March 11, 2015

2015 ANTITRUST MERGER ENFORCEMENT UPDATE AND OUTLOOK

To Our Clients and Friends:

In keeping with the explosive growth of regulatory oversight of business activities over the past decade, including in areas such as criminal cartel enforcement, antitrust and competition enforcers around the world have continued to closely scrutinize the competitive consequences of mergers and acquisitions. In the United States, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) continued to challenge a number of high-profile transactions in and out of court, leading some parties to settle and others to abandon their proposed transactions altogether. Both agencies currently have a full docket of investigations involving industry-shaping transactions, some of which appear to be heading to trial (such as the FTC's case against the Sysco/U.S. Foods combination and DOJ's case against National CineMedia/Screenvision). In the European Union, Commissioner Almunia has stepped down after a long and eventful tenure, leading DG Comp with new leadership and a slate of important transactions to consider.

Outside of the U.S. and EU, merger enforcement continues to proliferate. Well over 100 jurisdictions around the world now have merger control regimes, and as newer merger enforcers gain experience, they are increasing their scrutiny of transactions and the use of broad-based remedies. For example, India's relatively nascent merger enforcement agency (the CCI) recently ordered the first divestiture remedy in its history. Meanwhile, China's merger enforcement agency (MOFCOM) continues to assert itself on the global merger control scene. While MOFCOM continues to struggle with resource constraints and delays, it has introduced new procedures designed to streamline the approval of transactions subject to its jurisdiction. Nevertheless, MOFCOM's review process is prolonged and there is a growing chorus of criticism directed at MOFCOM's decision-making, which often diverges from international competition norms. Other jurisdictions throughout the Americas and Africa continue to grapple with substantive and procedural reforms as they seek to align themselves with more established enforcement regimes.

Our 2015 Update and Outlook examines the key cases and trends over the past year around the world. As in past years, the lesson to be drawn is that global merger enforcement presents increasingly complex challenges to transacting parties, particularly where the merging parties operate in many jurisdictions. In this environment, parties planning a transaction must carefully consider the issues that may arise across a number of jurisdictions, and adopt a unified approach to enforcers after announcing their deal.

Gibson Dunn's Antitrust Merger & Acquisition Practice

Gibson Dunn's Antitrust and Competition Law Practice Group has extensive experience successfully 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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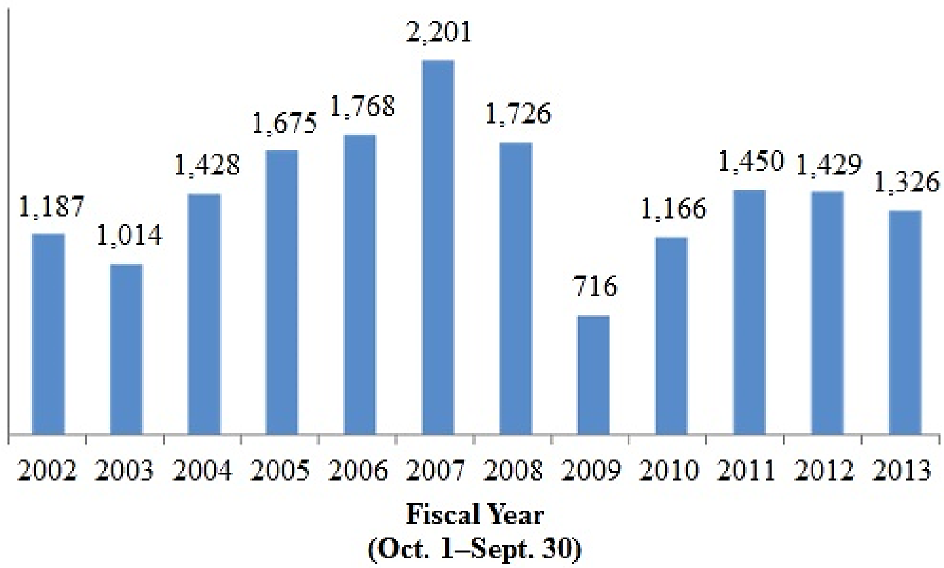
HSR Volume Stabilizes as High Enforcement Levels Continue

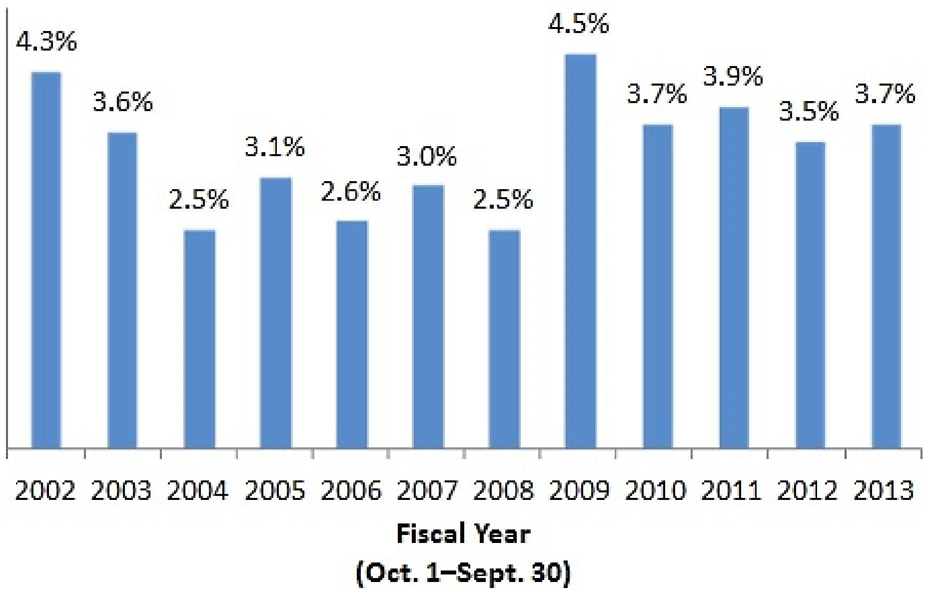
Preceding a well-publicized uptick in global M&A activity in 2014, the number of transactions reported under the Hart-Scott-Rodino ("HSR") Act in FY 2013 actually declined by 7% from FY 2012. The longer-term trend points to a rising but perhaps more stable volume of HSR-reportable transactions than has been the case in over the decade: while a volatile financial climate contributed to HSR volume ranging from a high of 2,201 and a low of 716 between 2007 and 2009, the annual volume appears to have leveled off over the past three years. While official figures are not yet available, it appears that FY 2014 HSR transaction volume will be higher than in FY 2013, but still well below the extraordinary level of HSR activity in the years leading up to the 2008 financial crisis.

HSR Act-Reportable Transactions
FY 2002–2013



Of course, the number of HSR filings is a useful measure of overall U.S. M&A activity, but because a small percentage of these filings trigger formal second request investigations (less than 5% historically), such figures provide little insight into the agencies' enforcement workload. The rate at which the agencies investigate transactions and seek enforcement shows merger enforcement continues to be a priority. The percentage of HSR Act-reportable transactions subject to a second request was 3.7% in FY 2013, which is in line with the elevated rate we have observed over the past six years. While the agencies have not yet published statistics for FY 2014, the agencies continue to issue second requests at the same relatively high rate as compared to historic norms.

Percentage of HSR Act
Transactions Resulting in a Second Request
FY 2002–2013



Enforcement rates (reflecting transactions that are either challenged in court, abandoned due to antitrust concerns, or subject to remedies) under the Obama Administration continue to be on the higher end of the historic range. Between FY 2006 and FY 2008, the agencies brought an average of 34 merger enforcement actions per year. By contrast, between FY 2010 and FY 2012, the agencies averaged 41 challenges annually, even though M&A volume was considerably lower. The agencies challenged another 38 merger enforcement actions in FY 2013, down from a decade-plus high of 44 in FY 2012. We expect that the data for FY 2014, when it is published, will show that agencies continue to challenge transactions at a relatively high rate.

U.S. Agencies Continue to Focus on Non-Reportable Transactions

It is well-known that a transaction will not escape agency scrutiny simply because its value is too small to trigger an HSR filing. Over the past several years, the FTC and DOJ have focused increasingly on such "below the radar" transactions, which resulted in well-publicized litigation such as *United States v. Bazaarvoice* (ratings and reviews software platforms), *United States v. Twin America* (New York City bus tours), and *FTC v. ProMedica Health* (hospitals). As one agency official noted, DOJ alone conducted 73 investigations of non-reportable deals between 2009 and 2013, representing nearly 20 % of all DOJ merger investigations. A number of these challenged transactions were exceedingly small--including one involving the sale of a chicken processing plant valued at only $3 million.

Smaller-value deals can be enticing targets for antitrust investigations. In a number of cases that triggered antitrust enforcement, the parties' competed in small or geographically isolated markets, where they enjoyed significant market shares along with limited competition and prospects for new entry. As discussed below, the FTC challenged a $9 million combination of competing medical groups in Nampa, Idaho, which despite its small size would have created a medical practice that included the vast majority of practicing physicians in the local area. In other cases, post-merger conduct such as price increases triggered agency scrutiny. In *Microsemi/Semicoa*, for example, DOJ alleged that the parties announced price increases in the wake of the transaction, which DOJ viewed as strong evidence of the anticompetitive effect of the merger.

At a time where information about M&A transactions large and small is readily available through any number of online information and media services, the risk that a problematic nonreportable transaction will be detected has never been greater. DOJ and FTC staff actively monitor trade publications, information services, and media outlets--and it is often case that third-party customers, competitors, or others alert the agencies to a problematic transaction.

Parties contemplating a transaction should therefore be prepared, if necessary, to defend the antitrust merits of their transaction even if it doesn't trigger HSR. In some cases, it may be advisable to alert the FTC or DOJ well in advance of closing in order to avoid the uncertainties and potentially exorbitant cost and disruption of a post-consummation investigation and divestiture. In others, it may be advisable to proceed with the transaction but carefully monitor post-closing conduct to ensure that customers or other third parties have no reason to complain.

The Department of Justice

As discussed in the 2014 update, under the leadership of Bill Baer, DOJ has aggressively investigated and pursued enforcement actions against mergers across all major sectors of the economy. Although DOJ did not match its impressive enforcement record over the past two years, which included headline-grabbing merger challenges such as *US Airways/American*, *InBev/Grupo Modelo*, and *Bazaarvoice/PowerReviews*, 2015 may be a banner year for DOJ's merger enforcement efforts under AAG Baer. DOJ is currently investigating a number of major, industry-shaping transactions--including *Baker Hughes/Halliburton*, *Comcast/Time Warner*, and *AT&T/DirecTV*. DOJ is also preparing for trial in its challenge to National CineMedia's $375 million acquisition of rival Screenvision, alleging that the merger would harm competition and lead to higher prices for cinema advertising network services. And in January, DOJ issued a Second Request seeking additional information regarding the $2.6 billion merger between Danagher and NetScout, two leading providers of network monitoring services.

In addition to merger enforcement actions, DOJ also brought an enforcement action against Flakeboard and SierraPine alleging the parties had engaged in illegal premerger coordination prior to the expiration of the HSR waiting period for their transaction. The parties ultimately agreed to a nearly $5 million settlement to resolve DOJ's concerns, the largest fine ever levied against transacting parties for gun-jumping. This case was clearly intended to send a signal that DOJ takes gun-jumping seriously and that transacting parties must remain separate and independent during the HSR waiting period.

DOJ and Bazaarvoice Agree on Remedy to Address PowerReviews Acquisition

Following its victory in the liability phase of its case against Bazaarvoice's consummated acquisition of PowerReviews, DOJ negotiated a proposed remedy with Bazaarvoice which will resolve DOJ's competitive concerns associated with the acquisition and should end the litigation. The proposed remedy requires Bazaarvoice not only to sell all of the assets it acquired from PowerReviews, but also to take what Bill Baer characterized as "meaningful additional measures that will allow the divestiture buyer to quickly achieve the competitive position that PowerReviews would have occupied today, absent the unlawful transaction."

DOJ Initiates Ligation Challenging National CineMedia/Screenvision Merger

On November 3, 2014, DOJ filed a civil antitrust lawsuit in the Southern District of New York seeking to block National CineMedia Inc.'s ("NCM") $375 million acquisition of Screenvision LLC. Both NCM and Screenvision operate cinema advertising networks, which create the "pre-shows" that movie theatres play prior to the start of a movie. DOJ alleged that the acquisition would combine the only two significant cinema advertising networks in the United States, depriving movie theaters and advertisers of options for cinema advertising and risking higher ticket prices for movie goers.

According to the complaint, NCM and Screenvision currently serve 88 % of all movie theatre screens in the United States through long-term, exclusive contracts. DOJ alleged that over the past two years, Screenvision has evolved into a particular aggressive competitor as it has sought to steal share from NCM by reducing prices and offering financial incentives to theatres. In the complaint, DOJ highlighted a number of internal documents from NCM and Screenvision executives describing the aggressive competition between the companies and NCM's desire to "buy [Screenvision] before either us or [Screenvision] does a stupid deal." In response to the lawsuit, NCM and Screenvision have signaled that they intend to challenge DOJ's allegations in court, and that their transaction will deliver a number of procompetitive benefits, including lower costs and improved services.

Although most DOJ merger enforcement actions typically result in a consent decree, as this lawsuit demonstrates, DOJ will not shy away from going to court. It remains to be seen whether a federal judge is willing to adopt DOJ's narrow market, which is premised on the notion that movie "pre show" advertising is unique among other available marketing and advertising outlets (TV, radio, Internet). Based on the complaint, DOJ's case relies heavily on internal documents, as was the case in *Bazaarvoice*, to prove its alleged market definition and the likelihood of anticompetitive effects.

DOJ Requires Upstream Divestiture in Tyson Foods' Acquisition of Hillshire

Perhaps the most significant transaction challenged by DOJ in 2014 involved an unusual theory that that the merger would enhance "monopsony" (i.e., buyer) power. In Tyson Foods, Inc.'s ("Tyson Foods") $8.55 billion acquisition of Hillshire Brands Company ("Hillshire"), DOJ alleged in its complaint that the transaction would diminish competition for the purchase of sows (pigs for slaughter) from farmers in the United States as the combined company would account for over a third of all sows purchased, providing them with enhanced buying power. As Tyson Foods and Hillshire did not compete in the production of sausage or the sale of sows, DOJ alleged that the relevant product market affected by the transaction was the purchase of sows.

DOJ challenged the transaction, alleging that the acquisition would eliminate a significant customer for sows. DOJ noted that for many farmers, the merging parties constitute their two best alternatives among the small number of potential buyers from whom these farmers seek or receive quotes. Thus, if the transaction were consummated, DOJ alleged the merged firm would be less aggressive and the farmers would receive lower prices for their sows. As a result of these lower prices, farmers might have been forced to ship sows to more distant purchasers, resulting in economic inefficiencies such as additional cost and shipping time.

To resolve DOJ's concerns and obtain approval for the acquisition, Tyson Foods and Hillshire agreed to a settlement that requires Tyson Foods to divest Heinold. The settlement demonstrates that when analyzing a merger or acquisition, at least in cases involving agricultural products where larger buyers tend to purchase inputs from many small sellers, it is important to consider the transaction's potential effects on suppliers in addition to customers. Although it is unusual to see an enforcement action based on the likelihood of lower prices realized by suppliers due to alleged buyer power, requiring Tyson Foods to divest Heinold illustrates DOJ's continued focus on monopsony power issues in agriculture, particularly as they may impact small farms and other producers.

DOJ Challenges Agricultural Joint Venture between ConAgra, Cargill, and CHS

In a second significant merger enforcement action involving the agricultural industry, DOJ required ConAgra Foods Inc., Cargill Inc., and CHS Inc. to divest four flour mills in order to obtain approval for the formation of the Ardent Mills joint venture. Ardent Mills would be formed by combining the flour milling assets of Horizon (a joint venture between Cargill and CHS) and ConAgra Mills (a subsidiary of ConAgra). DOJ alleged in the complaint that Horizon and ConAgra Mills were two of the three largest flour millers in the United States, as measured by capacity, and that the joint venture would lessen competition in the sale of hard and soft wheat flour in various geographic markets.

