 50% in interest in Crown. ABI also contracted to provide Modelo-branded beer to Crown for import and sale in the United States under a 10-year supply agreement. However, DOJ rejected this proposed remedy, asserting in its complaint that the proposed agreement merely created a "façade of competition between ABI and its importer" (Crown). Because Crown would not have its own brewing facilities, Crown would be "fully dependent" on ABI for its supply of beer and would essentially be a "business partner" rather than a competitor.

The ABI/Modelo Settlement

DOJ announced on April 19, 2013 that it had reached a settlement with ABI. The settlement was approved by Judge Richard Roberts of the U.S. District Court for the District of Columbia in October. According to DOJ, the settlement—unlike ABI's initial proposal—"will create an independent, fully integrated and economically viable competitor to ABI." Under the terms of the settlement, Modelo was required to divest its entire U.S. business—including perpetual licenses of Modelo brand beers, its most advanced brewery, and its interest in Crown—to Constellation (or to an alternative purchaser if the transaction could not be completed with Constellation). In addition to DOJ's insistence on this divestiture, the settlement also included additional "conduct" restrictions designed to complement the structural remedy. The settlement is conditioned on Constellation expanding the capacity of the brewery it is acquiring, and sets milestones for this expansion. By requiring ABI to include a brewery as part of the divestiture and that Constellation expand the brewery, DOJ hopes to ensure that Constellation will ultimately not be reliant on ABI for any of its brewing needs, and thus will be an effective and independent competitor. Finally, the settlement requires ABI to enter into interim supply and transition agreements with Constellation, and imposes certain conduct obligations on ABI with respect to the distribution of Modelo brands over the next three years.

This settlement demonstrates that DOJ will continue to demand structural relief to address the potential anticompetitive effects of horizontal mergers, but also reflects DOJ's continued willingness to use conduct or behavioral provisions to complement a structural remedy. The ABI settlement is particularly noteworthy because DOJ accepted behavioral provisions that required Constellation, a non-party to the merger, to take certain specified actions. Thus, while merging parties should continue to anticipate that any settlement addressing a horizontal competitive concern will require structural relief, they should also recognize that DOJ may demand additional behavioral restrictions. The ABI settlement also shows the inherent risk of offering a remedy up-front, as DOJ may reject the proposed remedy and instead use it as the starting point for negotiating a much harsher remedy package.

Cinemark Acquisition of Rave Theatres

On May 20, 2013, DOJ simultaneously filed a complaint challenging Cinemark Holding Inc.'s ("Cinemark') acquisition of Rave Holdings, LLC ("Rave") and a proposed final judgment whereby Cinemark and Rave consented to the divesture of 19 movie theatres in order to satisfy DOJ's concerns regarding the transaction. In the complaint, DOJ alleged that the acquisition would reduce competition for first-run, commercial movies in four geographic markets. Notably, in addition to requiring Cinemark and Rave to divest theatres in these four geographic markets, DOJ also required the founder and Chairman of Cinemark to completely divest his ownership interest in Movie Tavern Inc.—which operated 16 theatres, only four of which were located in the four relevant geographic markets. Thus, this settlement shows that DOJ may require parties to provide significant divestitures to avoid litigation, and in some cases the remedy may include alleged overlaps relating to the ownership interests held by key executives.

Gannett's Acquisition of Belo Corp.

Also significant is DOJ's decision to require a remedy addressing the alleged competitive harm from Gannett Co, Inc's ("Gannett") acquisition of Belo Corp. ("Belo"). Both companies own and operate local broadcast television stations; Gannett owned 23 stations, while Belo owned 20. According to the DOJ complaint, the companies owned two of the top three stations in the St. Louis Designated Market Area ("DMA"). Federal Communication Commission regulations barred Gannett from operating both stations in the St. Louis DMA, so it had previously agreed to sell the station (along with five others) to a third party, Sander Holdings Co., LLC ("Sander"). However, the contract between Gannett and

Sander included an option agreement that allowed Gannett to re-acquire the station, should the FCC's regulations be eliminated; a shared services agreement, under which Gannett would have provided a variety of services to help Sander operate the station; and a financing guarantee obligating Gannett to repay the $101 million loan Sander would have obtained to purchase the station, if Sander were to default. According to DOJ, these provisions reduced the incentive for Sander and Gannett to compete in the St. Louis DMA. DOJ's proposed consent decree requires Gannett to divest the St. Louis station to a third party without including provisions similar to those in the Gannett-Sander agreement.

DOJ described the relevant market as the market for the sale of broadcast television spot advertising. According to DOJ, cable and satellite television advertising and advertising are not used "as a substitute for broadcast television, but rather to supplement a broadcast television message"; similarly, advertising associated with online video distributors like Netflix or Hulu is allegedly "not currently a substitute for broadcast television spot advertising." According to DOJ, online video distributors "lack[] the reach of broadcast television spot advertising," because they reach fewer homes in any given market.

This analysis is notable because DOJ continues to reject the argument that cable, satellite, and online video advertising compete with broadcast television or local (including spot) advertising. DOJ's position may eventually seem anachronistic as the marketplace evolves and consumers continue to shift from television to online entertainment, but for now the enforcement action is a clear signal that DOJ will continue to closely review broadcast television mergers. In fact, in its 2011 Comcast/NBC Universal complaint, DOJ recognized that online video distributors compete in the same market as cable and satellite television companies. DOJ could argue that each case is different; perhaps because online video competes more closely with cable than with broadcast television. But together, Comcast/NBC Universal and Gannett/Belo confirm that in the future, DOJ will need to carefully assess the competitive relationship between online video advertising and traditional broadcast television.

The Federal Trade Commission

There have been significant leadership changes at the FTC over the past year, both at the Commission and Director levels. In 2013, Commissioner Edith Ramirez was elevated to Commission Chairwoman following the departure of Chairman Jon Leibowitz, and Joshua D. Wright replaced retiring Commissioner Tom Rosch. In addition, President Obama nominated Terrell McSweeny, former Deputy Chief of Staff for Vice President Biden and White House domestic policy advisor, to fill the remaining vacant seat on the Commission. Ms. McSweeny is currently Chief Counsel for Competition Policy at the Antitrust Division. We expect Ms. McSweeny will be confirmed by the Senate shortly, and once confirmed she, along with Chairwoman Ramirez and Commissioner Brill, will form the Commission's three-member Democrat majority. Commissioners Wright and Olhausen (nominated to the Commission by Obama in 2011 and 2012, respectively) are the two Republican Commissioners.

Shortly after her appointment as Chairwoman, Chairwoman Ramirez named Debbie Feinstein to succeed Rich Feinstein (no relation) as Director of the Bureau of Competition and in September appointed Steve Weissman to fill the Deputy Director vacated by Pete Levitas' departure. In addition, Chairwoman Ramirez appointed Marty Gaynor, a health care economist who will replace Howard

Shalansky as the Director of the FTC's Bureau of Economics (Dr. Shelansky left the FTC in July for a post in the Office of Management and Budget).

Ms. Feinstein was previously in private practice and is known for her expertise in agency merger review. Ms. Feinstein's resume also includes prior FTC service as an Assistant to the Bureau of Competition Director and Attorney Advisor to Commissioner Dennis Yao. Although there is new leadership, we anticipate little substantive change in the Bureau's relatively aggressive enforcement program under the Obama Administration, with the potential exception of tighter mooring to the analytical methods outlined in the Horizontal Merger Guidelines. In addition, Ms. Feinstein is proving to be deeply engaged in the substance of investigations at relatively early stages, which signals greater consistency across the Bureau in terms of its investigative practices and slightly more sensitivity to the substantial burdens associated with second request and civil investigative demand compliance.

Thus far, Ms. Feinstein has been vocal regarding her views that negotiated remedies are a critical component of the agency's merger enforcement program, and that transacting parties should approach the agency early in the review process if they wish to propose a remedy. In a recent speech, Ms. Feinstein called negotiated remedies "every bit as important in preserving competition and protecting consumers as are our successful litigation efforts," and urged parties to consider past consent orders, including the Analysis in Aid of Public Comment documents published by the Commission, for insight into the Commission's approach.

Heath Care Services Remain a Key FTC Focus

Building on its litigation victories in *Phoebe Putney* (Supreme Court case holding that state action doctrine did not immunize hospital merger from antitrust scrutiny), *OSF/Rockford* (injunction blocking a merger of competing hospitals), and *ProMedica/St. Lukes* (injunction blocking a hospital merger), the Commission has continued to be very active policing health care merger activity.

The Commission scored another litigation victory against a transaction between health care providers after it joined a private action to successfully break up St. Luke's Health System's acquisition of a large multi-specialty physician group. *St. Luke's* reflects the FTC's willingness to invest substantial resources policing relatively small transactions that it believes produce high market shares and the skepticism with which it views efficiency claims premised on higher quality and lower costs through integrated delivery models. The FTC also filed a complaint to enjoin Capella's proposed acquisition of Mercy Hot Springs, two hospitals serving Hot Springs, Arkansas, which led the parties to abandon the transaction. The *Capella/Mercy Hot Springs* case did not break new ground from an analytical perspective, but again highlights the FTC's strict scrutiny of hospital mergers. Finally, the Commission recently announced a consent agreement allowing Community Health System's $7.6B proposed acquisition of Health Management Associates to go forward, subject to the divestiture of the two hospitals. CHS and HMA each operate large networks of hospitals that overlap geographically in only a handful of areas. The settlement requires divestitures in Gadsden, Alabama, where the parties are the only local providers of hospital services, and in Darlington County, South Carolina, where CHS and HMA operate two of three hospitals. CHS and HMA had very high market shares in the markets where the FTC required divestitures and the settlement is analytically consistent with the

Commission's review of other recent hospital mergers, including *ProMedica/St. Lukes* and *OSF/Rockford*.

Several take-aways are emerging from the Commission's very active hospital enforcement docket, including that the Commission:

- Focuses on cases where the hospitals compete in a geographic area that is fairly easily demarcated (e.g., cities and towns comprising fairly distinct population centers);

- Pays particular attention to M&A activity involving the leading health care system in a given area (by market share);

- Will go to court seeking to block mergers involving physician and other non-inpatient services that traditionally have not been subject to the same high level of enforcement as mergers involving inpatient hospital services (the Commission's traditional focus in hospital mergers); and

- Assigns weight to failing/flailing firm arguments only where the parties can convincingly show with business documents that one party's operations will cease or change dramatically in the very near future absent the transaction, a very high bar.

The FTC's merger enforcement efforts in the health care industry have important implications going forward. As has been well-publicized, the Affordable Care Act (the ACA or "Obamacare") incentivizes the creation of Affordable Care Organizations and other systems of health care providers to allow for better coordination of health care services, which will continue to cause consolidation across the industry. As one economist observed, health care "[c]onsolidation has gone up a lot in the wake of the ACA . . . because the idea is to foster coordination within the health system, and coordination is often easier within a firm than between firms."