Although DOJ recognized that flour can travel long distances by rail and that transportation costs are a relatively small portion of the cost of delivered flour, it nevertheless alleged that transportation costs limit the ability of distant millers to compete with local millers for customers, and thus competition for flour sales largely takes place among millers with milling capacity located within 150 to 200 miles of a customer. Based on this limited definition of the geographic market, DOJ found that the joint venture would own between 40 and 100 % of the milling capacity for hard and/or soft wheat flour in four relevant geographic markets. Thus, in order to obtain approval for the joint venture, DOJ required the parties to enter into a settlement agreeing to divest a flour mill in each of the relevant geographic markets.

DOJ Continues Strict Scrutiny of Broadcast Television Transactions

On the heels of its decision in 2013 requiring a remedy to address the alleged competitive harm from Gannett Co, Inc.'s acquisition of Belo Corp., DOJ remained very active in its investigation of transactions involving broadcast television companies. In 2014, DOJ challenged three transactions involving companies that own and operate local broadcast television stations--Sinclair Broadcast/Perpetual; Media General/Lin Media; and Nexstar/CCA. As it did in its challenge of the Gannett/Belo transaction, DOJ alleged that each of these three transactions would lead to higher prices for broadcast television spot advertising in the relevant local media markets. The parties in each of these three transactions entered into consent decrees which required them to divest broadcast television stations in the effected markets.

In each of the complaints, DOJ defined the relevant product market as the sale of "broadcast television spot advertising." According to DOJ, "broadcast television spot advertising possesses a unique combination of attributes that set it apart from advertising using other types of media," due to the fact "television combines sight, sound, and motion, thereby creating a more memorable advertisement" than other forms of advertising and "of all media, broadcast television spot advertising generally reaches the largest percentage of potential customers in a targeted geographic area." While DOJ recognized that subscription television channels and online video distributors, such as Netflix and Hulu, are important sources of video programming, DOJ found that they are not a desirable substitute for broadcast television spot advertising due to the fact that they lack the "reach" of broadcast television.

As discussed in last year's update, this analysis is notable as DOJ continues to reject the argument that cable, satellite, and online video advertising compete with broadcast television or local (including spot) advertising. Consistent with its stance in the *CineMedia* (pre-screen advertising) litigation, DOJ once again adopted an aggressively narrow market definition in a media advertising transaction. As the media landscape continues to evolve rapidly, with Internet and social media outlets commanding an increasing share of advertising dollars, DOJ may ultimately be forced to reevaluate its position and analyze the increasingly intense competition between traditional broadcast advertising and other forms of advertising. But for now, DOJ appears wedded to a distinct product market for broadcast television spot advertising.

DOJ Continues Aggressive Enforcement Posture in Forest Product Mergers

In 2014, DOJ investigated three transactions in involving forest products, resulting in one consent decree--Verso/NewPage--and two transactions--Louisa Pacific/Ainsworth and Flakeboard/SierraPine--being abandoned by the parties after DOJ expressed concerns about the competitive effects of the transactions. As Bill Baer noted following the Verso/NewPage consent decree, these challenges demonstrate that DOJ "remains committed to preserving competitive vigor in the market for forest products" and will continue to closely scrutinize transactions in this industry.

Verso Paper/NewPage

On December 31, 2014, DOJ filed a complaint challenging Verso Paper Corp.'s ("Verso") $1.4 billion acquisition of NewPage Holdings Inc. ("NewPage"). According to the complaint, NewPage was Verso's closest competitor in the sale of coated paper used for labels, magazines, and catalogues. DOJ alleged that each of these three types of coated paper constituted a relevant product market and that Verso and NewPage's combined share in these three markets was 40%, 50%, and 70%. At the same time that it filed the complaint, DOJ filed a proposed consent decree requiring the companies to divest two paper mills. DOJ noted that competition between Verso and NewPage has historically resulted in lower prices, improved products, and better services and alleged that without this divestiture, the transaction would have risked causing higher prices in the United States and Canada for coated paper.

Louisiana Pacific and Flakeboard Abandon Acquisitions Following DOJ Concerns

Louisiana Pacific Corp. (LP) abandoned its $1.1 billion acquisition of Ainsworth Lumber Co. Ltd. after DOJ expressed concerns about the transaction's likely anticompetitive effects. According to the DOJ press release announcing that the parties had abandoned the transaction, the companies were close competitor in the sale of a type of manufactured wood-based panel called oriented strand board (OSB), and the transaction likely would have substantially lessened competition in the market for the production of OSB sold to customers in the Pacific Northwest and Upper Midwest regions of the United States.

Flakeboard America Ltd. ("Flakeboard") similarly abandoned its plan to acquire three mills from SierraPine after DOJ expressed concerns about the transaction's likely anticompetitive effects in the market for medium-density fiberboard (MDF). According to the DOJ press release announcing that the parties had abandoned the transaction, Flakeboard and SierraPine are two of only four significant suppliers of MDF to the West Coast and for many customers they are the two closest sellers of MDF. DOJ alleged that the proposed acquisition would have given the combined firm a 58 % market share for the sale of certain types of MDF on the West Coast, and thus the proposed acquisition would have put Flakeboard in a better positon to raise prices and would have enhanced the risk of coordination with Flakeboard's few remaining MDF competitors.

Illegal Pre-Merger Coordination Results in $4.95 Million Fine for Gun-Jumping

In addition to expressing concern over the competitive impact of Flakeboard's proposed acquisition of SierraPine, DOJ brought "gun-jumping" charges against the parties, alleging that the parties had engaged in illegal pre-merger coordination before the parties abandoned the transaction in violation of the HSR Act and Section 1 of the Sherman Act. DOJ's complaint that the parties coordinated the closing of a SierraPine mill and the transfer of SierraPine's customers to Flakeboard before the HSR waiting period expired. The coordination between the parties included: (i) providing Flakeboard with competitively sensitive information about SierraPine's customers that Flakeboard distributed to its salesforce; (ii) delaying the announcement of the closure of the mill to provide Flakeboard an opportunity to contact SierraPine's customers; (iii) SierraPine allowing Flakeboard to direct its communications with customers; and (iv) encouraging SierraPine employees to direct customers to Flakeboard through the assurance of future employment with Flakeboard following the transaction. DOJ asserted that this level of coordination provided Flakeboard with operational control over SierraPine, and thus constituted a violation of the HSR Act.

DOJ indicated that although it was prepared to seek the maximum penalty under the HSR Act of $3.568 million ($16,000 per day of the violation) for each party, it reduced the penalty to $1.9 million per party because the parties voluntarily reported the conduct and cooperated with DOJ's investigation. In addition to the HSR Act fines, DOJ also imposed a disgorgement remedy of $1.15 million on Flakeboard in a separate claim under Section 1 of the Sherman Act. The additional $1.15 million disgorgement remedy allegedly represented DOJ's "reasonable approximation of the ill-gotten profit Flakeboard received as a result of the parties' coordination to close [a SierraPine mill] and move the mill's customers to Flakeboard."

Though unusual, DOJ's action against Flakeboard and SierraPine is a vivid reminder that the U.S. antitrust authorities regard gun-jumping as a serious matter. During pre-merger negotiations, diligence, and integration planning the parties are responsible for ensuring that they do not engage in illegal gun-jumping or premerger coordination. Although gun-jumping enforcement involving business conduct (as opposed to failure to file HSR) is uncommon--the last case brought by DOJ was *Smithfield Foods/Premium Standard Farm* in 2010--any conduct that appears to constitute unlawful pre-merger coordination could trigger an unwanted investigation and potentially delay HSR clearance. Finally, although *Flakeboard/SierraPine* involved a transaction that was also deemed to be problematic under the Clayton Act, parties to a merger should note that the pre-merger coordination rules apply regardless of whether the transaction itself raises competitive concerns--indeed *Smithfield Foods/Premium Standard Farm* resulted in Smithfield agreeing to a $900,000 settlement for exercising operational control before the HSR waiting period expired, even though DOJ ultimately found that the transaction did not raise any anticompetitive concerns.

The Federal Trade Commission

From the time of our 2014 Update last March until the end of the year, the Commission required remedies in 18 merger matters and blocked two deals. This marks a modest uptick in the number of consent orders compared to the prior two years, but the overall level of enforcement is roughly in line with aggressive levels of merger enforcement in 2013 and 2012. In addition, last week the Commission initiated litigation seeking to enjoin Sysco's proposed acquisition of US Foods, further highlighting its ongoing emphasis on merger enforcement.

There were several notable personnel changes at the Commission and within its Bureau of Competition. Most significantly, Terrell McSweeny was sworn in on April 28, 2014, filling the "fifth" Commissioner seat, which had been vacant for over a year. Commissioner McSweeny rounds out the Commission's three-member majority of Democratic-appointees. She most recently served as the Chief Counsel for Competition Policy and Intergovernmental Relations for DOJ's Antitrust Division. Elsewhere in the Commission, Marina Lao joined the FTC as Director of the Office of Policy Planning after serving as a professor at Seton Hall University School of Law and Ashkan Soltani replaced Latayna Sweetney as Chief Technology Officer.

In the Bureau of Competition, Edward "Ted" Hassi departed for private practice after a three-and-a-half year stint as Chief Trial Counsel. To re-staff its trial group, the Bureau added litigators Tara Reinhart and David Laing from private practice in December. In addition, one of the Bureau's Deputy Directors, Norman Armstrong, departed in October for private practice. To date, the Commission has not filled Mr. Armstrong's position. After 13 years apiece at the FTC, Assistant Director of the

Mergers IV Division Jeffrey Perry and Deputy Assistant Director of the Mergers I Division Jonathan Klarfeld both left for private practice. Alexis Gilman and James Weiss, respectively, were promoted from within their respective divisions to replace Messrs. Perry and Klarfeld.

On a sad note, Cathy Moscatelli, the Assistant Director of the Mergers II Division, passed away on February 18 after a valiant battle with cancer. Cathy was well-known within the antitrust community as a very professional and capable advocate, manager, and prosecutor. Within the FTC, Cathy was known for her tireless commitment to mentoring young attorneys, and the Commission has announced an award for mentorship named in her honor.

These new appointments and departures, while noteworthy, likely do not signal a new direction for the FTC, nor do they suggest the FTC is likely to depart from its practice in recent years of rigorously investigating mergers within its jurisdiction. As detailed in our 2014 Antitrust Merger Enforcement Update, the FTC's existing leadership--particularly Chairwoman Edith Ramirez and Bureau of Competition Director Deborah Feinstein--remain and will continue to play a central role in the FTC's enforcement decisions. We expect the Commission to continue to take a decidedly pro-enforcement approach to mergers and other antitrust matters.

The FTC Challenges Sysco's Proposed Acquisition of US Foods

The Commission's year-long review of Sysco's proposed $3.5 billion purchase of US Foods came to a conclusion on February 19 when it filed an administrative complaint charging that the proposed merger would harm competition in the "national market for broadline [food] distribution services" and in the local market for food distribution in 32 metropolitan areas. The Commission also authorized its staff to seek a preliminary injunction in federal court and 11 state attorneys general, including California, Illinois, and Maryland, will join the Commission's effort to preliminarily enjoin the acquisition. Sysco and US Foods are the two largest food distributors in the United States, and the Commission has alleged that together they account for 75% of the national market for broadline food distribution services. The parties had offered to divest 11 food distribution centers to Performance Food Group ("PFG"), a regional rival, to resolve competition issues. The Commission, however, took the position that the divestiture "would neither enable PFG to replace US Foods as a competitor nor counteract the significant competitive harm caused by the merger." It remains to be seen whether the parties will offer to divest additional assets as the litigation progresses. The litigation presents interesting questions regarding the legal viability of defining relevant product markets by reference to specific groups of consumers, an approach that underlies the high national market shares alleged by the Commission in its complaint.

FTC Opposition Leads to the Abandonment of Two Proposed Mergers

After the FTC sued to block the proposed deal in last December, Verisk Analytics and EagleView Technology quickly abandoned their $650 million merger. According to the FTC, Verisk, the second-largest provider of rooftop aerial measurement products for insurance assessments, sought to purchase EagleView, the largest provider of insurance assessment technology. The Commission alleged that the combined firm would have about 99 % of a relevant market for rooftop aerial measurement products used by insurance adjusters. The only viable alternative, according to the Commission, is manual, ground-based methods that generations of insurance adjusters used before the aerial products became available in 2008, including ladders. According to the Complaint, rooftop damage accounts for about 35% of property insurance claims nationwide, which means that a massive amount of insurance claims depend on the availability of such technology. The Commission claimed that the combined company would account for about 99 % of its defined market, and that entry and expansion by rivals would be thwarted by aggressive IP enforcement tactics used by the merging parties.

While there may have been close factual questions in the FTC's investigation, the Commission's analytical approach in Verisk Analytics/EagleView appears to be a fairly straightforward application of the agencies' Horizontal Merger Guidelines. The FTC relied primarily, if not exclusively, on market concentration metrics, which revealed that the parties had an extraordinarily high market share. In addition, the FTC concluded other alternative measurement tools were not economically viable substitutes for the merging parties' offerings.

Likewise, Jostens, Inc. dropped its plan acquire American Achievement Corp. ("AAC") after the FTC sued to block the deal. The FTC's complaint alleges that the market for class rings is dominated by three companies and that the merger would have "greatly enhanc[ed] the remaining two companies' ability to collude." In addition, the Commission was concerned that the deal, valued at $500 million, would cause prices to rise and quality to decline. The Commission defined two relevant product markets--high school class rings and college class rings--and noted that Jostens and AAC are the top two vendors in both of the markets.

It is difficult to draw definitive lessons from these two failed transactions because the parties chose to abandon their respective deals rather than challenge the FTC's findings in court. However, these two instances continue to demonstrate the agencies' recent ability to win the proverbial war without firing a shot. As discussed in our prior Updates, a number of major transactions in recent years have been abandoned without the agencies winning a single court ruling. In the past three years, the parties to AT&T/T-Mobile, 3M/Avery, Louisiana Pacific/Ainsworth Lumber, NASDAQ/NYSE Euronext, and Flakeboard/SierraPine all terminated their proposed transactions prior to or during litigation with DOJ. These and other cases demonstrate the leverage the agencies often have in instances where they are willing to litigate, particularly where the parties are less willing to engage in lengthy and costly court proceedings.

Director Feinstein Outlines Perspective on Analyzing Mergers Between Potential Competitors

While the framework for evaluating the impact of mergers between existing competitors is well-developed and widely understood, the application of the antitrust laws to mergers between potential competitors is more controversial. Evaluating the potential loss of future competition between firms that do not presently compete, but *may* compete in the future absent a transaction, involves a degree of speculation that is absent from cases involving competitors that have some history of marketplace rivalry.

In recent years, the FTC has aggressively sought to block or otherwise remedy issues that arise in transactions between potential competitors. For example, in *Polypore*, the FTC blocked a merger between battery separator manufacturers, in part, on potential competition grounds--in a case where the FTC prevailed on appeal to the 11th Circuit. In 2013, the FTC required Nielsen and Arbitron to divest and license certain technology as a condition for approving their $1.26 billion merger, a decision based on the theory that the parties were well-positioned to compete in a future market for cross-platform ratings systems. In addition, as discussed below, a number of pharmaceutical enforcement actions rely on potential competition theories. These cases naturally raise questions as to the legal and enforcement standards the FTC applies in potential competition cases.

In light of these cases, and the ongoing debate regarding the standards applicable to potential competition cases, in February 2014, Bureau of Competition Director Deborah Feinstein delivered a policy speech outlining the FTC's stance on "the forward-looking nature of merger analysis." Although Ms. Feinstein's speech provided a thoughtful, comprehensive overview of potential competition analysis, her comments closely adhered to the FTC's precedents in the area.

Feinstein noted that "[t]he task of merger review is to predict with some level of confidence--but not absolute certainty--whether the merger's likely competitive effects based on facts, economic learning, and reasoned analysis require intervention to prevent substantial harm to competition and consumers." A threshold issue, of course, is whether the merging firms should be treated as actual or potential competitors. According to Feinstein, "[a] firm not currently making sales can nonetheless be in the market as an actual competitor based on evidence that it is already having an effect on the behavior of firms currently making sales."

The essence of the FTC's stance on potential competition is that "where the facts show two firms likely to compete in the future--even if their products will not be on the market for some number of years--[the Commission] may have concerns that such a combination could adversely affect competition." The Commission conducts "a fact-based analysis . . . to predict whether a firm is sufficiently likely to enter [the market in question such] that its acquisition will harm competition." Then, if "the merging firms are the only, the most likely, or the furthest along in developing a new product, the Commission will likely take action" if those parties are likely competitors and no one else is close to them in new product development. To prevent mere speculation, Feinstein noted that the FTC relies on the parties' customers to provide insight on the future of the market in question.

As Nielsen/Arbitron demonstrates, the FTC is of the view that potential competition concerns may arise even where the *relevant market does not yet exist*. Such cases involve a higher degree of speculation regarding merging parties' ability to enter, the future success of other potential rivals, and the notion that a new technology market will exist at some point in the future. On the other end of the spectrum, in some cases it is possible for the Commission to foresee the development of particular markets with more confidence (as in the case of generic drugs, where it is widely-known when the patent for a branded drug will expire and "pipeline" drugs will be marketed).

The FTC Remains Focused on Health Care

The FTC's focus on the health care sector, discussed in our 2014 Update, has continued unabated. Indeed, two-thirds of the Commission's merger remedies (12 out of 18) between March 21 and the end of the year addressed health care products or services.

While all corners of the health care sector remain squarely in the FTC's sights, the pharmaceutical industry saw the most activity. In particular, the FTC required remedies in four mergers between makers of generic drugs. The Commission pays particularly close attention to mergers in the pharmaceutical industry (and especially the generic drugs market) because it is often possible for the Commission to accurately predict future competition in the market for a particular drug due to the lengthy FDA approval process. The Commission required remedies in four transactions involving generic drug product markets in 2014--Endo Health Solutions/Boca Life Sciences, Akorn Enterprises/Hi-Tech Pharmacal, Akorn Enterprises/VersaPharm, and Actavis/Forest Laboratories. And the Commission began 2015 by requiring a divestiture before approving Sun Pharmaceutical's purchase of Ranbaxy Laboratories in January. In each of these consent orders--consistent with the FTC's past practice--the FTC defined relevant markets as individual generic drugs.

However, the FTC took a different approach to market definition in its complaint and proposed consent order placing conditions on the merger of Valeant Pharmaceuticals and Precision Dermatology. The order, which was approved in August, mandated divestiture of both the branded and generic versions of acne treatments known as single-agent topical tretinoins, and defined the relevant market as including both branded and generic drugs. Valeant and Precision both manufactured and had substantial market shares in the branded and generic versions of that type of acne medication. While this remedy does not necessarily suggest a departure from the FTC's historic position that generic drugs compete in markets separate from their branded counterparts, Valeant/Precision Dermatology highlights that the FTC may adopt other approaches to market definition depending on the facts of a given case, particularly where there is evidence of customer switching and cross price elasticity between branded and generic drugs.

The Commission also required remedies in two mergers involving branded pharmaceuticals. In Prestige Brand Holdings' $750 million acquisition of Insight Pharmaceuticals, the parties agreed to divest Prestige's branded motion sickness drug so they could keep Insight's well-known Dramamine brand. The drugs in question had different active ingredients. However, in its complaint, the FTC defined the market as all over-the-counter motion sickness drugs instead of defining the market, as it has in past cases, by active ingredient. Defining the market by the clinical applications of these pharmaceuticals, as opposed to limiting the relevant market to a single drug, provided the foundation of the FTC's claim that the merger would harm consumers by eliminating competition between the two drugs and was based on evidence of competition between motion sickness drugs with different active ingredients.

After evaluating GlaxoSmithKline's proposed joint venture with Novartis, the FTC defined the relevant market as nicotine-replacement transdermal patches, rejecting a broader category of nicotine-replacement treatments including chewing gum and vaporizers. Novartis, which has a 36.5% stake in the joint venture, agreed to divest its Habitrol nicotine patch so that the parties may continue to market Glaxo's Nicoderm CQ patch. The FTC's analysis of Prestige/Insight and the GlaxoSmithKline/Novartis joint venture reflect the FTC's close scrutiny of physician, patient, and payor substitution patterns to define the scope of the relevant market in mergers involving branded drugs.

In addition to the pharmaceutical industry, the Commission continued its rigorous scrutiny of hospital and health care provider mergers. In April, the Commission approved a final consent order under which Community Health Systems agreed to divest medical centers in Gadsden, Alabama and Darlington County, South Carolina in order to complete its purchase of Health Management Associates. Absent such a remedy, the FTC claimed that the merger would have resulted in a near-monopoly in general acute care in Gadsden and reduced the number of providers from three to two in Darlington County. Similarly, Surgery Center Holdings, in its $792 million deal for Symbion Holdings, agreed to divest a surgery center in Florida that Symbion formerly owned. According to the FTC, Surgery Center Holdings would have owned the only two multi-specialty surgery centers and two of the three largest overall surgery centers in the relevant geographic market. Both enforcement actions reflect an ongoing focus on local competition between health care service providers and are in keeping with the Commission's substantial track record of enforcement actions in hospital transactions. The FTC's case against Promedica and its proposed acquisition of St. Luke's Hospital in Ohio is ongoing, as well. The Commission was unanimous in blocking the merger in 2012 and the Sixth Circuit upheld the Commission upon appeal in 2014. After the Sixth Circuit declined to rehear the case en banc, Promedica petitioned the Supreme Court for certiorari in December.

The FTC scored another significant appellate victory when the Ninth Circuit affirmed a federal district court ruling that barred an Idaho hospital's purchase of a group of primary care physicians. The FTC had challenged the acquisition, alleging that St. Luke's Health Systems (no relation to the aforementioned St. Luke's Hospital in Ohio) would have been able to raise prices for primary care services if its purchase of Saltzer Medical Group were allowed to go through. On appeal, the Ninth Circuit rejected St. Luke's efficiencies argument that the merger would allow it to optimize compliance with a provision of the Affordable Care Act.

In the medical device space, the FTC approved Thermo Fisher's purchase of Life Technologies after Thermo Fisher agreed to divest three medical products. Thermo Fisher and Life Technologies are two of the three largest producers of cell culture media and cell culture serum, and two of the four largest producers of short/small interfering RNA ("siRNA") reagents. Cell culture media are liquid and powder products that support cell growth; cell culture serum is a product derived from animal blood that propagates cell lines; and siRNA reagents are products used to study specific genes for disease treatment and other purposes. As part of its $42.9 billion merger with Covidien, Medtronic consented to the FTC's demand that it divest Covidien's nascent drug-coated balloon catheter business. According to the FTC, the two companies were the only firms conducting clinical trials of that type of catheter and only one firm, C.R. Bard, currently produces them.

No Commissioner dissented in any of these matters, reflecting the relative consensus developing within the FTC around the appropriate analysis and standards applicable to merger review in the healthcare sector.

FTC's Antitrust Review Shapes the Bidding War for Family Dollar

For much of 2014, Family Dollar, the second largest chain of discount "dollar" retail stores, had been the subject of a takeover battle between Dollar General, the market leader, and Dollar Tree, the number three industry player. The saga ended on January 22, 2015 when Family Dollar shareholders approved Dollar Tree's $8.5 billion takeover bid. Family Dollar's board had originally approved the deal in July and later rejected a $9.1 billion bid from Dollar General, citing antitrust concerns. The board then urged shareholders to reject Dollar General's subsequent hostile bid, which was set to expire on January 30.

Family Dollar's board explained its reasoning in a January 12 letter to shareholders, arguing that the FTC would require divestiture of thousands of stores in a merger with market-leader Dollar General, but only around 300 in a merger with number-three Dollar Tree. Just days later, Dollar General responded and asserted that its proposal to divest 1,500 stores would win FTC approval, but shareholders sided with Family Dollar's board.

Unfortunately for FTC observers, Dollar Tree's purchase of its larger rival means that we will not see how the FTC would have handled a merger between the two largest players in the dollar store industry. The outcome does illustrate the high degree of difficulty associated with acquiring a rival through hostile means, particularly where there is an alternative bid that raised less serious antitrust concerns. In this case, Dollar Tree, despite offering a lower premium for Family Dollar shares, was able to convince Family Dollar shareholders that the antitrust risk associated with Dollar General's bid did not justify the higher premium they would have received. The ability to assure Family Dollar's shareholders of FTC approval (even with divestitures) proved to be a winning argument in favor of Dollar Tree's bid.

The FTC Sticks to Its Supermarket Merger Review Playbook and Requires the Largest-Ever Supermarket Divestiture

The Commission made headlines in the early portion of 2015 by requiring its largest ever divestiture in the supermarket industry. Albertson's agreed to purchase Safeway last year for $9.2 billion, pending FTC approval. The parties agreed in January to sell 168 stores in 130 geographic markets, the vast majority of which are located on the West Coast. Despite significant divestitures, the combined entity will retain over 2,000 stores around the United States.

In its Complaint, the FTC adhered to the traditional market definition of supermarkets and excluded discount retailers, club stores, convenience stores, and superstores. Even though a wide range of food and grocery items are available at these other retailers, the FTC determined that supermarket shoppers "are not likely to . . . significantly increase grocery purchases at other types of stores, in response to a small but significant price increase by supermarkets." The Commission adhered closely to the market concentration thresholds in its Horizontal Merger Guidelines, which presume enhanced market power when the acquisition results in an HHI increase of 200 or more and a post-acquisition level of 2,500 or higher. The result was the FTC forced divestitures even in the 75 geographic markets that had at least four (and sometimes as many as six) supermarkets before the merger.

More Consolidation in Office Supply Superstores Triggers Further FTC Scrutiny

The FTC once again faces the question of competition in the market for office supplies after Staples' proposed deal to purchase Office Depot for $6.3 billion. When it cleared Office Depot's 2013 merger with Office Max without requiring any remedy, the FTC noted that competition from online-only retailers, general big-box retailers, and club stores had changed the market substantially since 1997, when the Commission blocked Staples' previous bid for Office Depot.

In its review of the Office Depot/Office Max merger, the Commission assessed both the consumer retail and corporate contracting channels of commerce. The FTC did not mention competition from Staples in its assessment of competition in the retail line of commerce, although it was mentioned as a strong competitor for corporate contracts. A Staples/Office Depot combination--which would result in just one major national office supply superstore--will test just how far the FTC is willing to go in finding that other retailers, both online and brick-and-mortar, compete in the market for office supplies.

Another Merger Remedy Retrospective

The FTC recently announced a proposal to conduct a retrospective study of merger remedies and is currently soliciting public comment on the concept. FTC Chairwoman Edith Ramirez initially floated the idea at a conference in September and all five Commissioners voted in favor of moving forward by seeking public comment on the proposal. The proposed study would include the review merger remedies imposed by the FTC between 2006 and 2012 in order to assess their success. The Commission's last merger remedy retrospective, published in 1999, identified several unsuccessful divestitures and resulted in the Commission tightening its merger remedy practices, including by:

- Reducing the time allowed for parties to complete their divestiture obligations;
- Requiring the divestiture of "related assets" to "ensure the viability of the divested assets;"
- Limiting the scope and duration of any on-going relationship between the parties and the buyer; and
- Requiring the parties to "facilitate the transfer of knowledgeable staff" to the divestiture buyer.

We expect the new merger retrospective to also result in the FTC demanding more onerous divestitures and prophylactic provisions, as outlined in our recent Client Alert.

Clarity from the Supreme Court Regarding State Action Immunity

On February 25, 2015, the Supreme Court sided with the Commission in *North Carolina Board of Dental Examiners v. FTC*, ruling that the Board illegally blocked non-dentists from performing teeth-whitening procedures. The Court held that a professional regulatory board established by the state only qualifies for state-action immunity from federal antitrust law when it is actively supervised by the state.

Although the Board was established as a state agency under North Carolina state law, six of its eight members are required to be practicing dentists. This means that the majority of the Board is comprised of active market participants who, in this instance, stood to benefit from the Board's decisions. Supreme Court precedent states that a private body may enjoy immunity under the state action doctrine only where the state "clearly articulated" an intention to displace competition and "actively supervise[s]" the entity in question. A state agency, on the other hand, need not be "actively supervise[d]." Although formally a state agency, the Board did not qualify for immunity. The Court, in a 6-3 decision, determined that, in actuality, the Board is primarily a body of private industry actors behaving in their own private interest.

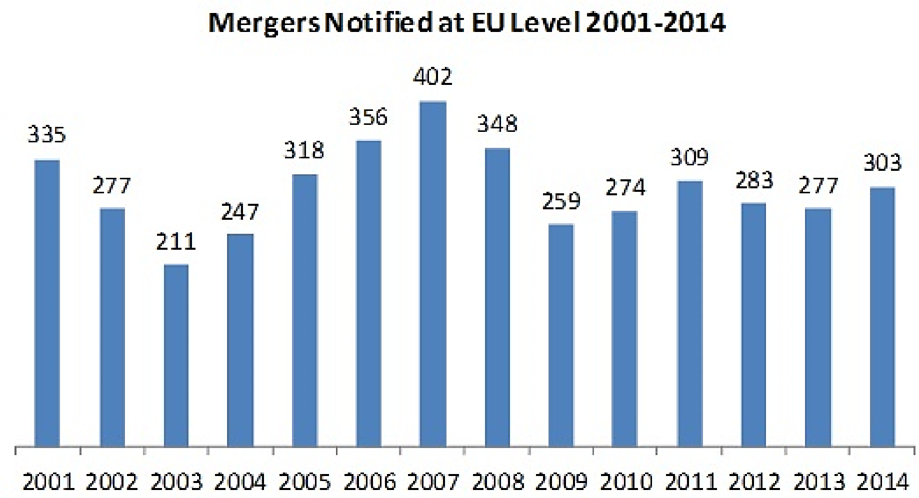
Although *North Carolina Board of Dental Examiners* is not a merger enforcement case, the state-action exemption can be asserted as a merger defense. In its unanimous 2013 *Phoebe Putney* decision, the Supreme Court agreed that the FTC can block a merger between two hospitals in Albany County, Georgia even though a state-created local hospital authority controlled one of the hospitals. By providing further guidance on the scope of state-action immunity, the Court's decision will undoubtedly impact the analysis of future mergers that involve state actors.

THE EUROPEAN UNION

Trend Towards Greater Merger Scrutiny Continues

In 2014, 303 merger transactions were notified to the European Commission (the "Commission"). Although well below the peak of 402 notified mergers in 2007, the most recent figures are higher than those for calendar years 2009 and 2010 and are relatively stable compared with those of 2011-2013.

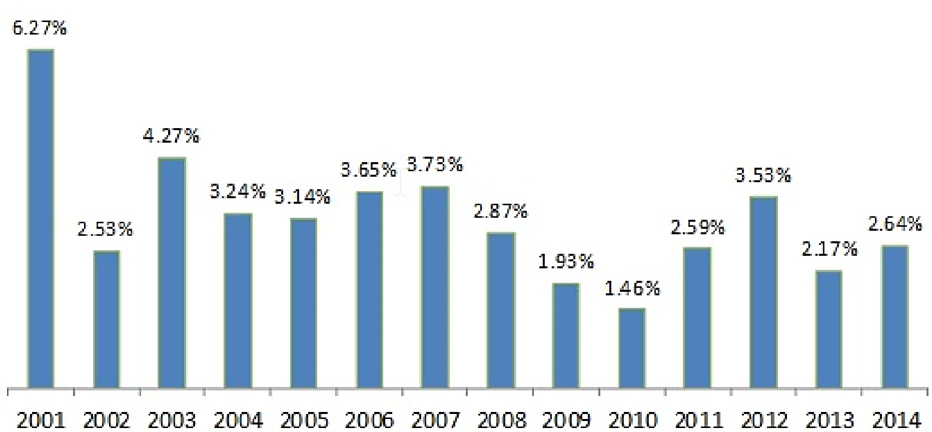
Despite the challenging economic climate throughout the EU experienced during the last years, the trend toward greater scrutiny of mergers, highlighted in both our 2013 and 2014 Antitrust Merger Enforcement Update and Outlooks, has been reconfirmed by recent events.



The last four to five years have seen a trend towards more in-depth ("Phase II") investigations. The number of Phase II investigations reflects the Commission's level of scrutiny of the most complex and problematic proposed transactions. Unlike the United States, where virtually all enforcement actions are preceded by a second request (or formal investigation for nonreportable deals), transactions that raise concerns in the EU are often resolved in Phase I. A Phase II investigation reflects the Commission's determination that a far more lengthy and probing investigation is warranted.

The Phase II figures demonstrate the Commission's increasing scrutiny of complex transactions. During the course of 2014, the Commission opened eight Phase II investigations and adopted seven decisions following ongoing Phase II investigations. Over the past four years, the rate at which M&A transactions trigger a Phase II investigation has nearly doubled, from 1.46% in 2010 to 2.17% in 2013 and 2.64% in 2014.