While the FTC is aware of the potential benefits of greater integration, the *St. Luke's* decision and other cases show that from the FTC's perspective, the patient benefits expected from health care provider consolidation are not always sufficient to justify mergers that the FTC views as anticompetitive and that the FTC will require substantial *ex ante* evidence of the benefits before crediting them. Indeed, Dr. Gaynor (the FTC's new lead economist) is of the view that "U.S. hospital markets are highly concentrated and have become even more concentrated over time," and that "[m]ergers between rival hospitals are likely to raise the price of inpatient care in concentrated markets." While Mr. Gaynor maintains that "the goal of the antitrust laws is entirely consistent" with the ACA's objectives, it remains unclear whether and to what extent the FTC will account for the patient benefits of innovative new health care delivery systems encouraged by the ACA. Either way, companies involved in health care transactions should continue to expect strict scrutiny from the FTC going forward.

The FTC "Stays the Course" on Pharma Acquisitions

The Commission continued to closely scrutinize pharmaceutical mergers and acquisitions. Before deciding to clear Watson's acquisition of Actavis, the Commission required divestitures of assets and

IP relating to 21 drugs. The Commission also required divestitures of 11 generic drugs to clear Mylan's acquisition of Agila. The consent agreements in *Watson/Actavis* and *Mylan/Agila* are consistent with the Commission's past practice in the generic pharmaceutical space, and define relevant markets comprised of individual drugs, rather than broader disease-treatment categories, where generic alternatives are available. In certain cases, it is doubtful that the Commission could have successfully persuaded a judge that these product markets are relevant markets for antitrust purposes. The parties to pharmaceutical deals nonetheless frequently agree to the divestitures in order to close their transactions rapidly.

The FTC Continues to Press "Potential Competition" Theories in the Nielsen/Arbitron Consent

The Commission's clearance of Nielsen's $1.3B acquisition of Arbitron, subject to divestitures, illustrates that the Commission remains willing to bring potential competition cases. Such cases are often controversial given the speculative nature of predicting whether non-competing merging parties would enter and compete absent the transaction. Prior to the Neilsen/Arbitron merger announcement, the parties did not compete in their core businesses—Nielsen was the leading provider of television rating services, while Arbitron was the leading provider of terrestrial radio rating services. Neither Neilsen nor Arbitron offered "cross platform" rating products and services, an emerging but not yet developed offering that incorporates ratings of users' consumption of media and advertising across smartphone, television, internet, tablet, and other platforms. However, both Nielsen and Arbitron were developing such offerings, had allegedly started working with potential customers, and planned to launch them in the near future.

A majority of the Commission found this evidence sufficient to support an enforcement action and required Nielsen to divest panel data and other intellectual property as a remedy. The Commission stated that it believes the divested assets, which do not include any tangible property or business units, will allow a third party to develop and offer a cross platform ratings products that will compete effectively with those that will be offered by the combined firm.

In his dissent, Commissioner Wright countered that the majority's enforcement action was unwarranted because neither party offered a cross platform rating service prior to the merger, and given the speculative nature of an emerging product such as cross platform ratings, it is very difficult to assess whether, absent the deal, the parties would have competed meaningfully in the future or whether sufficient competitive alternatives would have emerged. Commissioner Wright noted that the agencies and courts have traditionally applied a heightened "clear proof" standard to similar cases alleging potential future competition.

Nielsen/Arbitron, like the Commission's recent litigated victory in *Polypore*, highlights the Commission's continued focus on "potential competition" cases. But unlike *Polypore*, where the evidence suggested one merging party had entered and started to compete with the other in an established market, neither Neilsen nor Arbitron had entered the relevant market for cross platform ratings services. Indeed, there was and continues to be significant uncertainty regarding the future competitive significance or market shares of the parties and any rivals. The relatively mild remedy required by the Commission—a "divestiture" that is comprised almost entirely of a commitment to provide a third party with access to data for a period of several years—suggests that the Commission majority weighed the speculative nature of its concerns when formulating its remedy demands.

FTC Moves to Block Glass Bottle Deal

On July 1, 2013, the FTC filed an administrative complaint challenging the Ardagh Group, S.A.'s proposed $1.7 billion acquisition of Saint-Gobain Containers, Inc. The Commission alleged that the transaction, which would have combined the second- and third-largest producers of glass containers for beer and spirits, was "a straightforward merger-to-duopoly," which would have left the remaining two firms controlling more than 75% of the $5 billion U.S. market.

Ardagh, based in Europe, entered the U.S market in 2012 by acquiring Anchor Glass Container Corporation, previously the third-largest U.S. glass manufacturer. The FTC alleged that, together with Ardagh, Saint-Gobain and Owens-Illinois make up what are known as the "Three Majors," which the FTC alleged "dominate" the market in the U.S., especially with no other company owning more than one plant dedicated to producing glass containers for brewers and distillers. The FTC defined a fairly narrow market in this case, focusing only on glass containers produced for use by brewers and distillers, which account for more than 60% of glass container usage in the U.S. Notably, the FTC rejected the inclusion of other packaging materials, such as plastic or aluminum containers, citing evidence that customer preferences and brand identity made switching to such options difficult for most brewers and distillers. In addition to a highly concentrated market (at least according to the FTC), the FTC's complaint also expressed concern that there would be a substantial risk of coordination between the two remaining competitors, and that the elimination of direct competition between Ardagh and Saint-Gobain would allow them to unilaterally raise prices and reduce output.

An administrative hearing was set for December. But at a final pre-hearing conference on December 16, 2013, the Administrative Law Judge postponed further proceedings until April, as the parties and the FTC engaged in settlement negotiations. At the time, Ardagh was proposing that it sell six of its nine existing glass plants—a very substantial divestiture relative to the acquired assets—and in response complaint counsel indicated that talks were proceeding and a consent agreement was a possibility in the near future. The FTC finally reached terms with Ardagh in late February 2014, agreeing to sell six plants located in New York, Oklahoma, Florida, Indiana, Minnesota, and Georgia, a mold facility in Ohio, an engineering facility in Illinois, its U.S. headquarters in Florida, and several key managers, employees, contracts, and other assets. The ultimate agreement appears to require even more than Ardagh's already-substantial December proposal, reflecting a significant victory for the Commission. According to a status report filed on February 28, 2014, Ardagh had already begun marketing the divestiture assets, and the sale was "well underway."

Among the notable aspects of the FTC's administrative complaint in this case is the extent to which it essentially ignores "fringe" manufacturers, which account for approximately 25% of industry sales. Although no "fringe" manufacturer owns more than one glass plant, fringe firms together account for a significant percentage of the market, and the FTC, in calling the deal a "straightforward merger-to-duopoly," ignores these other market participants. The FTC's position potentially has significant implications for other transactions involving specialty products where a few major manufacturers compete with a "long tail" of smaller manufacturers with individually small but collectively significant market shares. The FTC's approach suggests that it is may not be persuaded by arguments that such players meaningfully constrain their larger competitors without additional evidence.

FTC Closes Office Depot/OfficeMax Investigation

On November 1, 2013, the FTC closed its seven-month investigation of Office Depot, Inc.'s proposed merger with OfficeMax, Inc., permitting a transaction that combines the second and third largest chains of office supply superstores in the United States. The Commission's decision to close its investigation represented a marked departure from its position sixteen years ago, when it moved to successfully block the Staples/Office Depot merger. The Commission noted that "the market for the sale of consumable office supplies ha[d] changed significantly in the intervening years," and that as a result, the transaction was unlikely to affect competition in the sale of office supplies to either retail or contract customers.

In *Staples*, the FTC successfully defined an "office supply superstore"-only market, relying on qualitative and empirical evidence that "OSS's" set prices according to the number of competing superstores in the local area, and on company documents revealing intense competitive focus on rival superstores. By contrast, in the Office Deport/OfficeMax transaction, the Commission concluded that the relevant market is much broader, in part because of increasing competition from non-OSS brick-and-mortar retailers (including mass merchants such as Wal-Mart and Target and club stores like Costco and Sam's Club) and online retailers, particularly Amazon. The Commission's closing statement noted that both company documents and the econometric analysis supported a broad market with prices set nationally and against both OSS and non-OSS competitors. In the contract customer space, the Commission noted that the ability of large contract customers to source directly from manufacturers and other non-OSS competitors, including those in adjacent product categories, meant that the transaction was unlikely to have a substantial effect on competition.

The Commission's decision to permit the transaction to proceed signals a shift from its past practices in the retail space, demonstrating a greater focus on the products retailers sell, rather than the format of the store in which they are sold. In particular, the inclusion of online retailers and mass discount merchants in the relevant market suggests that where merging parties can show price competition with such retailers, the Commission may well be more receptive to such arguments than it has been in the past. However, public comments from Ms. Feinstien make clear that the Commission will not always be persuaded by arguments that online sellers are in the same market as their brick and mortar counterparts.

Commissioner Wright Questions Commission's Competitive Effects Analysis: Fidelity National Financial/Lender Processing Services

On December 23, 2013, the Commission voted to issue a Complaint against Fidelity National Financial, Inc., challenging its proposed acquisition of Lender Processing Services, Inc., alleging the transaction would have anticompetitive effects in the market for title information services in a number of Oregon counties. Fidelity proposed to acquire LPS for some $2.9 billion.

Under Oregon law, title insurers and insurance producers, who are the only users of title information services, must own an interest in a "Title Plant," or privately-owned collections of property ownership records, in each county in which they operate. Two of the counties in the alleged relevant market were serviced by four plants, four counties by three plants, and three counties in the Portland metropolitan area were serviced by one jointly-owned title plant. Both Fidelity and LPS owned title plants in each of the relevant geographic markets, as well as an interest in the jointly-owned Portland-area plant. The Commission alleged that the acquisition would eliminate head-to-head competition between the parties, increase the likelihood of collusion between the remaining competitors, and enable the merged company to expel competitors from the jointly-owned Portland-area plant.

Commissioner Joshua D. Wright dissented from the Commission's decision to issue the complaint, concluding that "there is no reason to believe the proposed transaction is likely to lessen competition," and that "the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy." He was argued that the Commission's decision "based exclusively upon a tenuous logical link between the reduction in the number of firms that own title plants in each of the Oregon counties identified in the complaint and a presumption that the merger . . . will increase the likelihood of collusion or coordinated action among the remaining competitors." Commissioner Wright noted that "there is no basis in modern economics to conclude with any modicum of reliability that increased concentration—without more—will increase post-merger incentives to coordinate."