Percentage of Reported Transactions
Resulting in a Phase II Investigation
2001-2014



Commission Toughens Stance on Up-Front Buyers for Divested Assets

During 2014, the Commission continued to take a tough stance on remedies; a trend we previously reported in our 2014 Antitrust Merger Enforcement Update and Outlook. In particular, the Commission increasingly requires Commission-approved, "up-front buyers" before accepting remedies offered by the parties in order to obtain clearance. The key decisions are described in greater detail below.

No Blocked Mergers in 2014

On the other hand, 2014 saw a reversal of a previous trend towards blocking mergers, with no deals prohibited. By contrast, in 2012, the Commission blocked Deutsche Börse/NYSE Euronext and blocked two additional transactions in 2013: UPS/TNT Express and Ryanair/Aer Lingus III. It has been argued that previous Commissioner for Competition Almunia, whose term in office expired in October 2014, deliberately adopted a more interventionist approach than his predecessor, Neelie Kroes, although no mergers were blocked during his final year in office. Neelie Kroes blocked just two mergers during the course of her five-year mandate.

In Depth ("Phase II") Investigations in 2014

The Commission issued seven Phase II decisions in 2014: two unconditional clearances (Holcim/Cemex West and Cemex/Holcim Spanish assets, in connected asset-swap deals) and five conditional clearances (Ineos/Solvay, Hutchison 3G UK/Telefonica Ireland, Telefonica Deutschland/E-plus, Huntsman/Rockwood titanium dioxide assets, and Liberty Global/Ziggo).

Unconditional Authorisations after a Phase II Investigation

As reported in our 2014 Antitrust Merger Enforcement Update and Outlook, on October 22, 2013 the Commission opened an in-depth investigation into Holcim/Cemex West. Cemex West comprised Cemex's activities in grey cement, ready-mix concrete, aggregates, and cement-based materials in western Germany together with a small number of plants and sites located in France and the Netherlands. The Commission was initially concerned that the transaction could facilitate potential coordination between producers of cement in Germany and Belgium, and bring together the two main German suppliers of granulated blast furnace slag (a by-product of the production of steel that is used in the production of cement and concrete). However, after an in-depth investigation, the transaction was authorised unconditionally as the Commission found that although the market for grey cement is prone to coordination due to the homogeneity of the product, the presence of the same competitors in different geographic markets, and a certain level of market transparency, the transaction itself was unlikely to increase materially the risk of potential coordination.

In a related transaction, Cemex West acquired Holcim's cement activities in Spain and the Czech Republic. While this transaction did not meet the thresholds of the EU Merger Regulation ("EUMR") and was notified to the Spanish and Czech authorities, the Commission accepted a referral request by the Spanish Competition Authority. The Czech Competition Authority chose not to join Spain in the referral request and it reviewed the acquisition of Holcim's Czech business. In April 2014, the

Commission opened an in-depth investigation into the proposed transaction. The Commission was concerned that the transaction could jeopardise competition in the market for grey cement in certain areas of Spain. However, the Phase II investigation showed that the merged entity would continue to face competition from a number of players in eastern Spain with sufficient capacity to constrain its behaviour. In addition, the Commission also reached the conclusion that the proposed acquisition was unlikely to facilitate potential coordination between cement producers in central Spain. The transaction was authorised unconditionally on September 9, 2014.

The deals were connected to the *Holcim/Lafarge* transaction, involving the two global leaders in cement products. That deal, described further below, was noteworthy for receiving Phase I merger clearance in the EU, after the parties had made a number of significant concessions. In addition to Holcim's disposals outlined above, Holcim and Lafarge agreed to sell large swathes of valuable assets around Europe to approved buyers in order to obtain clearance.

In combination, the EU and national decisions in these cases demonstrate that it is possible to secure relatively rapid clearance even for the most complex and challenging international deals, if the parties are prepared to offer sufficient remedies.

Conditional Authorizations after a Phase II Investigation

A number of the conditional authorisation decisions raised important points of law and procedure. As noted above, the Commission is increasingly requiring divestitures with an upfront element to address concerns that had been raised during its investigation:

In November 2013, the Commission opened an in-depth investigation into the proposed joint venture ("JV") between the EEA chlorvinyls businesses of INEOS and Solvay. The Commission had raised concerns that the JV would combine the two leading suppliers of suspension polyvinyl chloride ("S-PVC") and sodium hypochlorite (bleach), leading to anti-competitive effects in North-West Europe and the Benelux. The commitments offered by the parties during the initial investigation, namely the divestiture of two S-PVC production plants in Germany, did not offer a sufficiently clear-cut solution in order to eliminate the Commission's concerns, and thus the Commission issued a Statement of Objections. The parties subsequently offered to divest their overlapping European production assets and plants in the markets for S-PVC in North West Europe, and bleach in the Benelux. The parties committed not to close the proposed transaction before concluding a binding agreement for the sale of the divestment business to a suitable purchaser approved by the Commission. The transaction was thus conditionally authorised on May 8, 2014.

Similarly, in November and December 2013, the Commission opened two Phase II investigations into the proposed acquisition of O2 Ireland (owned by Telefónica) by Hutchison 3G UK and the proposed acquisition of Germany's E-plus by Telefónica Deutschland. The parties provide mobile telephony services in Ireland and Germany, respectively. At Phase I, the Commission had raised the following concerns:

- Retail mobile telephony: the transactions would reduce the number of suppliers from four to three in the Irish and German markets. Moreover, Telefónica Deutschland and E-plus were close competitors at the retail level in Germany, while, in Ireland, the Hutchison/O2 Ireland merger would 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.

- Wholesale access and call origination: both transactions would significantly reduce the number of mobile network operators ("MNOs") effectively willing to host mobile virtual network operators ("MVNOs"), thereby resulting in a reduced choice of host networks and weakened negotiating power for MVNOs.

In May 2014, having previously issued a Statement of Objections, the Commission authorised the Hutchison/O2 Ireland transaction conditional on Hutchison (i) selling up to 30% of the merged company's network capacity to two MVNOs in Ireland at fixed payments; (ii) divesting five blocks of spectrum in the 900 MHz, 1800 MHz and 2100 MHz bands (the spectrum will be available for ten years, starting from 1 January 2016); and (iii) allowing Eircom to continue benefitting from the network sharing agreement on improved terms. The Commission's clearance was dependent on the sale of capacity to one of the MVNOs being made upfront (*i.e.,* before closing of the transaction).

In July 2014, the Commission authorised the Telefónica Deutschland/E-Plus transaction subject to the following commitments: (i) selling up to 30% of the merged company's network capacity to up to three MVNOs in Germany at fixed payments, to ensure the short-term entry or expansion of one or several MVNOs; (ii) divesting radio wave spectrum and certain assets either to a new MNO entrant or to the MVNO(s) who acquire network capacity thanks to commitment (i); and (iii) extending certain existing wholesale agreements with MVNOs and Service Providers, in order to offer wholesale 4G services to all interested players in the future, and to improve their ability to switch from one MNO to another. The sale of capacity to up to three MVNOs was required to occur before closing of the transaction.

Finally as regards upfront remedy cases, in March 2014, the Commission opened an in-depth investigation into the proposed acquisition of a part of Rockwood's chemical business by Huntsman. After this investigation, the Commission reached the conclusion that the transaction would have combined the two leading suppliers of titanium dioxide for printing ink applications, leading to the creation of a dominant position in this market in the EEA, and that the combined entity would not face sufficient competition from other titanium dioxide suppliers, which lack the relevant know-how and/or incentives to expand on the market. In order to address the Commission's concerns, the parties offered to divest Huntsman's "TR52" business--its main titanium dioxide grade used for printing ink applications--and committed not to close the proposed transaction before concluding a binding agreement for the sale of the divestment business to a suitable purchaser approved by the Commission. The Commission authorised the transaction conditioned on these commitments.

Also in 2014, the Commission opened in-depth investigations into two transactions by media conglomerate Liberty Global, namely: (i) Liberty Global's proposed acquisition of Dutch cable TV operator Ziggo and (ii) Liberty Global's proposed acquisition of a controlling stake in De Vijver Media NV.

The first of these cases is interesting in that it constitutes a new example where a transaction is considered to potentially lead to competition concerns because it results in an increase in the buying power of the parties (for a previous example see Case COMP/M5046 Friesland Foods/Campina).

More specifically, according to the Commission, the transaction might hinder competition by consolidating two close competitors in the Dutch market for the wholesale of premium Pay TV film channels. By increasing Liberty Global's buyer power vis-à-vis Dutch TV channel broadcasters, the deal allegedly would hinder the development of innovative audio-visual content provision over the Internet, which the Commission believes constitutes a significant threat to the traditional Pay TV model. In order to address these concerns, Liberty Global committed: (i) to divest its premium Pay TV film channel to a third-party purchaser while continuing to carry the channel on its Pay TV network for a period of three years; and (ii) to terminate certain clauses in its channel carriage agreements with TV broadcasters that might restrict the ability of broadcasters to offer their channels and their content via Internet services. Liberty Global also committed not to include those clauses in agreements for a period of eight years. In October 2014, the Commission authorised the transaction conditioned on these commitments.

The *Liberty Global/Ziggo* case is also interesting for two further reasons:

- First, it highlights that the Commission will, in appropriate circumstances, consider the impact of a proposed merger on nascent neighbouring markets in addition to well-established markets--in this case the small but developing market for internet TV.

- Second, the case was noteworthy from a procedural perspective, as the Commission rejected a request made by the Dutch Competition Authority that the case be referred to it for review. The Commission concluded that the Dutch Competition Authority was not better placed to examine the transaction because of the Commission's experience in assessing mergers in the converging media and telecommunications sectors, the presence of Liberty Global in 12 countries of the European Economic Area ("EEA"), and the need to ensure a consistent application of the merger control rules.

According to the Commission, Liberty Global's acquisition of a controlling stake in De Vijver Media might create a close relationship between the largest TV retailer in Flanders (Liberty-controlled Telenet) and two of the region's most popular free-to-air TV channels, Vier and Vijf. The Commission had concerns that, after the transaction, De Vijver would refuse to license its channels to TV distributors that compete with Telenet. In order to address the competition concerns, the parties committed to license under fair, reasonable, and non-discriminatory terms to any interested TV distributor in Belgium: (i) the channels Vier and Vijf; (ii) certain new pay TV channels that De Vijver may lunch in the future; and (iii) certain linked services such as catch-up TV and PVR (a service that allows users to record programs and view them at a later stage). In February 2015, the Commission authorized the transaction conditioned on these commitments.

Ongoing Phase II Investigations

In October 2014, the Commission opened a Phase II investigation into Zimmer's acquisition of Biomet. According to the Commission, the transaction would combine two leading designers and manufacturers of orthopedic implants (such as hip, knee, elbow, and shoulder implants), which collectively have significant market power in a large number of EEA countries. The Commission is concerned that the remaining competitors in many of the markets affected by the transaction may not be able to exert a sufficiently strong competitive constraint on the merged entity, perhaps leading to reduced innovation and choice for orthopedic implants.

In November 2014, a Phase II investigation was opened into the proposed acquisition of the Greek gas transmission system, DESFA, by the State Oil Company of Azerbaijan Republic ("SOCAR"). SOCAR's activities include the production of natural gas and the wholesale sale of gas in Greece. DESFA owns and operates Greece's sole high-pressure gas transmission and Greece's only LNG terminal. The Commission is concerned that the transaction may allow the merged entity to hinder SOCAR's competitor's access to the Greek gas transmission network by strategically limiting investments in future expansions of import capacity including an expansion of the LNG Terminal and an interconnection between TAP and DESFA's network. In addition, the merged entity could restrict inflows of gas into Greece by managing the gas transmission network in a discriminatory way favoring SOCAR's supplies over its competitors.

In December 2014, a Phase II investigation was opened into the proposed acquisition of Jazztel p.l.c. by Orange, S.A. The proposed transaction would reduce the number of nationwide providers of fixed telecommunications services in Spain from four to three. While the Commission concedes that the post-transaction entity would not enjoy a dominant position, it is concerned that the proposed transaction may lead to a significant loss of competitive constraints in relation to fixed Internet access services and the so-called "fixed-mobile multiple play offers" (*i.e.*, those comprising fixed voice, fixed Internet, and mobile telecommunications services). The Commission is of the view that only integrated providers with fixed and mobile networks might be able to compete for a potential market for fixed-mobile triple-play offers. In November 2014, the Spanish Competition Authority submitted a referral request in order to deal with the case. However, in January 2015, the Commission rejected Spain's request, concluding that it was better placed to deal with the case, particularly in the light of the Commission's extensive experience in assessing cases in the fixed and mobile telecommunications sector. According to publicly available information, in February 2015, Orange received the Statement of Objections from the Commission.

In December 2014, the Commission opened an in-depth investigation into the JV between Douwe Egberts Master Blenders 1753 B.V. ("DEMB") and MondelÄ“z International Inc. According to the Commission the parties to the JV are two of the world's leading coffee manufacturers. The proposed transaction would create a joint venture entity combining the operating subsidiaries and substantially all the material assets of DEMB group with MondelÄ“z International's coffee businesses. The Commission's initial investigation indicated that the transaction would reduce competition for roast and ground coffee in France, Denmark, and Latvia, as well as for filter pads in France and Austria. Moreover, DEMB and MondelÄ“z are two of the four leading manufacturers of the so-called "single serve systems", such as filter pads or capsules for use in Senseo and Nespresso machines. Although DEMB and MondelÄ“z do not sell coffee machines, they provide price support to purchasers of machines, *e.g.*, cash back, with the aim of increasing lucrative follow-on sales of pads and capsules.

In January 2015, the Commission opened an in-depth investigation into a JV for online music licensing between three collective rights management organisations ("CMOs"): the British PRS for Music Limited ("PRSfM"), the Swedish Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. ("STIM"), and the German Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte ("GEMA"). After the transaction, it would appear that PRSfM, STIM and GEMA would not offer multi-national licenses for their repertoire individually. The Commission is thus concerned that the JV could lead to an increase in the bargaining power of the JV, as a result of the aggregation of the repertoires of the three organizations, which, according to the Commission, are currently among the most important in the EEA. More specifically, the Commission has adopted the preliminary view that the transaction may lead to higher prices and worsened commercial conditions for digital service providers.

In February 2015, an in-depth investigation was opened into the proposed acquisition of rotating equipment manufacturer Dresser-Rand (of the U.S.) by Siemens (of Germany). Both companies supply turbo compressors as well as the engines which drive these compressors ("drivers"). According to the Commission, the main suppliers in certain segments of these turbo compressors and drivers are Siemens/Rolls-Royce, General Electric, and Dresser-Rand. The Commission thus had concerns that the transaction would reduce the number of competitors from three to two in these markets, thereby potentially leading to a decrease in product variety and, ultimately, higher prices.

Also in February 2015, the Commission opened an in-depth investigation into the proposed acquisition by General Electric of Alstom's energy businesses. Both companies are active in the market for heavy-duty gas turbines, which are mainly used in gas-fired power plants. According to the Commission, the transaction would reduce the number of competitors from three to two in this market, thereby potentially resulting in price increases and reduced R&D and consumer choice. The Commission has indicated that it is cooperating closely with the US Department of Justice in the US in its review of this transaction.

In February 2015, a Phase II investigation was opened into the proposed acquisition by Cargill of Archer Daniels Midland ("ADM") (both of the US). Both companies supply industrial chocolate as well as fat-based coatings and fillings. Industrial chocolate is used in the food processing industry in order to produce end-consumer products. Customers of industrial chocolate include producers of biscuits, ice-cream, chocolate confectionery, and other end-consumer products. According to the Commission, the transaction would reduce the number of main competitors in this market from three to two in the UK and Germany, thereby potentially resulting in price increases.

Other High-Profile EU Investigations in 2014

The Commission approved, unconditionally or subject to commitments, several high-profile transactions following an initial Phase I investigation, without opening an in-depth examination. In some of these cases, this was despite the parties' (relatively) high market shares.

In December 2014, the Commission cleared, subject to conditions, the acquisition of cement company Holcim by rival Lafarge, creating the largest cement producer worldwide. The parties compete in the manufacture and supply of cement, ready-mix concrete, aggregates, and other construction materials. To expedite the process, the parties submitted a remedies offer, which included significant divestments of assets of both parties in various Member States, at the same time as the notification. The market investigation had shown that in several markets, the remaining players would have provided insufficient competitive constraint, resulting in a significant risk of price increases post-transaction. The Commission therefore required commitments to divest operations where there was an overlap between the parties' activities. The Commission was only willing to accept the offered commitments if they included an upfront buyer.

The Commission unconditionally cleared the acquisition by Dolby of Doremi and Highlands in October 2014. Both parties were active in the market for the production of digital cinema servers ("DCS"). The Commission concluded that, despite the parties significantly overlapping activities in DCS, the acquisition was unlikely to have anticompetitive effects because sufficient alternative suppliers remained and recent entry confirmed there are no significant barriers to entry or expansion. In addition, the market investigation showed that the market has a fast-moving nature and customers can easily switch suppliers. The Commission also found the transaction would not lead to anticompetitive conglomerate effects with regard to the parties' overlapping activities in DCS and Dolby's position on the market for digital cinema audio processors. The market investigation confirmed that, while the new entity would have a large installed base of DCS, it would not be able to use this to foreclose suppliers of competing audio processors due to a lack of market power over new DCS sales and control over the DCS-installed base. The Commission found that customers would have a greater incentive to switch DCS suppliers than to upgrade to a different audio processor in light of the greater cost of the latter. This decision shows the weight the Commission will attach to technological developments and fast-moving markets.

The Commission unconditionally cleared the acquisition of Whatsapp by Facebook in October 2014. The market investigation regarding consumer communication services (for smartphones) showed that, while both parties offer consumer communication apps for smartphones using text, photo, voice, and video messages, they were not close competitors, considering consumers use the two apps differently and often simultaneously on the same smartphone. The Commission also found that a wide range of alternative choices for consumer communication apps would remain available. The Commission also investigated possible network effects which characterize consumer communications apps, but concluded that sufficient competition would remain to challenge the new entity, in particular considering the dynamic nature of the market. As regards social networking services, the Commission concluded that no competition concerns would arise mainly due to the fact that the boundaries of the services continue to evolve. It found that Facebook and WhatsApp were (if anything) distant competitors in this market, largely due to the fact that Facebook offers a "substantially richer experience," and that many alternative service providers would remain post-transaction. Finally, the investigation with regard to online advertising services (where WhatsApp was not active) showed that Facebook's position would not be significantly strengthened, irrespective of whether it would introduce advertising for WhatsApp. In particular, sufficient alternative providers for targeted advertising would remain, while Facebook does not have exclusive control over a large amount of internet user data valuable to advertisers.

In October 2014, the Commission cleared the merger between banana suppliers Chiquita and Fyffes, subject to conditions. The Commission's decision to authorize the transaction following an initial Phase I investigation is notable considering the parties were the two largest banana suppliers in the EEA, and the parties had high market shares in at least seven Member States. Nevertheless, the Commission found that sufficient competition would remain in the market for the import and sale of bananas to retailers and wholesalers. In particular, the parties' (relatively) low and decreasing share of banana imports into main Northern European ports was considered an indicator that the remaining competition would be healthy. Moreover, the Commission's market investigation confirmed the strong buying power of supermarkets. Finally, the sufficient (and increasing) number of suppliers, as well as the existence of private label bananas of supermarkets indicated a sufficiently strong competition in the market post-transaction. However, the Commission did require behavioral commitments from both parties to eliminate a serious risk of foreclosing competing suppliers at shipping level. In particular, Fyffes committed to removing the exclusivity clause in its shipping agreement with liner shipper Maersk. Also, both parties committed to refrain from including such exclusivity provisions in agreements with liner shippers for the next 10 years, or incentivizing them to refuse service to other banana suppliers.

Procedural Issues: Gun-Jumping; Information Obligations; Review Timescales

In July 2014, the Commission imposed a EUR 20 million fine (approx. $ 26.56 million) on salmon farmer and processor Marine Harvest for jumping the gun on its acquisition of rival Morpol. Marine Harvest had notified its intended acquisition of the remaining shares of Morpol and obtained clearance for the acquisition in September 2013. However, Marine Harvest had not provided notification for its acquisition in 2012of a minority stake of 48.5 % in Morpol. The Commission found that this shareholding resulted in *de facto* sole control over Morpol due to the wide dispersion of the remaining shares and irregular attendance rates at shareholdings meetings. The Commission found that in light of Marine Harvest's size and previous experience with EU merger control, it should have been aware of its obligation to notify the acquisition of the 48.5 % stake, and thus, its failure to do so constituted negligent conduct. In light of the fact that the acquisition of the remaining shares was ultimately only cleared subject to significant remedies, the Commission considered the infringement particularly serious. However, the Commission also took into account mitigating circumstances, such as the fact that Marine Harvest had not exercised its voting rights following the acquisition of the 48.5% stake, and the company had readily informed the Commission of this transaction during its pre-notification discussions regarding the acquisition of the remaining shares.

In February 2014 the Commission sent a formal Statement of Objections to Ahstrom and Munksjö raising the concern that the parties may have provided misleading information during the merger control process. EU merger control laws require notifying parties to provide information which is correct and complete, to the best of their knowledge. Providing misleading information, intentionally or negligently, may result in fines of up to 1% of the parties' combined turnover. As reported in our 2014 Antitrust Merger Enforcement Update and Outlook, the Commission had cleared the merger of Munksjö and Ahlstrom's label and processing paper business in May 2013, subject to divestiture commitments. During the Commission's investigation, the parties had supplied internal documentation indicating internal estimations of market size and market share, which were significantly different from what was stated in the formal notification. The parties replied to the Commission's Statement of Objections explaining that the discrepancies were the result of the fact that, as part of the notification, the parties had undertaken a market reconstruction exercise, resulting in different figures than previous internal estimations. The Commission found these reasons sufficient to remove concerns about possibly misleading information and closed the infringement proceedings without imposing any fines, but also recalled that "any discrepancies between the parties' best estimates in a merger notification and the parties' estimates in their internal documents should always be justified in a timely manner by the parties." The action by the Commission in this case highlights the importance of an adequate and thorough review of internal documents and of full disclosure during the notification process.

Finally, 2014 saw the Commission apply little-used rules which allow it to extend the normally strict timetables imposed by the EUMR. The most striking example is in the ongoing investigation into the proposed acquisition by Zimmer of Biomed. First, the Commission took the unusual step of formally declaring the notification incomplete in June 2014, before finally declared the notification as complete on in August 2014. This pushed back the deadline for the initial Phase I investigation from July to October.

Second, on October 3, the Commission opened an in-depth Phase II investigation of the acquisition. Just six days later, on October 9 2014, the Commission used its power to extend the investigation by 15 additional working days, pushing the deadline back to March 11, 2015. On November 17, 2014 the Commission again extended the Phase II investigation by five working days. Finally, on December 2, 2014, the Commission stopped the clock all together, while Zimmer offered a first set of remedies to resolve competition concerns on December 3. The Commission resumed its review of the Zimmer/Biomed transaction on February 9, 2013 and it remains unclear whether the extended deadline for its final decision, currently set at May 26, 2015, will be further pushed back if additional issues arise during the proceedings.

Whilst significant, we do not believe that this case should be interpreted as representing a change of approach by the Commission. Rather it provides, in our view, a reminder of the Commission's power to extend the EUMR timetables and underlines the importance of clear, timely communication with the Commission.

Referrals to Member States

The EUMR allows the Commission to refer the assessment of a case to a Member State if the competitive effects are restricted to purely national (or smaller) markets. In 2014, the Commission transferred several transactions to Member States for review under national competition laws. These included the proposed acquisition of Dia France by Carrefour to the French Competition Authority and the proposed acquisition of DTS by Telefónica to the Spanish Competition Authority.

On the other hand, during the course of 2014, the Commission also rejected several referral requests from national authorities.

In November 2013, the German authorities requested the Commission to refer the review of the proposed acquisition by Telefónica Deutschland of E.plus, arguing that the transaction could have significant effects on the German markets for retail mobile telephony, wholesale access and call origination on mobile networks. The Commission rejected this request in January 2014 and concluded it was better placed to review the cause due to "*its experience in assessing mergers in the mobile telecommunications sector and the need for a consistent application of the merger control rules in the EU.*" As reported above, the Commission cleared the transaction following an in-depth investigation.

The German authorities also requested the referral of the review of the proposed acquisition of a part of Cemex West by its rival Holcim, arguing that the transaction would affect cement markets in Northern and Western Germany. The Commission rejected the request as it found that the geographic scope of the affected cement market was wider than national and included, besides German areas, parts of Belgium, the Netherlands, and the northeast of France. As reported above, the Commission cleared the transaction unconditionally following an in-depth investigation.

The Dutch authorities requested the referral of the acquisition of Dutch cable operator Ziggo by Liberty Global for review under Dutch competition law. The Commission rejected the request, as it found itself to be better placed to review the transaction due to its "*experience in assessing many mergers in the converging media and telecommunications sectors, the presence of Liberty Global in 12 countries of the European Economic Area (EEA), and the need for a consistent application of the merger control rules*."

European Commission Policy Reforms

Simplified Procedure

As previously reported in our 2014 Antitrust Merger Enforcement Update and Outlook, the Commission adopted a number of changes to the EU simplified merger control procedure in 2014. In particular, the Commission's Notice on Simplified Procedures and the Implementing Regulation on merger control were amended, with effect as of January 1, 2014. The package of amendments simplifies the procedures for notified transactions which pose few genuine competition law concerns, and clarifies the nature of the documentation required where remedies are sought.[1] The amendments broaden the scope of notifiable transactions that can qualify for a simplified procedure under the EUMR. In addition, the amendments significantly reduce the burden for transactions where the parties have no overlapping activities. In such cases, the parties are required to provide less information than in the past and the time in which a the transaction can obtain clearance is reduced.

Further Procedural Changes

Between July and October 2014, the Commission consulted on its proposals on possible further improvements of merger control at EU level. The proposals, which are outlined in the Commission's White Paper "Towards more effective EU merger control," would enable the Commission to review certain non-controlling minority shareholdings which may affect competition, such as the acquisition of a stake in a competitor. In addition, the referral procedure by which Member States refer a transaction to the Commission, or vice versa, would be simplified and expedited. As an overall aim, the proposals look to streamline and simplify procedures, *e.g.*, by excluding certain non-problematic transactions--such as JVs operating outside the EEA without an impact on European markets, or by further reducing notification requirements for non-problematic cases which could qualify for a simplified procedure, in order to cut costs and the administrative burden on the parties (and on the Commission). Based on the replies to the public consultation, the Commission may submit a legislative proposal to amend the EUMR.

Leadership Changes

A new European Commission took office on November 1, 2014 and took its oath of independence before the European Court of Justice on December 10, 2014. The new Commission has a more politicized look, and Commission President Jean-Claude Juncker has stated his ambition to overhaul the executive body of the EU and tackle the current political and economic challenges with a reinvigorated Commission.

Commission President Juncker has introduced an entirely new structure for the Commission, using a two-tiered approach of seven Vice Presidents and 20 "normal" Commissioners. Unlike the "normal" Commissioners, the Vice Presidents do not have their own Directorate General, but rather have project teams to steer and coordinate the work of various "normal" Commissioners who are responsible for portfolios related to the key policy priorities of the Vice President in question.

As such, there is a degree of interdependence between the two tiers of Commissioners: a "normal" Commissioner will require the support of a Vice President to bring forward a new initiative, while a Vice President will rely on contributions from his or her "Project Commissioner(s)" to identify and deliver initiatives.

The competition portfolio rests under Vice President Jyrki Katainen of Finland, who will coordinate Jobs, Growth, Investment and Competitiveness. Not only will the new Competition Commissioner, the Danish Margrethe Vestager, work closely with Vice President Katainen, she will also, where appropriate, work with the Vice Presidents responsible for Digital Single Market and the Energy Union.

As the Vice Presidents aim to look at the bigger picture of priority policies, concerns have been raised in certain quarters about the possible politicization of competition and merger enforcement. In response, Commissioner Vestager, who was formerly Denmark's Minister of Economic Affairs, stated during her confirmation hearing before the European Parliament that whilst she would "*listen to everyone, from the largest multinationals to the representatives of small firms. From states to citizens… the analyses of my staff and my own judgment will not be swayed by anyone*."

Whilst her assurances are welcome, the need to report to Vice Presidents with policy portfolios may pose challenges to her independence that previous Competition Commissioners did not have to face. Conversely, they may also represent an opportunity for DG COMP to increase the influence of competition policy in other economic spheres.

Interaction with Other Jurisdictions

U.S.

As previously reported in our 2014 Antitrust Merger Enforcement Update and Outlook, the negotiations for the Transatlantic Trade and Investment Partnership ("TTIP"), commenced in July 2013. Previous Commissioner for Competition Almunia had strongly emphasized the importance of the TTIP in a speech of September 26, 2013, in which he said: "*[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*." The TTIP negotiations continued in 2014 with three rounds of talks. The competition chapter covers mergers, as well as antitrust, State-owned enterprises, and subsidies. In October 2014, the Council of the EU published the negotiation directives. Karel de Gucht, Commissioner for Trade at the time, stated that the publication "*further underlines our commitment to transparency as we pursue the negotiations*."

Switzerland

As previously reported, in May 2013, the EU and the Swiss Confederation signed a bilateral cooperation agreement on competition matters (the "Cooperation Agreement"). This Agreement came into force on December 1, 2014. The Cooperation Agreement is a "dedicated" agreement, which deals exclusively with antitrust matters and is expected to significantly enhance the way in which the Commission and the Swiss Competition Authority ("COMCO") coordinate and cooperate with regard to their enforcement activities, including merger control. While the Agreement mainly concerns the competition authorities' antitrust investigations, it does have an impact on merger review as well.

Previously, the Commission and COMCO were limited to informal means of cooperation on antitrust matters. In addition, there was legal uncertainty as to whether Swiss companies and individual parties to a transaction subject to or consulted during the Commission's review were allowed under Swiss law to provide information to the Commission. Article 271(1) of the Swiss Penal Code prohibits "*carrying out activities on behalf of a foreign state on Swiss territory*," in order to preventing the assertion of foreign jurisdiction within the Swiss territory. A violation of this prohibition is punishable by up to three years imprisonment and/or a fine. As such, the cooperation under the EUMR (*e.g.*, replying to a questionnaire sent by the Commission during its market investigation) was deemed to be covered by the obligation to obtain a prior approval of the Swiss authorities; a process that could take several weeks.

Under the Cooperation Agreement, the Commission and COMCO have a general duty to inform each other of "enforcement activities," including investigations and proceedings in connection with mergers, which may affect "important interests" in their respective territories. If they so choose, the competition authorities may also coordinate their enforcement activities in related matters. In addition, the competition authorities may exchange information obtained in parallel investigations (*i.e.*, into the same or related transaction), without the need always to obtain consent from the parties. The ability to exchange information is subject to certain limitations. As such, information containing personal data would require the consent of the party concerned (likely in the form of a waiver). In addition, the receiving authority can only use the information it receives for a predefined purpose in relation to a proceeding into the same or related procedure. The competition authorities are also prohibited from using the information to impose sanctions on natural persons and must keep the information they have received confidential (subject to ,*e.g.*, the need to disclose such information as part of the rights of defense and/or in appeal proceedings) and ensure the protection of "business secrets."

On the other hand, the Cooperation Agreement does not appear to address the extent to which those companies cooperating with the Commission would be in breach of Article 271(1) of the Swiss Penal Code, absent an explicit authorization from the relevant Swiss authority.

Challenges on Appeal to the General Court of the European Union

On September 5, 2014, the General Court confirmed the Commission's approval of the purchaser for the Vivendi assets divested as part of the acquisition by Lagardère of Vivendi Universal Publishing. The Commission had allowed Lagardère to acquire the European book publishing activities of Vivendi Universal in 2004, subject to the commitment that Lagardère would divest a significant part of the assets of Vivendi Universal Publishing. The Commission required Lagardère to secure an up-front buyer and submit the proposal to the Commission for approval. During the selection procedure, Lagardère approached several possible candidates, including Éditions, Odile Jacob, and Wendel Investissement SA. Lagardère accepted Wendel's offer, and the Commission approved the latter as a suitable purchaser. Odile Jacob appealed the decision of the Commission approving Wendel as the purchaser. The General Court, while confirming that the Commission was right to authorize the acquisition by Lagardère, annulled the decision approving the purchaser, on grounds that the decision was based on a report of a trustee who did not satisfy the required condition of independence. This finding was upheld on appeal by the Court of Justice in 2012. Following the court proceedings, Lagardère submitted a second request to the Commission for the approval of Wendel as a suitable buyer, and proposed a new trustee. The Commission re-approved Wendel, with effect as of July 30, 2004. Odile Jacob sought the annulment of this second approval decision, on grounds that the General Court's rulings of 2010 were not given full effect, and the Commission had infringed the principle of non-retroactivity, while erring in its assessment of Wendel's bid.