The FTC ultimately settled its dispute with the merging parties, requiring Fidelity to sell a copy of LPS's title plants in the six non-Portland counties within five months of closing, and required Fidelity to sell an ownership interest equivalent to LPS's share in the jointly-owned Portland-area plant, and to notify the FTC in advance of acquiring further title plants in Oregon in "circumstances that might raise anticompetitive concerns." The fact that Commissioner Wright's position ultimately failed to carry the day illustrates that parties cannot count on persuading the Commission to discount high market shares and concentration levels, unless there is very strong "direct" evidence that a transaction will not reduce competition.

DOJ and FTC Issue New Model Confidentiality Waiver

In September, the FTC and DOJ issued a new joint model waiver of confidentiality for use by individuals and companies involved in merger and non-merger civil matters concurrently reviewed by U.S. and international competition authorities. The waiver provides a standard form agreement, and permits disclosure of otherwise confidential information only to the specified non-U.S. competition authority. It also provides that information obtained by the non-U.S. competition authority and shared with the applicable U.S. enforcement agency will be treated as if it was requested and obtained directly from the entity—that is, in compliance with the appropriate confidentiality rules. The waiver further provides that the FTC and DOJ will assert all applicable exemptions from disclosure, should it receive a FOIA request from a third party for information provided by the entity, and that that no inadvertently produced privileged information will be shared with non-U.S. authorities. Finally, the model waiver states that the FTC and DOJ will not request information from non-U.S. competition authorities that would be legally privileged in the U.S.

The FTC and DOJ also released a joint "Frequently Asked Questions" document in conjunction with the model waiver. The document stresses potential benefits to entities in granting the enforcement agencies a waiver, noting that waivers "make[] it easier for Entities to have joint discussions with multiple investigating agencies because the Entities and investigating agencies can freely share information" and that "such joint discussions may be more efficient for Entities that can avoid having the same discussions in seriatim with multiple investigating agencies." While the agencies note that entities are not required to provide waivers and that the decision not to provide one will not prejudice the outcome of the DOJ or FTC's investigation, "in some cases, the absence of a waiver . . . may have practical effects. For example, it may impact an investigation's timing and/or increase the risk of inconsistent outcomes."

As a practical matter, merging parties often craft their own waiver letters that are tailored to their specific confidentiality needs. Nevertheless, the model waiver and FAQ provide significant insights into what terms the agencies are willing to agree to. Confidentiality is often of paramount concern to companies involved in merger investigations, and the agencies hope that this new guidance will "significantly reduce the time that Entities and the Agencies spend negotiating individual waivers, and the Model Waiver is intended to be used in almost all civil matters."

The Continued Importance of International Cooperation in DOJ/FTC Merger Reviews

International cooperation continues to play an increasingly prominent role in DOJ and FTC merger reviews. Agency officials repeatedly discuss how cross-border M&A is becoming more common, and the number of merger control agencies has increased dramatically over the last few years. By one count, the number of competition agencies around the world increased from 20 in 1990 to approximately 130 in 2013. Under these circumstances, coordination between merger control authorities is necessary in many cases—and has the potential to help parties obtain consistent resolutions from all of the agencies charged with reviewing a particular international merger.

Nowhere was this more evident than in the recent acquisition by Thermo Fisher Scientific of Life Technologies Corporation. That deal was subject to the review of antitrust agencies in nine jurisdictions, including the US, Europe, Japan, Korea, Australia, Canada, and China.[ii] Inter-agency cooperation allowed the companies to strike a deal with an upfront buyer, GE Healthcare, and to secure approval for that divestiture from the European Commission and the FTC on the same day.[iii]

While there is a consensus that international cooperation between enforcers has become more important in recent years, it is interesting to examine how this trend might evolve in the near future. One notable indicator is a recent survey that finds that cooperation is much more frequent among OECD countries than non-OECD countries. The agencies appear to view this as evidence that "there is room for increased cooperation among agencies, especially non-OECD members." Accordingly, greater coordination with non-OECD jurisdictions may become a reality in the near future.

Private Antitrust Merger Challenges Continue to Arise

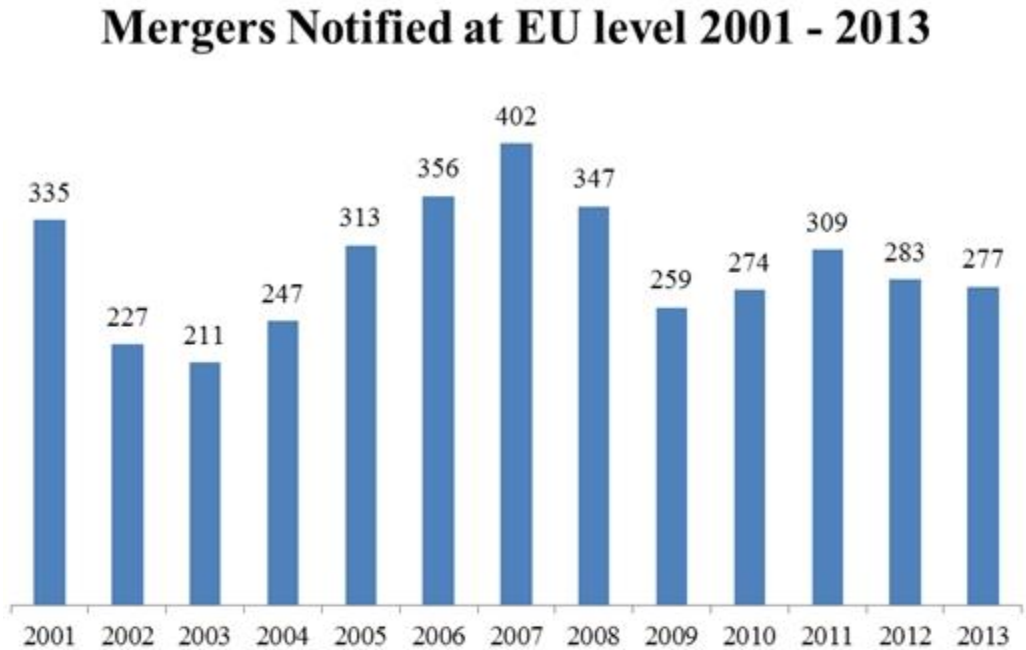
As we reported in Gibson Dunn's 2012 update, private antitrust claims against pending mergers appear to have become more common in recent years. Such challenges face many hurdles, especially when brought by competitors. More practically, however, private merger challengers often are in the unenviable position of having to rely on theories of competitive harm that have already been rejected, implicitly or explicitly, by the DOJ or FTC. Thus, for example, in denying plaintiffs' motion for a temporary restraining order against the US Airways-American merger, the Bankruptcy Court for the Southern District of New York emphasized that plaintiffs had failed to explain how the alleged harms from the merger were not addressed by the DOJ's consent order.[iv] A district judge in the Northern District of California dismissed private antitrust claims against the ABI-Modelo merger for similar reasons, rejecting the argument that Constellation would be the "puppet" of the merged firm under the revised agreement that had been incorporated into the DOJ's settlement.[v] And in yet another private merger challenge, a federal district judge in Minnesota granted summary judgment for wholesale grocers that had entered into an asset exchange agreement that the agencies had decided not to challenge.[vi]

Plaintiffs may fare better, however, in the unusual case in which parties have consummated a merger despite suggestions—or explicit findings—by the agencies that the merger would be anti-competitive. Most notably, the District Court for the Northern District of Illinois recently granted class certification in a challenge to the merger of Evanston Northwestern Hospital and Highland Park Hospital.[vii] Plaintiffs in that case touted the FTC's conclusion that the merger was anticompetitive.

THE EUROPEAN UNION

Stability and Change at the European Commission

Despite the continuing recession which characterizes most of the economies of the European Union ("EU") after the Eurozone crisis, 2013 proved to be an eventful year in European merger enforcement. Based on European Commission data, 277 merger transactions were notified to the European Commission (the "Commission") throughout calendar year 2013. Although nowhere near the peak of 402 notified mergers reached in 2007, the most recent figures are higher than those for calendar years 2009 and 2010 and relatively stable compared to those of 2011 and 2012.



Regardless of the challenging economic climate throughout the EU, the trend toward greater scrutiny of mergers, highlighted in both our 2012 and 2013 Antitrust Merger Enforcement Update and Outlooks, has been reinforced by recent events. Competition Commissioner Joaquín Almunia continued to warn in his speeches (see here and here) against the resort to industrial policy considerations under EU merger analysis, and has recently indicated that "**Europe does need an industrial policy – everyone knows that – but it needs a modern one; consistent with competition policy, not in contradiction with it**. And one that would avoid the mistakes made forty years ago."

The overall trend during the last years has been for the European Commission to be increasingly comfortable about initiating in-depth ("Phase II") investigations. During 2013, the Commission adopted six Decisions initiating Phase II proceedings, less than those issued during 2012 (ten) and 2011 (eight) but above those issued in 2009 (five) or 2010 (four). Over the past three years, the rate at which M&A transactions notified to the European Commission trigger a Phase II investigation has nearly doubled, from 1.19% in 2010 to 2.17% in 2013.

The past few years have seen a significant rise in the number of mergers blocked by the Commission. The prohibition of *Deutsche Börse/NYSE Euronext*, issued on February 1, 2012 has been followed by those of *UPS/TNT Express* and *Ryanair/Aer Lingus III*. The proximity of these prohibition decisions has led some commentators to suggest that Commissioner Almunia, whose term in office will expire on October 31, 2014, has spearheaded a more interventionist approach by the Commission's Directorate-General for Competition than his predecessor, Neelie Kroes, who blocked merely two mergers during the course of her five-year mandate, compared to Commissioner Almunia's four prohibition decisions since his appointment as Commissioner of Competition in 2010.

In addition, as highlighted in our 2013 Antitrust Merger Enforcement Update and Outlook, the Commission continues to be less willing to close Phase II investigations without issuing a Statement of Objections ("SO"). In *Nynas/Shell*, the Commission raised serious doubts in its SO, but eventually did not require commitments of the parties in order to clear the transaction, as the affected refinery would have simply closed down in the absence of the merger, given that it was not economically sustainable in its current setup and there were no alternative buyers. In *Munksjö/Ahlstrom* and *Syniverse/MACH*, the Commission only cleared the transactions after the parties offered divestiture commitments to alleviate the serious doubts raised in the respective SOs. The *Ryanair/Aer Lingus III* and *UPS/TNT* transactions were both prohibited after the market investigations confirmed the commitments offered by the parties did not alleviate the serious doubts raised by the Commission in its SOs. Similarly, the Commission has recently issued SOs to the notifying parties in its ongoing *Ineos/Solvay JV* and *Hutchison/O2* Phase II investigations.