The General Court confirmed that the full implementation of its judgment annulling the Commission's decision approving a buyer for the divested assets did not require the Commission to revoke its decision authorizing the underlying transaction. In particular, the Court held that the annulment of the approval decision had no impact on the lawfulness of the clearance decision. The Court also confirmed, with regard to the invalidity of the trustee, that the Commission was only required to re-do the procedure from the date on which the trustee was appointed, rather than repeat the whole procedure.

In July 2014, the Court of Justice rejected Electrabel's appeal against a "gun jumping" fine. In 2009, the Commission had imposed a EUR 20 million fine on Electrabel for failing to notify its acquisition in 2003 of shares in the Compagnie Nationale du Rhône, through which Electrabel had obtained de facto sole control of that company. In 2012, the General Court rejected the Electrabel's appeal. Electrabel then appealed to the Court of Justice, who also rejected its appeal. Electrabel had argued that the Commission's proceedings had been commenced after the expiration of the statute of limitations. The Court of Justice rejected this argument, arguing that the five-year limitation period had been interrupted by a Request for Information made by the Commission in June 2008 and by the adoption of a Statement of Objections in December 2008 (see Case C- 84/13 P, *Electrabel SA v Commission*, at para. 60). The CJEU rejected the remainder of the Electrabel's grounds for appeal on the basis that they had not been raised before the General Court and were, consequently, inadmissible. This case sends a clear signal as to the willingness of the European courts to uphold severe fines on companies for gun jumping.

United Kingdom

Legislative Developments

In April 2014, the provisions of the Enterprise and Regulatory Reform Act 2013 came into force, bringing significant changes to the UK merger regime. The principal change is that both initial Phase I and in-depth Phase II merger reviews will be carried out by one body, the Competition and Markets Authority ("CMA"). This replaces the old system whereby the OFT carried out the initial review and referred those cases requiring a more detailed examination to the Competition Commission. The second main change is the introduction of statutory time limits on CMA action, in particular a 40 working day limit for a Phase I review. The aim of the changes is to create efficiencies and cost/time savings for parties, and to speed up merger investigations.

Since April 2014, the CMA also has additional investigative powers and power to take steps to prevent or unwind "pre-emptive action" (any steps that might frustrate or hamper the ability of the CMA to deal with problematic mergers). As regards the former, the CMA can require the production of information and documents and, importantly, can also require persons to appear as a witness to give evidence during the initial Phase I review (previously this power was only available at Phase II). As regards the latter, the CMA can make initial enforcement orders (often known as "hold separate" orders) to cover anticipated mergers as well as completed mergers.

In our view, the changes to the merger regime may make navigating the UK merger regime more complex for notifying parties. Perhaps most significantly for those used to the old UK system, the ability of the CMA to prevent companies integrating their businesses during the review process or to undo integration that has taken place, may increase the incentive for companies to notify deals in advance of closing.

However, the data from the first few months of the operation of the new system suggests that the CMA is no more interventionist than the organizations (the OFT and the CC) that were merged to create it. It has opened 70 cases since April 1, 2014. Between that date and October 31, 2014, the CMA cleared 34 deals unconditionally, referred 1 case for in-depth investigation, and cleared 3 cases in Phase II. During Phase I, 12 cases went to case review meeting (which signals that they required serious consideration). Compared to an average of 48 conditional clearances, 24 Phase II referrals, and 25 case review meetings per full financial year over the last 5 years, the data available for the seven months of operation of the new regime indicates that the changes have not led to a significant increase in the number of cases reviewed by the CMA, but that fewer of those cases raised serious concerns.

Key Decisions and Court Judgments

Eurotunnel

In June 2014, following remittal by the Competition Appeal Tribunal ("CAT"), the CMA reconfirmed the Competition Commission's 2013 decision finding that the purchase by Groupe Eurotunnel of certain SeaFrance assets would lead to an adverse effect on competition. The key question was whether this collection of tangible and intangible assets met the legal definition of an "enterprise" - the UK merger rules only apply to deals through which at least one enterprise is subsumed into another, through either a merger or an acquisition. The CMA decided on the facts that the SeaFrance assets did constitute an "enterprise." The decision was appealed to the CAT in July 2014. On January 9, 2015, the CAT upheld the CMA's decision.

Private Healthcare

Later in the year, the CMA saw something of a setback in relation to its review of a merger in the *Private Healthcare* sector. The case was referred for Phase II investigation in April 2012. The CC published its final report finding an adverse effect on competition and imposing remedies in March 2014. In the context of an appeal to the CAT, the CMA was ordered to give the appellant's advisers access to certain econometric analysis it has undertaken. This brought a number of errors to light. The CMA accepted it made a procedural error by not re-consulting with the appellant on a part of its analysis, which the CMA had revised following an earlier consultation during the investigation. The CMA submitted to the CAT that the most appropriate course of action would be for the matter to be remitted to it to consider further representations on the insured pricing analysis. The CMA also indicated to the CAT that it would take into account any representations received from parties on whether there had been a material change of circumstances since its decision was published in April 2014. In December 2014, the CAT accepted the CMA's proposal.

Ireland

Legislative Developments

On October 31, 2014, new thresholds and timescales for notification under the Irish rules came into effect. The new thresholds provide that a merger will be notifiable to the new Irish Competition and Consumer Protection Commission ("CCPC") where, in the most recent financial year: (a) the aggregate turnover in the Republic of Ireland of all undertakings involved is not less than €50 million, and (b) the turnover in the Republic of Ireland of each of two or more of the undertakings involved is not less than €3 million. The previous requirement that at least one party "carries on business in the island of Ireland" is no longer in operation. By exchanging this physical link for a low turnover threshold, it can be expected that the new regime will catch significantly more mergers.

As well as the threshold changes, new timescales are also in operation. These provide for a 30 working day period for a Phase I review and 120 working days for a Phase II review. The timescales are extendable where a formal information request is issued by the CCPC or where remedies are proposed.

Finally, media mergers are subject to an additional notification to the Ministry of Communications to deal with "plurality" issues. The timescale in Phase II is 130 working days for a media merger. It remains to be seen how this dual process will work in practice and whether the additional complexity is likely to have a chilling effect on media mergers in Ireland.

Spain

In July 2014, the CNMC imposed a fine on Essilor S.A. ("Essilor") for its failure to comply with the obligation to notify its acquisition of Polycore Optical, Ltd. Essilor had closed the transaction in July 2013 and only notified the deal to the CNMC in February 2014 when it had realized that the market share of the post-transaction entity would breach the thresholds in Spain's merger rules. On March 13, 2014, the CNMC initiated proceedings against Essilor for *gun-jumping*. However, the CNMC imposed only a limited sanction on Essilor (EUR 5,065, around USD 6,000) due to the fact that (i) Essilor had voluntarily acknowledged the existence of the transaction; (ii) its failure to notify was due to an error in the calculation of the post-transaction entity's market share; and (iii) Essilor did not do so through bad faith, as evidenced by the fact that Essilor had reported two transactions in the past "with exquisite care." The exact terms of the decision are not yet public.

In November 2014, the CNMC authorized the acquisition of the online advertisement business of Milanuncios, S.L.U. by Schibsted, a Norwegian media group. The CNMC had opened a Phase II investigation in relation to the transaction in June 2014. The CNMC had concerns that the elimination of the competitive constraints deriving from Milanuncios, a close competitor, could reinforce the alleged market power of Schibsted. The in-depth investigation raised concerns that the transaction would hinder competition in the market for online classified advertisements for cars. In order to address the authority's concerns, Schibsted's Spanish subsidiary, Schibsted Classified Media Spain, agreed to grant a two-year license to a competitor who will exclusively control and manage classified ads posted by professional advertisers in the vehicle section of Milanuncios.com. The exact terms of the authorization are not yet public.

France

In 2014, the French Competition Authority, "Autorité de la concurrence" (the "Autorité"), was notified of various mergers, including two in the electronic communications sector:

First, in April 2014, the Autorité cleared, subject to remedies, the acquisition of D8 and D17 (two television channels) by Vivendi and Groupe Canal Plus. This is the second time the Autorité had reviewed the acquisition. An earlier clearance decision in July 2012 was quashed by the French Administrative Supreme Court (*Conseil d'Etat*). The *Conseil d'Etat* held that the commitment made with regard to French film rights should be strengthened to take into account the competitive risk linked to the purchase of the second and third free-to-air broadcast windows. In re-examining the operation, the Autorité carried out a new competition analysis in the light of the situation prevailing in 2014. The commitments offered by Vivendi and Canal Plus remained substantially the same but with an extended scope. The parties undertook not to pre-acquire (as opposed to its initial intention to acquire as set out in the first decision), in the same calendar year the pay and free-to-air broadcast film for more than 20 movies. This measure strengthened their commitments with regards to French films and the Autorité again cleared the transaction. These commitments run until July 23, 2017, and are renewable for five additional years by the Autorité.

Second, in October 2014, the Autorité cleared, subject to remedies, the acquisition of SFR by Numericâble, an Altice subsidiary. Numericâble is a cable network electronic communications operator and leader in the field of access to high-speed broadband. Following a Phase II investigation, including a consultation of the sectoral regulators (CSA, Arcep), the Autorité cleared the transaction subject to several commitments. First, Numericâble has to give its competitors (Orange, Bouygues Telecom, Free) access to its cable network. Second, Numericâble has to sell Completel, an optical fiber network for businesses. Third, Numericâble must divest its Outremer Telecom mobile telephony business in La Réunion and Mayotte. Finally, Numericâble must take measures to insure that no strategic information is given to Vivendi. All these commitments are held for a period of five years, and are renewable once. The completion of these commitments will be monitored by an independent trustee named by the Autorité.

In November 2014, the Conseil d'Etat handed down an important judgment regarding collective dominance. The Conseil d'Etat held that companies with no formal links to one another may never the less be in a collectively dominant position if they, over a long period, adopt similar conduct on the market in order to take advantage of collective economic power. Such a collective dominant position can occur when (i) each member of the oligopoly is able to know in a precise and immediate way the evolution of the behavior of the others; (ii) there are threats of credible reprisals in the event of deviation from the course of action implicitly approved by the members; and (iii) the predictable reactions of consumers and of current or potential competitors of the oligopoly cannot be enough to call into question the profits expected from the tacit collusion. The Conseil d'Etat relied on the definition of "tacit coordination" set down by the Court of Justice in Bertelsmann AG c/ Sony Corporation of America. In describing the approach that the Autorité should take, the Conseil d'Etat highlighted that the Autorité must avoid a mechanical approach looking at the three criteria taken in isolation, and instead must take into account the economic mechanisms for tacit coordination in the round.

CHINA

Since enacting its Anti-Monopoly Law (AML) in 2008, China's Ministry of Commerce (MOFCOM) has established itself as the world's fastest-growing merger control agency and an increasingly important global competition enforcer. Given the sheer size of China's economy and MOFCOM's complex, opaque, and often byzantine merger review process, China is now among the principal jurisdictions that merging parties must consider when engaging in global transactions. True to its multi-faceted enforcement tactics, MOFCOM has continued to take into consideration policy goals unrelated to competition, leading it to impose remedies beyond those required by the U.S., E.U., and other enforcement jurisdictions.

Though MOFCOM has made notable progress in speeding up its review process in some transactions, others are still plagued by long wait times, putting deals at risk for deteriorating before completion. The drivers of MOFCOM's prolonged clearance process are complicated and not easily resolved, but high-level officials within MOFCOM have publicly stated that they are instituting reforms aimed at streamlining the process. Most notably, China formally published the final draft of its *Interim Rules Regarding the Criteria for Simple Cases of Undertaking Concentrations*, which creates a streamlined procedure for mergers that do not raise significant competitive concerns.

Nevertheless, MOFCOM's merger enforcement practices have been garnering more global attention, even sparking the White House to comment publicly. Patrick Ventrell, White House National Security Council spokesman, recently noted growing concerns "that China is using numerous mechanisms, including anti-monopoly law, to lower the value of foreign-owned patents and benefit Chinese firms employing foreign technology."

Fast-Track Rules for "Simple Mergers"

The formal merger review process in China often takes up to six months, and oftentimes extends beyond six months due to lack of sufficient resources, the agency's atypical broad mandate, and its practice of engaging in inter-agency review. In the first ten months of 2013, MOFCOM accepted 175 out of 185 merger notifications, and over 80% of those accepted mergers reached "Phase II," including a number of transactions that involved no material competitive or vertical overlaps. And these delays have had real-world implications for transacting parties. For instance, though there were many reasons that the Publicis-Omnicom merger fell apart, delays in securing approval from MOFCOM contributed to the deal's demise in May 2014--over nine long months after the deal was announced in July 2013. Similarly, the delay in MOFCOM's approval of the merger between Wilmer International and Goodman Fielder--which the parties had expected to complete by the end of 2014--has created doubt as to whether the deal will go forward.

In 2013, MOFCOM circulated a draft of its *Interim Rules Regarding the Criteria for Simple Cases of Undertaking Concentrations* (the "Interim Provisions"), which creates a streamlined procedure for mergers that do not raise significant competitive concerns. The announced purpose of the Interim Provisions is to reduce the burden on the notifying parties in non-controversial transactions by introducing a streamlined form for parties to "simple" mergers.

In February 2014, MOFCOM published the final text of the Interim Provisions. The provisions outline six categories of transactions that qualify as "simple" cases:

1. Horizontal mergers (i.e., mergers involving competitors) where the combined share of all parties is less than 15% in each relevant market;

2. Vertical mergers (i.e., mergers involving parties with a supplier-customer relationship) where the parties' market shares do not exceed 25% in either the upstream (seller) or downstream (buyer) market;

3. Conglomerate mergers where the market share of each party in each market involved does not exceed 25%;

4. Acquisitions of foreign companies that have no activities in China;

5. Joint ventures established outside of China that have no activities in China;

6. Joint venture modification, whereby the control of a joint venture changes, but still includes one or more of the previous jointly controlling parents.

However, some cases that meet one or more of the above scenarios still may not qualify for fast-track approval. Namely, the Interim Provisions provide that a case will not be treated as "simple" if the relevant markets are difficult to define, or if MOFCOM believes that the concentration may result in adverse effects to market entry, technology development, consumers, other undertakings, or the national economy. MOFCOM may also rescind fast-track approval if it determines that (i) a party has concealed material information or provided false or misleading information, (ii) a third-party provides evidence showing the existence of competitive concerns, or (iii) there have been significant changes in the relevant markets.

In April 2014, MOFCOM published the *Tentative Guidelines on the Notification of Simple Cases in Undertaking Concentrations* (the "Tentative Guidelines"), which provide procedural guidance for the notification of simple cases as identified in the Interim Provisions.

Where applied, the Interim Provisions have proven effective at substantially reducing the waiting period. On June 9, 2014, MOFCOM approved the Rolls-Royce Holding and Daimler joint venture as its first transaction under the Interim Provisions; from filing to approval, the review period lasted 19 days. On July 4, 2014, MOFCOM issued its second approval under the new Interim Provisions, clearing Toyota Tsusho's acquisition of a 39.9% share of Scholz AG; from filing to approval, the review period lasted 30 days.

The impact of the Tentative Guidelines remains to be seen. Transacting parties must keep in mind that MOFCOM has not committed to review simple cases on a particular timeframe, that the simple case notification form still requires significant disclosures and third-party review. Most importantly, however, approval for the simplified process remains largely at the discretion of MOFCOM.

Thermo Fisher/Life Tech.

MOFCOM conditionally approved the merger between Thermo Fisher Scientific and Life Technologies on January 14, 2014, exemplifying the Ministry's increased use of economic analysis as well as its continued effort to expedite its review process. MOFCOM's decision also underscored its willingness to impose unique behavioral remedies not required by regulators in other countries.