In addition, a number of recent cases (both prohibitions and conditional clearances) suggest that the Commission is taking an increasingly tough stance on remedies. In particular, the Commission has placed significant emphasis in its recent decisions on the identity and long-term viability of the "remedy-taker" or purchaser. In each of the three most recent prohibitions, the Commission rejected proposed divestment commitments on the basis that they were insufficient to create a significant sustainable competitor. In *Ryanair/Aer Lingus III* the Commission rejected Ryanair's contention that, under Flybe's control, the divested business could have become and remained a sufficient competitive force to constrain the merged entity. In *UPS/TNT Express*, the Commission expressed doubts that a suitable purchaser could be found. Already in 2012, in *Deutsche Börse/NYSE Euronext*, the Commission had considered that the proposed divestment assets would not be independently viable on a long-term basis.

There are also signs of a trend towards the need for Commission-approved, "up-front buyers." Ryanair proposed two up-front buyers in a bid to win approval of its acquisition of AerLingus (both of which were, ultimately, rejected); the Commission also rejected the remedies in *UPS/TNT* on the basis that it considered that an up-front buyer would have been required; and in *Hutchison 3G/Orange*, decided on December 12, 2012, the Commission required up-front commitments in order to clear the transaction. Prior to 2012, the Commission had required an up-front buyer in only a handful of cases under the current Merger Regulation. It still remains to be seen whether the 2012-2013 cases signal a long-term shift to more far-reaching remedies and a greater use of upfront solutions, particularly since the full text of the Commission's decisions in the cases *Syniverse/Mach* and *Munksjö AB/Ahlstrom* (see below) are not yet public.

However, the crisis appears to have had some impact in the Commission's enforcement strategy. In 2013, the Commission authorized two transactions under the so-called "failing firm" defense, namely, *Aegean Airlines/Olympic Air* and *Shell/Nynas*. Since the demise of Arthur Andersen in 2002, the Commission had only resorted to the failing firm defense in order to authorize transactions in the *Newscorp/Telepiù* case in 2004 and in the *JCI/FIAMM* case in 2007. In both of these cases the Commission, while not formally endorsing a failing firm approach, nevertheless indicated that an authorization of the merger subject to appropriate conditions would be more beneficial to consumers than a disruption caused by the potential closing down of the relevant assets. In 2011, the Commission had also taken into account the likelihood of different possible counterfactuals of reductions in capacity when granting unconditional clearance to the acquisition by UPM-Kymmene of Myllykoski Corporation and Rhein Papier GmbH.

Furthermore, it should be noted that the greater level of scrutiny by the Commission, as highlighted in its Staff Working Document Accompanying the Commission's Report on Competition Policy 2012, issued on May 7, 2013, has not impeded its grant of unconditional clearances to transactions involving U.S. corporations, (e.g., Omnicom's merger with Publicis, Time Warner's acquisition of Central European Media Enterprises, Microsoft's acquisition of Nokia's mobile device business, Liberty Global, Inc.'s acquisition of the UK cable operator Virgin Media and Honeywell's acquisition of Intermec, a manufacturer and supplier of barcode scanners, scanning engines and the so-called "ruggedized" mobile computers).

Similarly, the Commission has authorized, subject to divestitures but after a Phase I investigation, a number of transactions involving U.S. companies, including: (i) the acquisition of Life Technologies by Thermo Fisher; (ii) the merger between US Airways Group and the AMR Corporation, including its main subsidiary, American Airlines, Inc,; and (iii) the acquisition by Baxter of the Swedish medical technology company Gambro, a competitor.

The Commission Issues Its Fifth and Sixth Prohibition Decisions Since 2002

It is noteworthy that the Commission issued as many prohibition decisions in the first two quarters of 2013 as it had during the entire tenure of Commissioner Kroes. The following prohibition decisions were issued in 2013:

UPS's Proposed Acquisition of TNT Express

An in-depth investigation was opened into the merger of UPS and TNT Express based on the level of concentration in markets for small parcel delivery services and, in particular, for international express services. On January 30, 2013, the Commission issued a press release announcing the prohibition of the proposed transaction. The Commission explained that the remedies UPS had offered, which included divestitures and allowing a new competitor access to UPS's air network for a period of five years, were insufficient to address its concerns. Given the limited number of appropriate candidates for purchase, the Commission required UPS to enter into a binding agreement with a suitable purchaser before the closing of the deal. UPS could not secure the signing of a binding agreement before the end of the Phase II and the Commission also expressed concerns regarding the candidates' ability to stimulate competition post-transaction. This transaction constitutes a reminder of the importance of entering into remedy discussions as early as possible in the proceedings, particularly where it is likely that the Commission will require a "fix-it-first" remedy.

Aer Lingus's Proposed Takeover by Ryanair ("Ryanair III")

On February 27, 2013, the European Commission prohibited the proposed takeover of the Irish flag carrier Aer Lingus by the low-cost airline Ryanair. According to the Commission, the acquisition would have combined the two leading airlines operating from Ireland. The Commission concluded that the merger would have harmed consumers by creating a monopoly or a dominant position on 46 routes where, currently, Aer Lingus and Ryanair compete vigorously against each other. An appeal, filed by Ryanair before the EU in the General Court (i.e., the Court of First Instance of the EU, "GC") is pending against the prohibition Decision of the Commission.

It should be noted that this is the third time that the proposed acquisition of Aer Lingus by Ryanair was notified to the Commission. In 2007, the Commission prohibited Ryanair's first attempt to acquire Aer Lingus ("*Ryanair I*"), a decision which was confirmed by the GC in 2010. In 2009, Ryanair had withdrawn its second notification of a similar transaction ("*Ryanair II*").

The fact that the Commission reached the same conclusion as in 2007 in its Ryanair analysis contrasts with its willingness to revise the new conditions in the market in its assessment of the acquisition of Olympic Air by Aegean Airlines (see below).

High Profile Investigations Decided in 2013

In-Depth ("Phase II") Clearances

The Commission cleared four proposed transactions in 2013 after an in-depth ("Phase II") investigation.

First, as reported in our 2013 Antitrust Merger Enforcement Update and Outlook, the Commission opened an in-depth investigation in December 2012 into the merger of Munksjö AB and Ahlstrom Corporation's label and processing paper business. On May 24, 2013, the Commission authorized the transaction after the parties committed to divest all of Ahlstrom's heavy weight abrasive paper backings and pre-impregnated paper ("PRIP"), a type of décor paper used by business furniture manufacturers. The Commission had concerns that the combined entity would have excessive market power in these segments where the post-merger entity would apparently have had worldwide market shares above 70%.

Second, the Commission cleared the acquisition by Syniverse of MACH on May 29, 2013. Both MACH and Syniverse are data clearing houses that settle the usage records of those subscribers who roam on the networks of mobile operators. Mobile operators use these services to determine the wholesale payments they make to each other for the roaming of these subscribers. As we had also previously reported, the Commission had opened an in-depth investigation in December 2012. According to the Commission, its Phase II investigation confirmed that there were significant barriers to expansion in the relevant markets and that the remaining (smaller) competitors would not be in a position to act as credible providers to larger customers or to replace the competitive constraints which Mach posed to Syniverse. Therefore, Syniverse committed to divest various elements of Mach's Data Clearing and Near Trade Roaming Data Exchange services in the European Economic Area ("EEA").

Third, on September 2, 2013, the Commission cleared the acquisition of the refinery assets located in Harburg, Germany of Shell Deutschland Oil GmbH by Nynas AB. The Commission opened an in-depth investigation in March 2013 as it had detected, after its preliminary investigation, possible competition concerns in the markets for certain oils. These oils are used for the production of industrial greases, metalworking fluids, adhesives, inks, insoluble sulphur, industrial rubber, fertilizers, defoamers, and additives. However, after its Phase II investigation, Shell demonstrated that the Harburg plant would simply close down if the transaction did not occur. Moreover, the Commission concluded that this closure would lead buyers to turn to producers outside the EEA, which would apparently result in higher prices for EEA consumers.

Fourth, on October 9, 2013, the Commission authorized the acquisition of Olympic Air by Aegean Airlines in the light of the parties' failing firm arguments. The parties were the two main Greek airlines offering passenger air transport services on Greek domestic and international routes, and close competitors. The Commission, which had prohibited a similar transaction in January 2011, had opened the in-depth investigation in April 2013 as concerns had been raised that the post-transaction entity would be able to raise prices and decrease service offerings on several domestic Greek routes out of Athens, where it would have a monopoly or an otherwise strong market position. According to the Phase II investigation, due to the ongoing Greek crisis, an analysis of the business prospects of Olympic Air's business and that of Olympic Air's parent entity, the Marfin Investment Group, demonstrated that Olympic Air would be forced to exit the market in the near future due to financial difficulties if it were not acquired by Aegean.

Other High-Profile EU Investigations in 2013

The European Commission unconditionally cleared on April 5, 2013, after a Phase I investigation, the proposed creation of Penguin Random House, combining parts of the publishing businesses of the media company Bertelsmann of Germany and the publishing company Pearson of the UK. The Commission assessed the impact of the transaction on the upstream markets for the acquisition of authors' rights for English language books in the EEA and worldwide, and on the downstream markets for the sale of English language books to dealers in the EEA, in particular in the UK and Ireland. The Commission found that on both types of markets the new entity Penguin Random House would continue to face competition from several large and numerous small and medium sized publishers. As regards the sale of English language books, the merged entity would also face a concentrated retail base, such as supermarkets for print books and large online retailers for e-books, like Amazon. Moreover, the Commission's investigation revealed no evidence that the transaction would lead to risks of coordination among publishers in relation to the acquisition of authors' rights or the sale of English language books to dealers.

On May 15, 2013, the Commission authorized, after a Phase I investigation, and pursuant to a simplified procedure, the acquisition by Access Industries, Inc., the ultimate owner of Warner Music Group ("WMG") of the Parlophone Label Group, comprising the majority of the EMI assets, including the iconic Parlophone label, which UMG had committed to divest in order to obtain the Commission's clearance for its acquisition of EMI's recorded music business (as reported in our 2013 Antitrust Merger Enforcement Update and Outlook.) While the clearance Decision was unconditional, the Commission nonetheless noted in its Press Release the existence of an agreement between WMG and two groups of independent music labels. Pursuant to this agreement, WMG, upon completion of the transaction, would undertake a number of measures, which, according to the Commission, are likely to result in the strengthening of the independent music sector in the EEA.

Similarly, a year after the Commission's prohibition Decision of *Deutsche Börse/NYSE*, the Commission approved on June 24, 2013, after Phase I proceedings, the acquisition by InterContinental Exchange ("ICE") of NYSE Euronext. The Commission's investigation confirmed that NYX and ICE are not direct competitors in the markets for the provision of trading and clearing services for certain exchange-traded derivatives ("ETD") and would continue to face competition from a number of other competitors.

On August 5, 2013, the European Commission authorized, after a Phase I investigation, the proposed merger between US Airways Group and American Airlines, Inc, both of the United States. Both US Airways and American Airlines are major U.S. commercial flag carriers that provide scheduled air passenger services. The Decision is conditional upon the release of one daily slot pair at London

Heathrow and other commitments designed to promote market entry on the London-Philadelphia route. The authorization contrasts with: (i) the Decision of the FTC to challenge the transaction; and (ii) the EC's reluctance to accept slot-based remedies in respective cases of the *Ryanair/Aer Lingus* I and III and *Aegean/Olimpic Air*.

Ongoing Phase II Investigations

On October 22, 2013, the Commission opened an in-depth investigation into the proposed acquisition of the German company Cemex West by Holcim, a Swiss competitor. Holcim proposes to acquire part of Cemex's activities in cement materials in western Germany and a small number of plants and sites in France and the Netherlands. The initial investigation indicated that the transaction might reduce competition in parts of Germany and Belgium where Cemex West is an actual or potential competitor of the acquirer Holcim. Of particular interest is that the Commission has raised the concern that the transaction could enable or facilitate cement producers in Germany and Belgium to coordinate their market behavior. That said, the Commission also has concerns of a unilateral effects nature regarding the transaction: it appears that the Commission's preliminary investigation shows that Holcim and Cemex West are the main German suppliers of granulated blast furnace slag, a by-product of steel production that is used as a substitute to clinkers for the production of cement.

The *Holcim/Cemex* transaction is linked to another transaction, the proposed acquisition by Cemex West of Holcim's cement activities in Spain and the Czech Republic. This second transaction did not meet the thresholds of the EU Merger Regulation and was therefore notified to the Spanish and Czech authorities. On October 18, 2013, the Commission accepted a referral request by the Spanish Competition Authority under Article 22 of the Merger Regulation, by which the Commission will assess the proposed transaction under EU rules. The Commission is currently pursuing a Phase I investigation. The acquisition of the Czech operations will be assessed by the Czech Competition Authority, which elected not to join the Spanish request.

On November 5, 2013, the Commission opened an in-depth investigation into the proposed joint venture between the chlorvinyls businesses of INEOS and Solvay in the EEA. The initial investigation raised serious doubts about the compatibility of the JV with the internal market. The JV would combine the two leading suppliers of certain chemical components in northwest Europe and the Benelux, thereby reducing the number of key competitors in these markets from two to one, while the constraints exercised by the remaining competitors may not be sufficiently strong. Thus, the JV might ultimately lead to potential price increases and to a reduction of choice for customers. The Commission found that the commitments offered by the parties during the initial investigation – the divestiture of two PVC production plants in Germany – did not offer a sufficiently clear-cut solution to alleviate its competition concerns. On January 22, 2014, the Commission issued an SO, in which it is understood to have continued to raise concerns as to the effects of the transaction in the northwest European affected markets, indicating that prices would already be higher pre-transaction in that part of the EU.

On November 6, 2013 and December 20, 2013, respectively, the Commission opened Phase II investigations into the proposed acquisition of O2 Ireland by Hutchison 3G UK and into the proposed acquisition of Germany's E-plus by Telefónica Deutschland. In the investigation concerning the acquisition of O2 by Hutchison 3G UK, the Commission issued an SO on February 3, 2014. The parties provide mobile telephony services in Ireland and Germany, respectively. In its SOs, the Commission has reportedly raised serious doubts about the compatibility of the transactions with the internal market in light of its concerns that competition may be substantially reduced in the markets for:

- *Retail mobile telephony*: the transactions would reduce the number of suppliers from four to three in the Irish and German markets, thereby removing an important competitive force and changing the merged entities' incentives to exert significant competitive pressure on remaining competitors. The *Hutchison/Telefónica Ireland* merger would also reduce the merged entity's incentive to continue a network sharing agreement with Eircom, a smaller competitor, thereby affecting the latter's ability to effectively compete; and

- *Wholesale access and call origination*: the transaction would significantly reduce the number of mobile network operators ("MNOs") effectively willing to host mobile virtual network operators ("MVNOs"), resulting in a reduced choice of host networks and weakened negotiating power for MVNOs. In both cases, the Commission also raised the concern that the transaction may result in MNOs being more likely to coordinate their competitive behavior and substantially increase prices due to a certain degree of market transparency at retail level.

European Commission Policy Reforms

In 2013, the European Commission adopted a number of changes to the EU merger control procedure in the form of amendments to the Commission's Notice on Simplified Procedures and to the Implementing Regulation on merger control, which came into effect on January 1, 2014. The amendments are designed to simplify the procedures adopted where notified transactions pose few genuine competition law concerns, while also clarifying the nature of the documentation required where remedies are sought.[viii]

The text of the EU Merger Regulation ("EUMR") itself has not been revised, which means that the scope of notifiable transactions, the notification thresholds, and the formal review periods remain the same. A further reform of EU merger control is anticipated to take place later in 2014.

Extending and Enhancing the Simplified Procedure

The changes to the so-called "simplified procedure" under the EUMR have: (i) widened the scope of the transactions that can benefit from that procedure; (ii) reduced the amount of information transacting parties are required to provide for a range of simplified notifications; and (iii) reduced, in practice, the time required to obtain clearance. More specifically:

First, more transactions will fall under the simplified procedure: The simplified merger review procedure is available for transactions that involve no, or limited, horizontal or vertical overlaps between the notifying parties' businesses and are thereby viewed as unlikely to raise any competition concerns. These transactions can be notified using the Short Form CO, which requires significantly less information than the full filing form (Form CO). In the case of horizontal overlaps (i.e., areas where the parties' businesses compete), the combined market share threshold for which the Short Form CO can be used has been raised from 15% to 20%. In the case of vertical overlaps (i.e., areas where one party is upstream or downstream from the other party, such as a supplier-customer relationship), the threshold has been raised from 25% to 30% (i.e., the short Form CO can be used if the parties' individual or combined market share is below 30% in both the upstream and downstream markets). Furthermore, a new category of mergers that may benefit from the simplified procedure has been introduced: a transaction may qualify for the Short Form CO mergers where: (a) the parties' combined market share does not exceed 50%; and (b) the market share increase resulting from the transaction is small (the Herfindahl-Hirschman Index increase resulting from the transaction is below 150).

Second, less information will be required for certain simplified notifications: Those joint ventures which are not active in the EU and which trigger the filing obligation solely because of the EU turnover of their parents will continue to require notification, assuming that the EUMR thresholds and requirements are met. However, the Commission will now pursue the "super-simplified" notification of these transactions. Thus, the notifying parties will have to provide even less information than what is required by the Short Form CO -- specifically, the parties will only need to describe the transaction and their respective businesses and provide turnover figures for the purposes of establishing the Commission's jurisdiction.

Third, shorter review period for certain simplified notifications: While the formal 25 working-day review period enshrined in the EUMR for a Phase One review has not been shortened, where transactions that do not involve any horizontal or vertical overlap between the parties, the Commission has done away with the timetable it traditionally utilized in practice for the pre-notification phase. The pre-notification phase is an informal practice that has developed over the years in which the notifying parties, prior to submitting a formal filing, share with the Commission the draft of their proposed filing, in order to avoid having their notification declared incomplete at the time of formal submission. According to its own guidelines, the Commission has five working days in which to review draft notifications in the pre-notification phase. By allowing the parties to truncate the pre-notification procedure, the time necessary to obtain clearance and to proceed with closing has been significantly shortened.

Further Information Requirements in Non-Simplified Procedures

Aside from the impacts of the changes on the "simplified procedure," the filing forms used in the merger filing process are also affected in a number of ways:

Amended Form CO: The updated Form CO both reduces in certain respects and increases in others the scope of documents to be submitted by the parties in a merger filing. Specifically:

- The scope of the transaction-related company documents that must accompany the filing has been expanded, and now includes the minutes of the meetings of any corporate bodies discussing the transaction, any analyses, reports, studies, surveys, presentations and comparable documents touching upon the transaction, as well as any documents relating to the parties' understanding of any markets concerned by the transaction. Prior to this change, the documentation required by a Form CO was closely aligned with the requirements of the Hart-Scott-Rodino (HSR) form instructions in the U.S., which allowed parties filing in both the U.S. and the EU to provide similar documentation in support of both filings. The new Form CO, however, appears to require documentation that is not required by Items 4(c) and 4(d) of the HSR instructions, such as board meeting minutes that do not analyze the transaction with respect to competition, markets, or sales growth. Nevertheless, there remains substantial overlap between the documentation required for an HSR filing and a Form CO.

- The Commission provides detailed guidance regarding the types of waivers that the parties can request, which, if granted, exempt the parties from providing certain types of information during the pre-notification discussions. While the waivers can reduce the overall information burden on the parties, obtaining such waivers may prolong the pre-notification process and thereby the overall merger review timeframe, as negotiating and obtaining the waivers takes time.

- The definition of "affected markets" for which detailed information must be provided by the parties has been amended and only involves horizontal markets where the parties' combined market share is in excess of 20% (against 15% until the end of 2013) and vertical markets on which the parties' combined market share is more than 30% (against 25% until the end of 2013). The Form CO no longer requires detailed information both for hypothetical EU/EEA/EFTA-wide markets and for each of the Member States, but only for the relevant geographic markets. At the same time, the parties are also required to submit information for plausible alternative relevant product and geographic markets.

Amended Form RS: The Form RS is used by the parties to request the referral of a case either (a) to the Commission, where the merger is notifiable in at least three Member States but does not meet the EUMR thresholds; or (b) to Member State(s) where the transaction is otherwise notifiable to the Commission but the parties consider that the competition authorities of one or more Member States are better placed to review it (e.g., because its effects are felt primarily on local or sub-national markets).

The amendments reduce the information required by the Form RS. The practical impact of the updated Form RS is questionable, however, particularly in the case of referrals to the Commission. Most of these referrals are successful, and the information contained in a more detailed Form RS could be incorporated directly into the text of the Form CO.

Clarifying Questions Relating to Remedies

The new and clarified rules also address those transactions that do raise competition concerns and, thereby, require remedies.

As part of the remedy review package, the Commission has published an updated standard model text for divestiture commitments. While the use of the model text remains voluntary, it is nevertheless a helpful tool in satisfying the Commission's requirements in terms of the form that asset divestitures should take, as well as satisfying the requirements for the appointment of a Monitoring Trustee.

The Commission has also clarified the means by which the length of the review period in Phase Two mergers will be calculated where remedies have been offered. Remedies may lead to the extension of the review period. As general rule, if offered before Day 55 of the Phase Two review period, no extension is mandated, while the offering of remedies on Day 55 or later results in the Phase Two review period being automatically extended by 15 working days. The Commission has now clarified that the 15-working day automatic extension period also applies in the case of remedies that are submitted before Day 55 but which are amended after Day 55.