Thermo Fisher Scientific and Life Technologies both produce biotechnology products and services, including analytical instruments, reagents, and laboratory consumables. MOFCOM did not require further divestitures relating to the two companies' business overlap in polymer-based magnetic beads even though authorities in the EU and Canada already had required such divestitures. Instead, MOFCOM focused on other products of the merging companies and imposed unique behavioral remedies that other jurisdictions did not require. Specifically, MOFCOM required the merged company to offer Chinese customers a one-percent annual discount off its catalogue prices and give third parties the choice of receiving its protein products through an OEM agreement or a perpetual and non-exclusive IP license. These requirements reflect MOFCOM's unique preference for imposing behavior requirements on transacting parties in addition to, or even in place of, the structural divestitures generally imposed by antitrust regulators in other countries.

Additionally, MOFCOM's published decision was notably the first to cite complex econometric regressions that required the parties to provide extensive data. MOFCOM applied the "Illustrative Price Rise" test (IPR) (a metric that relies on price/cost margins, similar to the "Upward Pricing Pressure" test utilized in the United States) and found that the predicted price increase was above five percent in twelve of thirteen tested markets. After further investigation, MOFCOM decided not to impose any remedy in four of these markets, where it found that there were a large number of competitors, unlimited production capacity, and low barriers to entry. Reflecting MOFCOM's use of increasingly complex econometrics--and the fact that the Ministry has yet to staff a permanent "chief economist"--MOFCOM engaged third-party economic consultants to assist with its economic analysis.

Finally, MOFCOM highlighted its somewhat faster review process. According to MOFCOM, it conditionally approved the Thermo Fisher transaction on January 14, 2014, only 6.5 months after the formal filing. MOFCOM's four conditional approvals in 2013 took 8 months (Baxter/Gambro), 10 months (Marubeni/Gavilon), 12 months (Glencore/Xstrata) and 14 months (Mediatek/MStar). Thus, the 6.5-month review time represented an improvement for MOFCOM, particularly in light of the heavy use of economic data.

Microsoft/Nokia

In a decision that highlighted its continued focus on intellectual property rights and standard-essential patents, MOFCOM conditionally approved Microsoft's $7.4 billion purchase of Nokia Corporation's handset and services units on April 8, 2014. MOFCOM concluded that Microsoft (mobile operating systems) and Nokia (smartphones) had relatively small shares in their respective markets. However, MOFCOM found that the transaction would give Microsoft an incentive to restrict access to its patented smartphone technology, which were "essential" to the manufacturing and use of Android-based smartphones (over 80% of the smartphones sold in China are Android-based).

As a result, MOFCOM required Microsoft to offer its standard-essential patents (SEPs) for licensing on fair, reasonable and nondiscriminatory (FRAND) terms. Microsoft also agreed to continue to make nonexclusive licenses to its SEP available for competing Android mobile phones.

Moreover, MOFCOM also took the unusual step of implementing restrictions on the post-closing conduct of the seller, Nokia. MOFCOM apparently concluded that Nokia, which retained certain patents covering smartphone-related features, would have the incentive to increase its own royalty rates to smartphone manufacturers as a result of the transaction because it no longer would be a participant in the downstream device and service market. Among other conduct remedies, MOFCOM required Nokia to honor its existing FRAND commitments for its retained SEPs.

On the one hand, MOFCOM expressed concern that Microsoft would *gain* the incentive to increase SEP royalty rates by *entering* the smartphone business through the acquisition. On the other hand, MOFCOM expressed concern that Nokia would also *gain* the incentive to increase SEP royalty rates by *exiting* the same business. While the merits associated with either theory of harm can be debated, these actions are in line with other efforts by China's enforcers to reign in perceived abuses by SEP owners (such as Qualcomm) and protect allegedly vulnerable device manufacturers. MOFCOM's foray into the SEP debate is also noteworthy because of the unique conduct remedy imposed on the selling party which, through the transaction, was largely exiting the relevant business.

Merck/AZ Electronics

MOFCOM conditionally approved Merck's $3.1 billion acquisition of specialty chemicals maker AZ Electronic Materials S.A. ("AZ") on April 30, 2014. MOFCOM's review focused on two chemical materials, liquid crystal and photoresist, which are both components in the manufacture of electronics products, including flat panel displays (FPDs).

MOFCOM's decision demonstrates its willingness to intervene even in cases where the parties do not compete. According to MOFCOM, Merck controlled a significant share of the liquid crystal market (60% worldwide and 70% in China), while AZ controlled a smaller portion of the photoresist market (35% worldwide, and 50% in China). MOFCOM alleged that liquid crystal and photoresist products formed "adjacent markets" because both are raw materials required to manufacture FPDs. MOFCOM concluded that, after the consolidation, Merck would be in a position to "cross subsidize" the two products. MOFCOM also pointed to Merck's large patent portfolio, concluding that the consolidation would threaten competition.

MOFCOM conditioned its approval on Merck's commitment not to bundle the companies' products together, to alert the authority to any patent licensing agreements it enters into with Chinese companies, and to offer those licenses on commercially reasonable and non-discriminatory terms for three years.

Again, the *Merk/AZ* decision demonstrates MOFCOM's willingness to embrace remedies and antitrust theories that are well outside the mainstream in other jurisdictions. Perhaps for this reason, the remedy MOFCOM imposed was conduct rather than structural.

Wilmar Int'l/Goodman Fielder

In July 2014, Australian food company Goodman Fielder accepted Wilmar International's AU$1.3 billion ($1.23 billion) buyout offer. The parties initially anticipated receiving approvals from the various merger enforcement agencies and closing the deal by the end of 2014. However, in September 2014, Goodman Fielder announced that "[w]hile Wilmar and First Pacific are continuing to progress the required regulatory approvals, Goodman Fielder and Wilmar/First Pacific now anticipate that the process for obtaining approval from the Ministry of Commerce in China is likely to take longer than initially anticipated." The delay in MOFCOM's approval has created doubt as to whether this deal will go forward, particularly in the wake of the Publicis/Omnicom deal's demise while waiting over nine months for MOFCOM approval. Steven Gregg, chairman of Goodman Fielder, noted that the conditions of the deal can certainly be met, and "the only reason it might not move forward is the regulatory approval." The deal includes options for Goodman to allow the deal to lapse if MOFCOM's approval is still not forthcoming by March 2015.

Gun-Jumping Enforcement: MOFCOM Targets China's SOEs

In December 2014, in its first published decision relating to a failure to file, MOFCOM announced that it had fined the Chinese state-owned Tsinghua Unigroup (Tsinghua) a total of 300,000 RMB ($48,300) after it was deemed to have completed its acquisition of RDA Microelectronics (RDA) without first reporting the merger. MOFCOM, which had announced its investigation into Tsinghua's acquisition of RDA in August 2014, found that Tsinghua had signed a purchase agreement with RDA on November 11, 2013, to acquire the whole share capital of RDA for $907 million, and that the deal was completed on July 18, 2014, without prior MOFCOM approval. MOFCOM held that Tsinghua's failure to submit an application for merger clearance to MOFCOM was a direct breach of Article 21 of the Anti-Monopoly Act, which requires MOFCOM approval of transactions that meet certain financial thresholds.[2] MOFCOM ultimately found that the transaction would not have an adverse effect on competition, and MOFCOM decided not to require divestiture.

MOFCOM's decision to fine a domestic state owned enterprise (SOE) for failure to file is a noteworthy development. MOFCOM has been criticized for years for its apparent focus on transactions between non-Chinese companies doing business in China. This enforcement action suggests that MOFCOM is taking this criticism seriously and will endeavor to police domestic transactions going forward.

BRAZIL

Brazil's Merger Control Reform: Two Years Later

In May 2014, the Brazilian Administrative Council of Economic Defense ("*Conselho Administrativo de Defesa Econômica*," "CADE") celebrated the second anniversary of the entry into force of the Brazilian Competition Act (Law 12,529 of November 30, 2011). As reported in our 2014 Antitrust

Merger Enforcement Update and Outlook, the new Law introduced the following changes to Brazilian merger control:

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

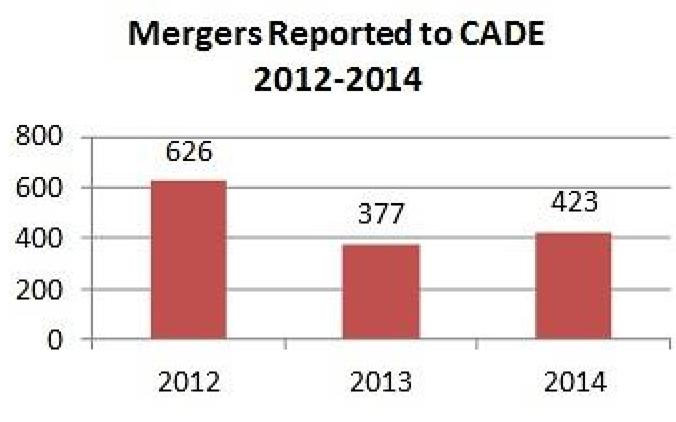
2. Establishing a pre-merger review system with a suspensory regime (i.e., a mandatory waiting period).

3. Implementing other changes with the goal of streamlining reviews of "simple" cases.

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 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 and which previously scrutinized antitrust behavioral cases, is now a part of CADE's Superintendence and also deals with merger control.

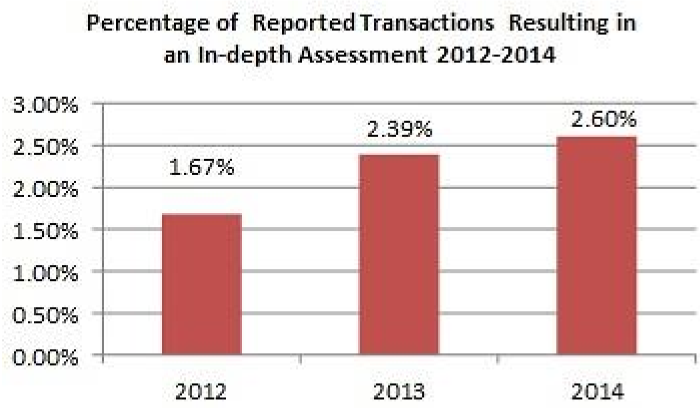
It remains to be seen whether and to what extent the re-election of President Dilma Rousseff on October 26, 2014 for a second term will impact CADE. In fact, according to publicly available information, the President of CADE's Tribunal, Mr. Vinicius Marques de Carvalho, has not ruled out the appointment of a new Director of the Superintendence.[3]

In any event, in 2014, 423 transactions were reported to CADE, 46 more than in 2013 (a 12% increase), but significantly less than the 626 transactions notified in 2012. This decrease is likely to result from the slowdown in the Brazilian economy. According to statistics from the World Bank, Brazil's GDP grew by 7.5% in 2010, and by 1% and 2.5% in 2012 and 2013, respectively. Data for 2014 appears not to be publicly available yet, but the IMF World Economic Outlook foresees a 0.3% growth in Brazil's GDP.



As in other jurisdictions, only a small fraction of transactions reported to CADE are subject to an in-depth investigation. In 2014, the Superintendence referred 11 transactions to CADE's Tribunal for an in-depth assessment, which reflected a slightly higher rate than in 2013 and 2012 (approx. 2.60 %, 2.39

%, and 1.67 %[4] of all the transactions, respectively), but is significantly lower than the proportion of transactions reported under HSR subject to a Second Request.



High Profile CADE Merger Decisions in 2014

CADE Blocks PVC Deal

On November 12, 2014, CADE blocked the acquisition of Solvay Indupa by Braskem S/A. According to CADE, the companies would be the only two producers active in the Brazilian markets for certain types of PVC used in the construction industry, and the first and second companies in these markets in South America. Furthermore, reporting Commissioner, Mr. Gilvandro Araújo, explained that competition from imports was insufficient to offset the loss of domestic competition resulting from the transaction. According to Mr. Araújo, imported products suffered from a number of competitive disadvantages, such as longer delivery time and increased costs. It appears the parties did not offer any remedies to address CADE's concerns.

This is the seventh transaction blocked by CADE since the new Brazilian Competition Act came into force in late 2011. As reported in our 2014 Antitrust Merger Enforcement Update and Outlook, in 2013 CADE blocked three proposed acquisitions: *first*, the acquisition by the steel manufacturer Armco Staco S.A. of Mangels Industrial, S/A.'s guard rails and galvanized steel divisions. Guard rails are a type of barrier used on streets, avenues, and highways to protect vehicles. Galvanization is the fire treatment given to steel structures used to manufacture guard rails. *Second*, CADE blocked the proposed acquisition by Brasil Foods S/A, the second largest food company in Brazil, of the pork production and slaughter assets of Doux Frangosul S/A, a poultry and pork producer. And *third*, the proposed acquisition, by Unimed Franca, a health services cooperative, of the control over Hospital Regional de Franca, in São Paulo, and its healthcare plan "*Regional Saúde*."

Other Noteworthy Transactions

According to CADE's statistics, CADE was very active in 2014, imposing a variety of structural and behavioral remedies in 20 transactions decided in 2014. These include the imposition of remedies on global transactions involving non-Brazilian companies, acquisitions of minority interests, and licensing transactions.

Licensing Transactions. On January 23, 2014, CADE authorized Monsanto do Brasil Ltda.'s ("Monsanto") grant to Bayer S/A ("Bayer") of a license for the development, production and commercialization of soybean seeds with the "Intacta RR2 PRO" technology. This technology is used to enhance the resistance of certain plants to insects and their tolerance of glyphosate herbicides. The authorization was conditioned to the modification of a number of provisions in the license agreement. According to CADE, these modifications were necessary in order to remedy Monsanto's ability to exercise an undue degree of control and influence over Bayer's activities in the markets for soy.

Minority Acquisitions. CADE's authorization of two acquisition of minority shareholdings subject to remedies probably signal the Brazilian Authority's commitment to enforce its regulations regarding minority shareholdings. According to Article 10(2)(2) of the Brazilian Regulation no. 2 of May 29, 2012, acquisitions of minority shareholdings trigger an obligation to notify, *inter alia*, where there is an overlap between the merging parties and the acquiring company acquires 5% or more of the target's shares.

On April 10, 2014, CADE authorized the acquisition of a minority shareholding in the social capital of Usinas Siderúrgicas of Minas Gerais S.A. ("Usiminas") by the Companhia Siderúrgica Nacional ("CSN"), but conditioned approval on CSN's commitment to reduce its stake in Usiminas. CADE noted that the absence of control did not exclude the possibility of anticompetitive effects. The reporting Commissioner in the case, Mr. Eduardo Pontual Ribeiro, highlighted that the limitation of CSN's participation in Usiminas was necessary since both steel industries are rivals in an "extremely concentrated flat steel market." It appears that the parties are the two largest players in this segment in Brazil.

On August 20, 2014, CADE authorized the acquisition by Minerva S/A ("Minerva") of cattle slaughtering units of BRF S/A ("BRF") located in the state of Mato Grosso. As part of the payment for the operation, BRF would be compensated with 16.77% of the shares in Minerva. CADE's initial view was that the transaction was potentially pro-competitive in relation to the market for bovine fresh meat in that it would enhance Minerva's ability to compete with market leader JBS. However, the Superintendence brought the transaction before CADE's Tribunal, since it was of the view that: (i) the transfer of bovine slaughtering units could make Minerva one of the strongest actors in the markets for bovine fresh meat; and (ii) the minority shareholding of BRF in Minerva's capital could lead to coordination between the processed food businesses of the two companies. The transaction was authorized subject to certain divestitures of assets.

Gun-Jumping Enforcement. In the *CSN/Usiminas* case, CADE imposed a fine of BRL 671,000 (approximately $247,738 USD) on CSN for failing to notify the operation within the legal deadline. According to CADE, the obligation to notify the acquisition of the minority shareholding in Usiminas arose in January 2011, but the parties did not file with CADE until November 2011. Together with the fines for gun-jumping imposed by CADE in 2013 (and reported in our 2014

Antitrust Merger Enforcement Update and Outlook), this decision stresses CADE's commitment to enforce its merger control regulations.

Moreover, in November 2014, CADE decided that the acquisition of Brasfrigo Alimentos Ltda. by Goiás Verde Alimentos Ltda. had been closed before its mandatory notification and authorization. The acquisition of Brasfrigo by Goiás Verde had been closed in October 2012. The transaction is under substantive review by CADE. On January 29, 2015, CADE signed with the companies an agreement to ensure the unwinding of the transaction, in case CADE ends up prohibiting (an "Acordo de Preservação da Reversibilidade da Operação" or APRO).