Conclusion

The changes introduced by the Commission should be well received. In particular, a lighter notification burden for mergers that do not result in market shares in excess of the thresholds, in addition to those mergers that result in small incremental changes while falling short of 50% market share, will be most welcome. Having said that, the impact of the changes as regards the treatment of "affected" markets might be less profound. At least in the short term, the practical impact of this change might be minimal, as notifying parties struggle to differentiate between not being required to calculate alternative product or geographic markets while at the same time providing information on such markets. The full benefits of the changes will no doubt be reaped by those parties whose merger takes place in distinct (i.e., well-defined) relevant product and geographic markets; volatile or dynamic markets will in all likelihood continue to involve a similar workload in terms of the preparation of a filing under the EUMR.

Similarly, the need for less information in the Form RS context will be welcomed by those keen on resolving the jurisdictional issue, but ultimately the information not submitted for jurisdictional purposes will in any event need to be submitted to the Commission for its substantive review. Indeed, it is arguable that those parties not supplying a full dossier under the Form RS procedure might struggle to convince Member States that the Commission is best placed to review the merger in question in the first place.

Finally, as regards the offer of remedies to obtain the clearance of a transaction, two points can be made. First, practice has indicated that divergence from the standard model text tends to delay the process of remedy evaluation, which means that caution should be taken in departing from its structure in anything other than extraordinary circumstances. Significant divergence from its terms is therefore probably counter-productive in most cases in terms of the timing of the review process, even if not in terms of substance. In addition, the use of the 55-day period in a Phase Two review seems to be an arbitrary watershed which might lend itself to "gaming"; surely the availability of a more general possibility of extending the procedure will serve public policy goals well. On balance, however, while this clarification will have the impact of further lengthening the review period in the average Phase Two review, it will at least provide additional certainty to the parties in terms of expected timing.

Interaction with Other Jurisdictions

United States

In his speech on September 26, 2013, Commissioner Almunia emphasized the importance of the negotiations for the Transatlantic Trade and Investment Partnership ("TTIP"), commenced in July 2013 with the aim of boosting the economic links between the U.S. and the EU: "[s]trengthening the cooperation between the EU and the US will certainly sustain the signs of recovery that we are observing after years of crisis and uncertainty in the global economy." In November 2013, Commissioner Almunia reported that the competition chapter will cover antitrust, mergers, State-owned enterprises, and subsidies.

Switzerland

In May 2013, the European Union and Switzerland concluded a Competition Cooperation Agreement in order to strengthen the relationship between their competition authorities. The Agreement aims to improve enforcement coordination and enhance cooperation. In particular, the Authorities will notify any enforcement activities affecting each other's "important interests" and may request each other to initiate enforcement against behavior occurring in the other's territory.

India

In November 2013, the Competition Commission of India and the European Commission signed a Memorandum of Understanding to strengthen their cooperation in competition law enforcement. Under the new framework, the parties may engage in discussions on competition legislation, share non-confidential information on legislation, enforcement, multilateral competition initiatives and advocacy, and engage in technical cooperation regarding competition legislation and enforcement.

South Africa

In November 2013, Commissioner Almunia also made known his intentions to commence negotiations on a Memorandum of Understanding regarding competition with South Africa, in a similar vein to the MoU earlier concluded with the India. Upon the signature of this MoU, the Commission will have cooperation mechanisms in place with all BRICS countries.

Challenges on Appeal to the General Court of the European Union

The "Electrabel" Ruling

As reported in our 2013 Antitrust Merger Enforcement Update and Outlook, on December 12, 2012, the General Court (i.e., the Court of First Instance of the EU, "GC") dismissed an appeal by Electrabel against a decision of the Commission, imposing a fine of EUR 20 million for acquiring control over Compagnie Nationale du Rhône without prior approval. The Commission's Decision was upheld by the GC on December 12, 2012. The GC indicated that: "it is only if Electrabel had not been virtually certain, in December 2003, of obtaining control at future general meetings, that there would have been . . . no infringement of the obligation not to put the transaction into effect as from that date." The arguments raised by Electrabel to the effect that there was an absence of anti-competitive effects on the market, the lack of negligence on its part, and the disproportionate amount of the fine, were all dismissed by the GC.

The Microsoft / Skype Ruling

In October 2011, the Commission authorized, after a Phase I investigation, the proposed acquisition of the Internet voice and video communication provider Skype by Microsoft. In the area of consumer communications, the investigation found that the parties' activities mainly overlap for video communications, where Microsoft is active through its Windows Live Messenger. However, the Commission considered that there are no competition concerns in this growing market in which numerous players, including Google, are present. For enterprise communications, the investigation confirmed that Skype has a limited market presence for these products and does not compete directly with Microsoft's enterprise communication product Lync, which is used mostly by large enterprises.

Cisco, a major competitor of Microsoft for enterprise communications services, filed an appeal before the GC. The company was joined in its appeal by Messagenet, a European consumer communications video-calling provider. By ruling on December 11, 2013, the GC confirmed the Commission's Decision.

With regard to the market for Internet-based communications for the general public (consumer communications), the GC confirmed that the relatively high market shares and concentration resulting from the transaction were not sufficient for it to significantly harm effective competition. The GC took into account, in reaching this conclusion, the following considerations:

First, the consumer communications market is a nascent and fast-growing industry, characterized by short innovation cycles, and by the instability of market shares.

Second, sales of tablets and smartphones have overtaken those of PCs in Western Europe. Microsoft is less present in these new devices, where it faces strong competition from other operators, in particular Apple and Google. Any attempt to increase prices for PC users might result in their switching to alternative devices.

Third, given that users expect to receive consumer communications services free of charge, the potential for the new entity to set its pricing policy freely is significantly restricted. According to the GC: (i) the Commission rightly observed that any attempt to make users pay would run the risk of reducing the attractiveness of those services and of encouraging users to switch to other providers continuing to offer their services free of charge; and (ii) there are no technical or economic constraints which might prevent users from switching providers.

Fourth, the possible existence of network effects would not necessarily procure a competitive advantage for the new entity, given that competing operators of devices other than Windows-based

PCs have sufficiently large market shares to constitute communication networks with a level of use and attractiveness which is at least comparable to the merged entity.

With regard to the alleged conglomerate effects of the transaction in the market for Internet-based communications for businesses, the GC rejected the complainants' argument that the merged entity would be able to reserve exclusive or preferential interoperability between Microsoft's product (Lync) and Skype's large customer base, to the detriment of the competitors, for the following reasons:

First, the successful marketing of new products resulting from the interoperability between Skype and Lync, which would allegedly enable the merged entity to restrict competition, depended on several factors which are not certain to occur in the sufficiently near future.

Second, the precise advantages of and the real demand for a potential product resulting from the interoperability between Skype and Lync are vague (in particular, the aim of businesses is to communicate with their customers, and not with Skype users).

Third, other large competitors are active on the enterprise communications market, which considerably reduces the merged entity's incentive to impede competition (in particular, Cisco has a larger market share than Microsoft).

Spar v. Commission

On June 7, 2013, the GC also upheld the Commission's conditional Phase I approval of Rewe Group's ("Rewe") acquisition of the Austrian retail chain Adeg Österreich Handels AG ("Adeg"). During its preliminary investigation, the Commission was concerned about the possibility that the combined strength of Rewe and Adeg would result in increased price levels. The Commission conditioned its clearance on Rewe's commitment to divest Adeg-owned stores in certain areas and to permit independent merchants in the Adeg retail network to affiliate themselves with other retail chains.

Spar Österreichische Warenhandels AG ("Spar"), a competitor of the merging parties, challenged the Commission's Decision, arguing, among other things, that the Commission had breached Spar's rights to be heard and involved in the procedure.

The GC dismissed Spar's appeal and indicated that, in the context of a conditional approval in Phase I, the Merger Regulation does not entitle third parties to be heard or to comment on proposed commitments.

CHINA

The Chinese Ministry of Commerce ("MOFCOM") has become an increasingly important competition enforcer in recent years, particularly with respect to mergers. MOFCOM's profile continued to rise in 2013, when it imposed significant and sometimes atypical remedies in four merger decisions. All four cases involved foreign companies, and several were controversial due to their use of analysis that appears to differ significantly from that employed by the US and EU – in particular, MOFCOM took into account policy goals unrelated to competition, but important to domestic industries.

In keeping with its new prominence, MOFCOM also continued its efforts to provide guidance as to how its merger review system functions in practice. To that end, MOFCOM published draft remedies guidelines and provided additional insight into its developing plan to create a "fast-track" system for simple mergers.

Glencore/Xstrata

In its most noteworthy decision of 2013, MOFCOM required significant structural and behavioral relief to address its concerns relating to Glencore International Company's acquisition of Xstrata PLC. MOFCOM focused its review on the copper, zinc, and lead concentrate markets. Combined, the merged parties accounted for about 18% of China's imported copper concentrate. Glencore's share of Chinese zinc and lead imports was higher, but Xstrata imported neither metal to China, although it was a significant producer elsewhere. On a worldwide basis, the parties' combined share of each market was less than 18%.

Despite the parties' low market shares, MOFCOM concluded that the merger would result in anticompetitive effects in alleged markets for imported copper, zinc, and lead concentrate. MOFCOM based its decision in part on concerns that the merged firm would obtain market power through vertical integration and through its control over Xstrata's global production capacity. MOFCOM also placed significant emphasis on the fact that Chinese manufacturers were dependent on imports and were too small to have significant negotiating power.

To address these concerns, MOFCOM required the parties to divest Xstrata's La Bambas copper mine in Peru. It also imposed significant behavioral remedies applicable to all three markets. Under MOFCOM's order, Glencore must supply at least a minimum level of copper to the Chinese market for eight years, with the minimum level set at 900,000 tons in the first year and subject to adjustment in future years. It must also continue to supply zinc and lead concentrate under long-term and spot contracts at fair and reasonable terms. These commitments also apply for eight years.

Notably, the DOJ and Australian Competition & Consumer Commission allowed the merger to proceed without imposing conditions. And while the EU required Glencore to terminate its relationship with another European zinc producer, that decision was based on the fact that Glencore and Xstrata were the two largest zinc producers in Europe.

MOFCOM's decision is controversial. Given the parties' low market shares, and MOFCOM's emphasis on the need to protect small Chinese manufacturers' supply of imported metals, critics have suggested that industrial policy goals may have influenced MOFCOM's review process. Also controversial is MOFCOM's decision to require an extraterritorial divestiture—although it was not unprecedented (MOFCOM had previously required the divestiture of a Japanese business in Panasonic/Sanyo). The length of MOFCOM review process itself is also noteworthy: at well over a year (380 days), the review process appears to have been longer than any MOFCOM merger review except MediaTek/MStar, discussed below.

MediaTek/MStar

MOFCOM's decision in MediaTek/MStar is also controversial. MediaTek had agreed to acquire MStar, its rival in the chipset design business. MOFCOM determined that the merger would harm competition in the market for the design of LCD TV control chips in China. According to MOFCOM, the combined firm would have an 80% share of that market, and Chinese TV manufacturers would lose the benefit of competition between two of their leading suppliers.

The agency required MediaTek to transfer MStar's TV chipset business to a subsidiary and keep that business separate from its own operations. MOFCOM also limited MediaTek's rights as a shareholder in the chipset subsidiary, allowing it only to receive dividends, obtain financial statements, and appoint directors (subject to some conditions). The parties can apply for the removal of these restrictions after three years.

MediaTek/MStar marks the fourth time that MOFCOM has used such a remedy. Critics have argued that it creates significant uncertainty and prevents the merging parties from achieving the efficiencies that might otherwise result from a merger. It is also inconsistent with the practice in the US and Europe, where hold-separate orders are typically used on a temporary basis.

As mentioned above, MediaTek/MStar also appears to be the longest MOFCOM merger review on record. All told, the review took 416 days.

Marubeni/Gavilon

MOFCOM also required a long-term hold separate remedy to address its concerns with Marubeni Corporation's acquisition of Gavilon Holdings. Marubeni—one of Japan's largest trading companies—had agreed to acquire Gavilon—the third-largest North American grain company. MOFCOM's review focused on the market for soybeans imported into China. The agency did not provide market share statistics, but its opinion can be read to indicate that Marubeni's share was approximately 18%, while Gavilon's was less than 1%.

Despite these low market share figures, MOFCOM determined that the acquisition would harm competition in the market for imported soybeans. In explaining why the merger would result in anti-competitive effects, MOFCOM noted that China is heavily dependent on soybean imports and that the Chinese companies that acquire imported soybean are too small to have any significant buyer power.

MOFCOM required the parties to set up separate entities to house their respective businesses for importing soybeans to China. The parties can apply for the removal of these restrictions after two years.

As in Xstrata/Glencore, neither the EU nor the US objected to the transaction. The parties' relatively low market shares—and MOFCOM's emphasis on protecting the supplies used by small Chinese agricultural companies—suggests that MOFCOM may have taken industrial policy concerns into account. In addition, as mentioned above, MOFCOM's use of long-term hold separate remedies is also controversial.

Baxter/Gambro

In its fourth decision, MOFCOM required a divestiture to address its concerns relating to Baxter International Inc.'s acquisition of Gambro AB. Baxter and Gambro manufactured and sold equipment and consumables used in two forms of treatment for serious kidney disease and injury: continuous renal replacement therapy ("CRRT") and hemodialysis. MOFCOM determined that the merged firm would have a dominant position in the markets for CRRT monitors, blood tubes, and dialzyers, with combined market share (in China) of 57%, 84%, and 79%, respectively. With respect to the market for hemodialyzers, MOFCOM noted that Baxter held only a 3% share, while Gambro had a 19% share and a third firm, Nipro Medical Corporation, had a 26% share. It determined, however, that the acquisition would likely result in coordinated effects, since Nipro manufactured Baxter's hemodialyzers pursuant to an OEM agreement that required the companies to exchange competitively sensitive information. MOFCOM required the parties to divest Baxter's global CRRT business and terminate the Nipro-Baxter OEM agreement.

Fast-Track Rules for Simple Cases

MOFCOM has also made significant progress towards creating a streamlined procedure for mergers that do not raise significant competitive concerns. After circulating a draft in April 2013, MOFCOM recently issued final guidelines describing the six categories of transactions that count as "simple" for the purposes of this procedure. These categories include: (1) horizontal mergers where the parties' combined share is less than 15%, (2) vertical mergers where the parties' combined share is less than 25% in both the upstream and downstream markets, and (3) conglomerate mergers where the parties' combined share is less than 25%.[ix] The guidelines provide for several vague exceptions, however. For example, deals do not qualify as "simple" if the relevant market is difficult to define; if third parties complain; or if the transaction may negatively impact consumers, third parties, competition, market access, technological progress, or the development of the national economy.[x]

The guidelines do not describe the procedures that would apply to simple mergers. MOFCOM had, however, previously circulated a draft proposal under which MOFCOM would reportedly complete its review of "simple" mergers in 30 days, except if special circumstances exist.

Draft Merger Remedies Guidelines

MOFCOM also published a set of draft guidelines on merger remedies. The guidelines are lengthy and address many aspects of MOFCOM's remedial procedures. In many respects, the current draft guidelines mirror the approaches of the US and EU. It is worth noting again, however, that the guidelines could change significantly (or be abandoned altogether) before they are made final.

The draft guidelines are probably most notable for their guidance on the timing of remedial discussions. The draft guidelines encourage parties to submit a final remedial proposal no later than twenty days before the last day of the review process. They also state that MOFCOM should explain its competitive concerns to the parties at "an appropriate point." That commitment could be significant. Some critics have argued that MOFCOM's existing practices make it difficult for the parties to design an effective remedy proposal, since MOFCOM often does not inform the parties of its concerns. This new rule, if followed in practice, could help alleviate that problem.

The guidelines also contain a controversial provision allowing MOFCOM to modify its remedial orders after they have been implemented. Notably, this provision would allow MOFCOM to strengthen existing orders when it determines that they are no longer sufficient to reduce the harm to competition caused by a transaction.

Finally, while the guidelines provide detailed information concerning MOFCOM's remedial procedures, they provide no guidance as to the substantive standards that MOFCOM will employ when determining whether to require a specific type of remedy. Such a discussion would likely be helpful given MOFCOM's atypical remedial practices, such as the use of the long-term hold separate orders discussed above.

BRAZIL

The New Brazilian Rules on Merger Control: A Year Later

In May 2013, the Brazilian Administrative Council of Economic Defense ("*Conselho Administrativo de Defesa Económica*", "CADE") celebrated its first anniversary of the new Brazilian Competition Act (Law 12,529 of November 30, 2011). The new Law introduced the following changes to merger control in Brazil:

1. Consolidating authority for merger reviews under a single authority (CADE);

2. Establishing a pre-merger review system with a suspensory regime (i.e., a mandatory waiting period);

3. Implementing other changes aiming at streamlining reviews of simple cases.

The New CADE

Under the prior law, three separate agencies were responsible for the application of the Brazilian merger control rules. Now, a single institution, CADE, consisting of by the Administrative Tribunal (the, "*Tribunal Administrativo*," or "Tribunal") and the Superintendence ("*Superintendência-Geral*"), is in charge of merger analysis. The Superintendence investigates cases before referring them to the Tribunal for decision. The Secretariat (previously assigned to the Ministry of Justice), which previously scrutinized antitrust behavioral cases, is now a part of CADE's Superintendence and also deals with merger control.

The 2011 Brazilian Competition Act repealed the previous post-merger control regime, which had been in force since 1994. Under the old regime, the merging parties could close their transactions and deal with CADE at a later stage, without observing a waiting period. The new regime aligns Brazil's merger control principles with those of other jurisdictions, allowing for improved international cooperation. There have already been examples of this enhanced cooperation, in the domain of remedies. For example, in its 2014 Syniverse/MACH decision, the Superintendence found that the transaction would lead to a high level of concentration in the markets for data clearing and near-real-time roaming data exchange. CADE cooperated with the European Commission, which had raised its own concerns in the same markets in a Phase II investigation, for the purposes of devising a set of remedies that could alleviate the competition concerns of both authorities. As Reporting Commissioner Vinicius Marques de Carvalho stated, "this case demonstrates the importance of fomenting dialogue between Competition authorities in an increasingly globalized world."

Generally speaking, parties to a transaction are required to file and observe a waiting period in Brazil where: (i) the turnover (revenue) in Brazil of one party is at least BRL 750 million (approx. USD 348.22 million/EUR 261.44 million); and (ii) the turnover of the other party in Brazil is at least BRL 75 million (approx. USD 34.72 million/EUR 26.14 million). Unlike certain other merger control regimes, the turnover calculation includes that of the consolidated economic groups to which the transacting parties belong, including that of the seller.

The elimination of Brazil's market share threshold, and the increase in Brazil's turnover thresholds has reduced the number of transactions filed before CADE. However, the parties must submit to a waiting period under the new law, so transactions that meet the relevant thresholds may no longer be implemented before clearance. A breach of this obligation might result in the transaction being declared void and a penalty payment of BRL 60,000 to BRL 60 million (approx. USD 27,778/EUR 20,915 to EUR USD 27.78/20.9 million). In any event, CADE may demand that the parties submit a filing in connection with any transaction within a period of one year as of the closing date of the transaction, even if the transaction did not satisfy the turnover thresholds mentioned above. There is a flat filing fee of BRL 45,000 (approx. 20,833 USD/EUR 15,687) per filing.

The transaction must be reviewed within 240 calendar days (approximately eight months), extendable to a maximum of 330 calendar days. The current trend is to clear simple transactions as early as 20 calendar days provided that the "fast-track" procedure applies. According to CADE's own data, in its first year of operations (i.e., between May 2012 and May 2013), CADE approved 227 of 250 transactions it reviewed through the "fast-track" procedure within 20 days, while under the previous regime the average timetable for clearance was 154 days.

Noteworthy Transactions

In 2013, CADE has provided clear examples that it is ready to take action in case of failure to comply with the Brazilian obligation to notify -- so-called "gun-jumping".

For example, on April 17, 2013, CADE imposed a fine of BRL 7.4 million (approx. USD 3.43 million/EUR 2.58 million) on JBS SA for its failure to notify seven acquisitions of meat packing companies. CADE's authorization of the transactions was conditional on the commitment of JBS to report all further similar acquisitions of meat packing companies for the next 30 months, *i.e.*, including transactions which do not exceed the jurisdictional thresholds.

In addition, on August 28, 2013, CADE imposed a BRL 3 million fine (approx. USD 1.39 million/EUR 1.05 million) on OGX for implementing its acquisition of 40% stake of Petrobras's participation in two post-salt oil fields off the Brazilian coast. However, the transaction was not declared void. The Reporting Commissioner indicated that CADE took into consideration that the transaction did not threaten to harm consumers and that the "gun-jumping" activities were purely administrative.

Finally, in 2010, CADE's predecessor allowed Telefónica's subsidiary TelCo S.P.A. to acquire an indirect stake in Tim Brasil Serviços e Participações, S/As, subject to the condition that the activities of Telefónica and Tim Brasil were kept separate and independent. In 2013, Telefónica indirectly raised its shareholding in Tim Brasil by increasing its shareholding of TelCo. On December 4, 2013, CADE found that this transaction violated the commitments in the 2010 operation as it considerably increased Telefonica's (indirect) influence on Tim Brasil and could "*compromise the competition market balance*." CADE imposed fines on both Telefónica (BRL 15 million (USD 6.94 million/EUR 5.23 million) and Tim Brasil (BRL 1 million (USD 462,962/EUR 348,590)), and ordered the unwinding of the transaction.

The following recent CADE enforcement actions are also noteworthy:

In June 2013, CADE cleared Rede D'Or's acquisition of the hospital groups Medgrupo Participações S/A and Hospital Santa Lucia S/A in Brazil, conditional upon the divestiture of two hospitals. CADE found that the transaction would lead to the combined entity controlling more than half of the market for hospital care in Brazil.