Remedies Arguably Resulting in Limitations of Output. As reported in our 2014 Antitrust Merger Enforcement Update and Outlook, on December 5, 2013, CADE's Superintendence referred to CADE's Tribunal the proposed merger between Anhanguera Educacional Participações S/A ("Anhanguera") and Kroton Educacional S/A ("Kroton"). The Superintendence had concerns which resulted from the large market shares of the post-merger entity in the provision of regular undergraduate education services in three Brazilian cities. CADE's Superintendence also cited concerns with the overlaps between the two companies in their distance learning offerings across 55 Brazilian municipalities. On May 14, 2014, CADE authorized the transaction subject to the application of the following structural and behavioral remedies:

1. The divestiture of Uniasselvi, a company owned by Kroton. According to CADE, this divestiture would resolve "most of the concerns" in relation to distance learning in 12 of the 55 municipalities allegedly affected by the transaction.

2. Divestitures in the segment of formal education in the cities of Rondonópolis and Cuiabá, both in the state of Mato Grosso.

3. In order to address the concerns which affected the remaining 43 cities, CADE imposed a number of behavioral remedies. These included preventing the post-transaction entity from offering of new or additional places in certain education programs were competition problems had been identified. This behavioral remedy aimed at limiting the expansion of the merged entity in order to enable the competitors to grow and exercise a sufficient competitive pressure on the post-merger entity.

In addition, on February 27, 2014, CADE's Superintendence referred to CADE's Tribunal the merger between Estácio Participações, S/A and União dos Cursos Superiores SEB Ltda., which also related to two distance education institutions. On May 15, 2014, CADE authorized the acquisition subject to a behavioral remedy consisting in the limitation of students' enrollment in nine affected locations during four academic semesters. The objective of the remedy was, again, to facilitate the entry or expansion of the competitors of the post-transaction entity.

These two last cases constitute relatively surprising examples of behavioral remedies arguably limiting consumer choice and output. Both under US and EU law, purely behavioral remedies are rarely sufficient, on their own, to solve concerns of a horizontal nature.[5] Moreover, these two remedies are likely to result in a decrease in consumer choice and, ultimately, output, which would probably also make them unacceptable under US and EU law.[6]

Access Remedies. On February, 12, 2015, CADE authorized the acquisition of America Latina Logística – ALL by Rumo Logística a Operadora Multimodal S/A. According to CADE, the transaction would allow one of the country's largest sugar exporters to take control over a major railroad company. The new company, in addition to being controlled by a major player that uses the railroad to its own transportation of sugar and fuel, will control the entire export supply chain of dry bulk through the Port of Santos. To reduce the possibility of market foreclosure, CADE conditioned its approval, among others, on the new company (i) guaranteeing access by Rumo's competitors to its terminals in the Port of Santos; (ii) offering long-term contracts to certain railway users; and (iii) applying objective parameters for pricing the services provided to competitors.

Remedies in Foreign-to-Foreign Transactions. On December 10, 2014, CADE authorized the merger between Holcim Ltd. and Lafarge S/A. According to CADE, the transaction would result in high concentration levels in the cement and concrete markets in some Brazilian territories. In order to resolve competition concerns, the companies committed to divest a package of assets including certain plants in the Brazilian states of Minas Gerais and Rio de Janeiro. As previously indicated, the transaction was authorized in the EU on December 16, 2014, also subject to divestitures [and is still subject to review in the US]. Overall, the parties have indicated that they expect to divest between 10 to 15% of their business, mostly in Europe, in order to obtain worldwide approval.

Extra-territorial application of the remedial powers of CADE. On January 29, 2015, CADE authorized the acquisition of Veyance Technologies Inc. by Continental Aktiengesellschaft subject to divestitures, some of which in Mexico. The companies manufacture auto parts, rubber products, hoses and industrial equipment, among other products. According to CADE, the transaction represents a merger between the market leader and the third player in the markets for heavyweight steel conveyor belts and air springs. To address the competition concerns, the parties committed to divest the following assets of Veyance: (i) a plant located in San Luis Potosi, in Mexico, which produces air springs; and (ii) a factory in São Paulo, which produces heavyweight steel conveyor belts.

Other Noteworthy Transactions Subject to Remedies. On August 6, 2014, CADE authorized three mergers in the markets for support services in diagnostic medicine: (i) the acquisition of Clínica Radiológica Menezes da Costa Ltda., by Labs Cardiolab Exames Complementares S/A ("Cardiolab"); (ii) the acquisition by Delta FM&B Fundo de Investimento em Participações of Diagnolabor Exames Clínicos S/A, and (iii) the acquisition by the Fleury Group of Cardiolab. According to CADE, the acquisition of Cardiolab by the Fleury Group, would result in the latter acquiring a direct control over Clínica Radiológica Menezes da Costa and Clínica Luiz Felippe Mattoso Ltda., leading to a large concentration in the markets for echocardiograms, computerized tomography, ultrasonography, MRI, bone densitometry and mammography tests in the city of Rio de Janeiro. To resolve these concerns, CADE decided that Fleury Group should divest assets in Rio de Janeiro, with a turnover worth BRL 28 million (around USD 10.43 million). Furthermore, the acquiring group undertook not to carry out acquisitions in the city of Rio de Janeiro for a period of three years.

On August 20, 2014, CADE authorized the leasing by JBS of three cattle slaughtering units of Rodopa Indústria e Comércio e Alimentos Ltda ("Rodopa"). To address the competition concerns, CADE's authorization was conditioned to the divestiture of one of Rodopa's brands. JBS also committed not to acquire new units in certain Brazilian states where the company's market shares exceeded a certain limit.

On October 1, 2014, CADE authorized the acquisition of Innova S/A by Videolar S/A. The companies are active in the petrochemical industry and produce, among other products, polyethylene and plastic resin, which are used as an input to disposable products, packaging, household appliances and electronics white goods. The authorization of the transaction was subject to the fulfillment of a set of commitments, which included: (i) a prohibition to acquire or lease polyethylene plants in the Brazilian market for a period of five years; and (ii) the commitment by Videolar to license its polyethylene and styrene monomer patents to third parties.

Policy Reforms in Brazil

In October 2014, CADE approved a series of changes to its merger control rules both from a procedural and a substantive perspective. The changes took place after a series of public consultations held by the agency.

The most relevant changes are set out in Resolution no. 9, of October 1, 2014 and include:

(a) The establishment of the criteria to be used in order to define the scope of an "economic group" in transactions involving investment funds. Specifically, CADE will consider as part of an economic group those shareholders or companies who directly or indirectly hold interests which exceed certain thresholds (e.g., companies on which a fund holds 20% or more of the corporate or voting capital).

(b) The clarification that consolidation operations, in which a parent entity acquires further minority stakes in a previously controlled entity, should no longer be notified to CADE.

(c) The establishment of the conditions under which the acquisition of share-convertible securities trigger an obligation to notify in Brazil.

(d) The establishment of criteria for the notification of transactions on the stock exchange or organized over-the-counter markets. In short, transactions may be closed before CADE's authorization, but the exercise of control rights over the target entity will be prohibited until CADE authorizes the transaction.

(e) The increase in the scope of transactions eligible for the Brazilian fast-track procedure. The fast-track procedure now covers transactions where the parties' combined market share is lower than 50%, so long as the increase in market share resulting from the transaction is minimal (i.e., the merger increases market HHI by less than 200).

In addition, Resolution no. 10, of October 29, 2014 clarifies the type of joint ventures subject to the Brazilian merger control rules. Under this resolution, a joint venture triggers an obligation to notify where, in addition to meeting the filing thresholds: (i) its duration will exceed 2 years; and (ii) the market shares of the parties exceed certain thresholds (20% combined market share for horizontal joint ventures and 30% for those joint ventures between entities in a vertical relationship and which include exclusivity or revenue-sharing provisions) or the agreement concerns risk sharing and consequently leads to interdependence between the parties.

OTHER JURISDICTIONS

Mexico

Mexico's new antitrust law became effective on July 7, 2014. The major changes relating to merger enforcement were:

1. In connection with the filing thresholds, the new law allows use of domestic (as opposed to worldwide) revenue or assets for transactions involving two or more entities in the acquisition of additional assets or stock in Mexico;

2. A transaction that must be notified to the Competition Authority cannot close until it is affirmatively authorized by the Competition Authority – under the prior legislation, in the absence of the Competition Authority issuing a "no closing letter," the parties could close a transaction after a ten-day period, assuming the risk of a negative final resolution; and

3. The period for issuing a resolution of a notified transaction was increased from 35 to 60 business days from the date the notice was filed or from the submission of additional information requested by the Competition Authority (the term can be extended for an additional 40 business days).

The new law also addresses gun-jumping by expanding pre-merger conduct subject to sanctions to include: (i) the establishment, agreement or coordination of proposals or refraining from submitting proposals in private bids and auctions; and, (ii) the exchange of information among competitors with the purpose or effect of fixing, agreeing or manipulating prices; restricting supply; and segmenting or assigning markets (under the former law, information exchanges were penalized only in connection with prices).

India

More than 160 mergers notifications have been reviewed by the Competition Commission of India (CCI), since it came into effect on June 1, 2011. Apart from three of these, the rest have been approved unconditionally. Further, all the notifications, including four made under the long Form II procedure, have been cleared in the Phase I review process.

In the course of 2014, the CCI provided clarity on how it intends to assess changes in control, and inter linked transactions.

As reported in our March 2014 edition of "Antitrust Merger Enforcement update And Outlook," aside from the fact that it fined *Etihad Airway* for its part at implementation of its acquisition of a 24 per cent stake in *Jet Airways* before obtaining clearance, this transaction has also led the way in developing the CCI's thinking on how it views the concept of "control" in 2014. In this transaction, the parties entered into a combination of an investment agreement, a shareholders agreement, and a commercial cooperation agreement with the common objective of enhancing business through joint initiatives. In the eyes of the CCI the effect of those agreements was that, along with the right to appoint two Directors and a 24 % strategic investment, the acquirer had the ability to participate in the managerial affairs of the target's business. This amounted to the acquirer obtaining joint control over the target's assets and operations. Consequently, purely financial investments by private equity firms require notification to the CCI, even though they are unlikely to affect competition in the market in any material way.

With regard to those restructuring transactions, involving a series of proposed combinations of interlinked and/or interdependent transactions, some of which may be exempt, and others notifiable, a single filing which embraces the otherwise exempt transactions must be made by the merging parties. On 10 June, 2014, the CCI approved the creation of a joint venture by *Ineos* and *Solvey*, with the CCI noting that, no later than six years after the creation of the JV, sole control would pass to *Ineos*. The CCI has cleared the first leg of this transaction (the creation of the JV), whereas it has yet to approve the transfer of the JV to *Ineo's* sole control given that the competitive assessment of a transaction six years from now is likely to be different.

In an important amendment to the Combination Regulations, the traditional exemption provided for transactions taking place outside India with an insignificant local nexus but an insignificant effect on markets in India, has been removed. Consequently, foreign-to-foreign transactions satisfying the standard assets and turnover thresholds under the Competition Act are now not covered by any of the other exemptions and will need to be notified even if there are no "local nexus" effects on relevant markets in India. This amendment is likely to increase significantly the number of mergers notified in India.

Notably, to date the CCI has decided all merger notifications within the 30-day Phase I period of review, putting to rest stakeholders concerns as to how this new regime would practically function.

In late 2014, as a precondition to a merger clearance the CCI for the first time ordered the sale of certain assets. It conditionally approved the 4 billion dollar Sun Ranbaxy deal provided that the two companies sold certain select products identified by the CCI before the merger could take place. The clear preference of the CCI in this case was for structural rather than behavioral, remedies to be adopted as a precondition to clearance. With the US Federal Trade Commission settling on the divestiture of an antibiotic in February 2015 in the ongoing US proceedings Ranbaxy Laboratories and Sun Pharmaceutical subsequent to the merger will become the largest generic drug maker in India.

Common Market of Eastern and Southern Africa (COMESA)

As reported in our 2014 Antitrust Merger Enforcement Update and Outlook, the Competition Commission of the Common Market of Eastern and Southern Africa ("COMESA Competition Commission" or "CCC") was launched on January 14, 2014. While COMESA was formed in 1994 in order to promote regional economic development and peace and security, it took 20 years to create an operational Competition Commission. COMESA currently comprises 19 Member States: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

The CCC is in charge of, among other things, regional merger control.

On October 31, 2014, the CCC published its final Merger Guidelines. The Guidelines aim to provide clarification regarding the triggering events for a notification, as well as the CCC's substantive approach to mergers. While the Guidelines do not change the formal threshold for notification, they reaffirm that COMESA merger control rules only apply to deals with a "regional dimension." The Guidelines define "regional dimension" as a situation in which at least one party to the deal "operates" in two or more Member States, and the target "operates" in at least one Member State. The Guidelines then define "operates" as having a turnover or asset value in the Member State in question exceeding USD 5 million. The Guidelines also clarify that the required regional dimension will not be present if more than two thirds of the turnover in the Common Market of each of the merging parties is achieved or held within one and the same Member State.

Taken together this means that a deal would fall within COMESA's jurisdiction if:

1. (i) in at least two Member States, the local turnover/asset value of at least one party to the transaction exceeds USD 5 million;

   and

2. (ii) the turnover/asset value of the target undertaking exceeds USD 5 million in at least one Member State;

   unless

3. (iii) more than two thirds of the annual turnover or asset value of each party is achieved within one and the same Member State.

In addition, while it remains uncertain as to whether the COMESA merger control regime *legally* works as a one-stop-shop, it appears that the Member States are more inclined to accept the CCC's exclusive jurisdiction. Kenya, the Member State that explicitly required a parallel national filing, has been reported to not have raised the issue in a recent case.

[1] 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.

[2] Transactions require notification to MOFCOM where: (1) combined worldwide annual turnover of all the parties exceeds 10,000 million RMB and annual turnover in China of each of at least two parties in the previous financial year exceeds 400 million RMB; or (2) combined annual turnover in China of all the parties exceeds 2,000 million RMB and the annual turnover in China of each of at least two of the parties exceeds 400 million RMB in the previous financial year.

[3] *See* Philips, H., "An Interview with Vinícius Marques de Carvalho and Eduardo Frade," *Global Competition Review,* December 5, 2014.

[4] Please note that this percentage reflects the number of mergers referred to CADE's Tribunal for an in-depth assessment under the New Brazilian Competition Act (Law 12,529 of November 30, 2011) in 2012.

[5] See, *e.g.*, in relation to the US, the "Antitrust Division Policy Guide to Merger Remedies" of the Antitrust US Department of Justice, June 2011, at Section I.B.1., "*[...] the Division will pursue a divestiture remedy in the vast majority of cases involving horizontal mergers*." *See, e.g.*, in relation to EU, "Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004," at para. 15: "*[...] commitments which are structural in nature, such as the commitment to sell a business unit, are, as a rule, preferable from the point of view of the Merger Regulation's objective, inasmuch as such commitments prevent, durably, the competition concerns which would be raised by the merger as notified, and do not, moreover, require medium or long-term monitoring measures."*

[6] A remedy resulting in a limitation of output is likely to be incompatible with both EU and US law. *See*, *e.g.*, in relation to the US, the "Antitrust Division Policy Guide to Merger Remedies" of the Antitrust US Department of Justice, June 2011, at the Introduction: "*The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market. For simplicity of exposition, this Policy Guide uses the phrase 'preserving competition' throughout, which should be understood to include the concept of restoring competition or enhancing consumer welfare, depending on the specific facts of the transaction and its proposed remedy*. […] *In all cases, the key is finding a remedy that works, thereby effectively preserving competition in order to promote innovation and consumer welfare*." *See*, *e.g.*, in relation to EU, "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings," at para. 8: "*Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. By 'increased market power' is meant the ability of one or more firms to*

profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition. In this notice, the expression 'increased prices' is often used as shorthand for these various ways in which a merger may result in competitive harm" and "Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004," at para. 17: "*Commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances. In particular, commitments in the form of undertakings not to raise prices, to reduce product ranges or to remove brands, etc., will generally not eliminate competition concerns resulting from horizontal overlaps*."

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 in the firm's Antitrust and Trade Regulation Practice Group, or any of the following practice group leaders and members:

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