CADE concluded that an unconditional approval would have led to increased "prices, loss of service and medical care quality, in addition to the exclusion of competitors."

On November 22, 2013, CADE approved the acquisition of American Chemical CSA by Oxiteno Oxiteno S.A. CADE's Superintendence had recommended prohibiting the acquisition to the Tribunal. CADE had concluded that the transaction would harm competition in certain markets for chemical components used in cleaning and personal care products. However, the Tribunal allowed the transaction, concluding that Oxiteno's commitment to provide certain inputs to third parties at a determined price band was sufficient to alleviate the competitive concerns, and would ensure that no market foreclosure occurred.

Finally, on December 5, 2013, CADE's Superintendence referred to CADE's Tribunal the proposed merger between Anhanguera Educacional Participacoes SA and Kroton Educacional SA, recommending that the transaction be authorized only subject to conditions. The Superintendence concluded that the post-merger company would have an unacceptably large market share in three cities. The agency was also concerned with the overlaps between the two companies in their "distance learning" offerings in over 50 municipalities. On February 27, 2014, CADE's Superintendence also referred to CADE's Tribunal the merger between Estácio Participações, S/A and União dos Cursos Superiores Ltda, which relates to another two distance education institutions.

OTHER JURISDICTIONS

Japan

On January 24, 2013, the Japanese Fair Trade Commissioin ("JFTC") authorized the proposed acquisition of a majority stake in C&H Co, Ltd ("C&H") by the Daiken Corporation ("Daiken") , subject to the remedies offered by Daiken. Daiken is a manufacturer of wood-based materials, including medium density fiberboard ("MDF"), while C&H is a distributer of MDF products, produced by its parent, Hokushin Co, Ltd ("Hokushin"). Specifically, the JFTC was concerned that Daiken/C&H might supply the particular type of MDF to third party manufacturers on less favorable terms to than the terms the combined company would offer to Daiken and its subsidiaries. The JFTC accepted remedies offered by Daiken to address these concerns.

On February 21, 2013, the JFTC unconditionally authorized the proposed merger between Furukawa-Sky Aluminum Corp ("FSA") and Sumitomo Light Metal Industries, Ltd ("SLM") , respectively, the largest and second-largest manufacturers of rolled aluminum products in Japan. The JFTC found that, despite the fact that the combined entity's market share in two sub-categories of aluminum board products approached 50%, other significant competitors remained with available capacity. In addition, the merging parties faced strong competitive pressures from products in neighboring markets – including, among others, stainless steel and carbon fiber.

On May 7, 2013 the JFTC authorized, after an in-depth review (a so-called "secondary review"), the proposed acquisition of Cymer Inc. ("Cymer") by ASML US Inc. ("ASML") . In its review, the JFTC cooperated with several foreign competition authorities, including the U.S. DOJ and the Korea Fair Trade Commission. The proposed transaction raised vertical issues since ASML, the buyer, is present in the market for manufacturing and selling lithography systems whereas Cymer, the acquired entity, manufactures and sells an important input for the production of these systems. Taking into consideration the FRAND-based commitments proposed by ASML, the JFTC concluded that the acquisition would not harm competition.

On December 12, 2013, the JFTC authorized, after a secondary review, the proposed merger of the thermal power generation systems businesses of Mitsubishi Heavy Industries and Hitachi, Ltd. The JFTC had opened a public consultation in September 2013 regarding the possible impacts on competition, but eventually concluded that the transaction would not harm competition in any market segment.

India

In the course of 2013, the Indian Competition Commission ("ICC") provided clear examples that it intends to take the notification obligation seriously.

On April 2, 2013, the CCI imposed a fine on Titan International, Inc of INR 10 million (approx. USD 187,296/EUR 175,780) for gun-jumping, as the buyer failed to notify the CCI of the transaction until approximately 147 days after the transaction closed. The CCI rejected the parties' arguments that the omission to notify was "*inadvertent and unintentional*" (the parties claimed they had been unaware of the obligation). The CCI did, however, take a lenient view under the circumstances, since both parties are based outside India and did, ultimately, voluntarily notify. The CCI imposed a penalty smaller than the maximum available fine, namely approximately INR 1.45 billion (approx. USD 27.2 million/EUR 21.1 million).

On August 1, 2013, the CCI imposed a fine of INR 5 million (approx. EUR 72,889/USD 93,648) on Temasek Holdings and two of its subsidiaries of INR 5 million for the delayed notification (by 399 days) of the acquisition of DBS Group Holdings. The CCI rejected the parties' arguments that the delay was caused by incomplete and erroneous legal advice, and reminded the parties of the relatively high Indian thresholds for notification and the possibility of resorting to the pre-notification consultation mechanism for clarification of any doubts. The CCI also noted that the transaction appeared to raise serious competitive concerns, and that the parties failed to correct their mistaken determination not to file. The CCI recalled that it is "*imperative for the companies to understand appreciate the full extent of their responsibility*."

Finally, on November 26, 2013, the CCI imposed a fine on Etihad of INR 10 million (approx. USD 187,296/EUR 175,780) for partly implementing its acquisition of a 24% stake in Jet Airways before obtaining clearance. The CCI cleared the transaction in December 2013, after an in-depth investigation, but found that the acquisition of three slots at London Heathrow Airport should have been declared, despite the parties' argument that this constituted an independent, non-reportable transaction. However, the CCI took a lenient view as the parties did not attempt to conceal the London Heathrow deal and moved quickly to correct their mistake. The CCI's analysis of the combination was, consistent with European and U.S. airline merger analysis, based on markets defined by "city pairs" of origin and destination.

As set out in more detail in the EU portion of this update, on November 21, 2013, the CCI and the European Commission signed a Memorandum of Understanding to strengthen their cooperation in relation to competition law. Under the new framework, the parties may engage in discussions on competition legislation, share non-confidential information on legislation, enforcement, multilateral competition initiatives and advocacy, and engage in technical cooperation regarding competition legislation and enforcement.

The Common Market of Eastern and Southern Africa

On January 14, , the Competition Commission of the Common Market of Eastern and Southern Africa ("COMESA") was launched as a supra-national competition authority. It is based in Lilongwe, Malawi. The Common Market for Eastern and Southern Africa was formed in 1994 with a view to promoting economic development, as well as peace and security in the region. It currently comprises 19 Member States: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Libya, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

The COMESA Competition Rules and Regulations provide for a mandatory pre-notification merger control regime. In April 2013, the COMESA Competition Commission ("CCC") published for consultation its Draft Merger Assessment Guidelines in light of the widely acknowledged lack of clarity and legal certainty of the COMESA merger control regime. No revised or final guidelines have been published as of the time of writing.

The CCC's jurisdiction is triggered if both or either of the acquiring firm and target firm operate in two or more COMESA member states. While COMESA's regulations originally allowed for *de minimis* thresholds based on turnover and assets, the CCC has set these thresholds at zero. In other words, there are no financial thresholds currently applicable. The fees for filing a notification with the CCC are 0.5% of the parties' combined annual turnover in the COMESA region, or approximately USD $500,000, whichever is lower.

Significant uncertainties remain as to whether the CCC has exclusive jurisdiction to review mergers which meet the jurisdictional thresholds set out in the COMESA Competition Rules and Regulations. In particular, Kenya explicitly requires a parallel national filing of a transaction where notification to the CCC is mandatory, thereby increasing the risk of conflicting regulatory oversight for the same transaction. In addition, COMESA's rules allow member states to request the power to review transactions that they believe will particularly affect competition in their home jurisdiction.

Parties are required to notify the transaction within 30 days of the "decision to merge." While the CCC's Draft Merger Assessment Guidelines provide that, in principle, a notified transaction may be closed prior to its approval by the CCC, the CCC retains the power to require remedies or to prohibit the transaction after closing. Parties which fail to notify their transaction within the prescribed time frame may be fined up to 10% of their turnover in the COMESA region.

Upon receipt of a complete notification, the CCC has 120 days to review a notified merger, though this period can be extended. There is no official shortened review period for deals that do not raise competition concerns. The CCC's early decisional practice shows that the review period can vary. All cases thus far reviewed by the CCC have been cleared unconditionally within a few months from notification. Most cases were cleared within one or two months, while one case was cleared within a little under five months.

In 2013, the CCC received 11 notifications, 10 of which were unconditionally cleared within one to five months after notification. The CCC found that none of the transactions were likely to substantially prevent or lessen competition. The last transaction is still pending approval as of the time of writing.

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[i] *See In re: AMR Corp.*, 502 B.R. 23, 2013 Bankr. LEXIS 5028, at *38 n.17 (Bank. S.D.N.Y. 2013).

[ii] *See* Ron Knox, FTC Clearance Final Piece in Cross-Border Puzzle for Thermo Fisher/Life Sciences, Global Competition Review, 3 Feb. 2014, *available at*: http://globalcompetitionreview.com/usa/article/35152/ftc-clearance-final-piece-cross-border-puzzle-thermo-fisherlife-technologies/.

[iii] *See id.*

[iv] *In re: AMR Corp.*, 502 B.R. 23, 39-40 & n.15 (Bankr. S.D.N.Y. 2013).

[v] *Edstrom v. Anheuser-Busch InBev SA/NC*, 13-cv-1309, 2013 U.S. Dist. LEXIS 131386 (N.D. Cal. Sept. 13, 2013).

[vi] *In re: Wholesale Grocery Prods. Antitrust Litig.*, 09-MD-2090, 2013 U.S. Dist. LEXIS 4584 (D. Minn. Jan. 11, 2013).

[vii] *In re: Evanston Nw. Healthcare Corp. Antitrust Litig.*, 1:07-cv-04446, 2013 U.S. Dist. LEXIS 173794 (N.D. Ill. Dec. 10, 2013).

[viii] On 28 January 2014, the Commission published an update on the practical aspects of merger control filing and set out the requirements in terms of the number and format of notifications. In essence, the Commission has further reduced the number of paper and electronic copies required for the notification, and increased the allowed size of email attachments, which will further facilitate official communication with the Commission by electronic means.

[ix] The remaining categories: (1) off-shore joint ventures that do no business in China, (2) transactions that involve targets that do no business in China, and (3) transactions where an existing shareholder gains sole control over a joint venture.

[x] In addition, transactions are not simple if a notifying party provides incomplete, false, or misleading information or if there are material changes to the transaction or market conditions. And deals through which a shareholder acquires sole control over a joint venture are not simple if the shareholder and joint venture compete in a relevant market.

Gibson, Dunn & Crutcher lawyers are available to assist in addressing any questions you may have regarding the issues discussed above. Please contact the Gibson Dunn lawyer with whom you usually work or any of the following members of the Antitrust and Trade Regulation Practice Group:

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