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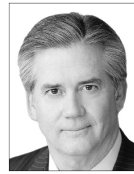
ANTITRUST TRADE AND PRACTICE

Expert Analysis

Litigating for Leverage? Merger Enforcement in 2013



By **Shepard Goldfein**

And **James A. Keyte**

The year 2013 was another year of robust merger enforcement at the Department of Justice Antitrust Division and the Federal Trade Commission (FTC). The agencies have shown they are quite willing to litigate to obtain their desired enforcement results when, from their perspective, a transaction is likely to substantially lessen competition in violation of Section 7 of the Clayton Act. The Antitrust Division, which went five years without litigating a single merger case in the early 2000s, has demonstrated its revitalized enforcement approach by challenging multiple high-profile transactions in 2013. The agencies have also continued to challenge non-reportable and consummated transactions, a reminder that all transactions, no matter how small, are subject to the agencies' watchful eyes.

While this uptick in merger enforcement continues a shift from the Bush administration, it also is part of what many practitioners perceive to be a new tactic by the agencies: aggressively litigating with at least an eye toward increasing settlement leverage.[1] Indeed, given what appears to be a new agency trend, antitrust practitioners have begun to question whether this increase in merger challenges represents a subtle change in enforcement policy and, if so, whether the approach is affecting risk assessment and outcomes.

In any event, in this environment, it is critical for a company contemplating a merger to understand potential antitrust litigation risk and to assess thoroughly the feasibility and impact of potential divestiture scenarios as early as possible in the analysis—certainly before a deal is struck that sets in stone the allocation of antitrust risk between the parties. Moreover, considering the recent experiences in *American/US Airways*, *ABI/Modelo* and *Ardagh/SGC*, any potential merging party—especially one operating in a concentrated industry—must be prepared to litigate, if not only to solidify positioning in post-complaint settlement discussions.

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Below, we outline several of the agencies' litigated challenges to high profile transactions in 2013.

HSR Reportable Transactions

The agencies challenged several transactions that met the filing thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act).

American/US Airways. In August 2013, the Justice Department, along with six state attorneys general, filed a suit alleging that the proposed $11 billion merger between US Airways Group and American Airlines' parent corporation, AMR Corp. (American), would substantially lessen competition for the sale of scheduled air passenger services in hundreds of alleged city pair markets throughout the United States, and in the alleged market for takeoff and landing slots at Ronald Reagan Washington National Airport (DCA).[2] (The authors' firm represented AMR's Official Committee of Unsecured Creditors in relation to this transaction.)

The Justice Department further alleged that the merger would remove US Airways as a price maverick in certain markets, and would otherwise facilitate coordination among the remaining network carriers—including Delta, United and the new American—leading to higher fares, higher fees and reduced service.[3]

In order to resolve the litigation, the parties entered into a proposed settlement with the Justice Department and plaintiff states under which the parties undertook slot divestitures at DCA and New York LaGuardia International Airport, and gate divestitures at five hub airports across the country.[4] The parties also agreed, with certain exceptions, to maintain historical operations at their hubs for a period of three years and provide daily scheduled service from one or more of their hubs to airports in each of the plaintiff states for a period of five years.

ABI/Modelo. In January 2013, the Justice Department sued to enjoin the merger between Anheuser-Busch InBev SA/NV (ABI) and Grupo Modelo S.A.B. de C.V. (Modelo) on the grounds that ABI's $20.1 billion acquisition of the remaining interest in Modelo that it did not already own would substantially lessen competition in the market for beer in the United States as a whole, and in at least 26 metropolitan areas across the United States. (The authors' firm represented ABI in relation to this transaction.)[5]

In response, the parties renegotiated the terms of their agreement and subsequently reached an agreement with the Justice Department that resolved the department's concerns largely as a result of the terms of the restructured transaction. In *ABI/Modelo*, the parties agreed to a perpetual license to certain Modelo brands as well as to the divestiture of Modelo's Piedras Negras brewery and its interest in Crown Imports, to Constellation Brands Inc.[6]

> An uptick in merger enforcement is part of what many practitioners perceive to be a new tactic by the agencies: aggressively litigating with at least an eye toward increasing settlement leverage.

Ardagh/SGC. The FTC has employed a similar approach, suing to enjoin Ardagh Group S.A.'s $1.7 billion acquisition of Saint-Gobain Containers (SGC), in July 2013. The FTC alleged that the merger between Ardagh and SGC would reduce competition in the U.S. markets for glass containers for beer and spirits, and that reducing the number of major competitors would facilitate coordination and result in supracompetitive prices that would harm consumers.[7] As of publication, *Ardagh/SGC* is scheduled to begin an administrative trial in the spring of 2014. While the parties

remain in negotiations with the FTC,[8] the FTC's conduct to date in negotiations and the parallel administrative proceedings in *Ardagh/SGC* has been consistent with the agencies' strategy of optimizing negotiating leverage through aggressive litigation. (The authors' firm represented ABI as a third party in relation to this transaction.)

Pinnacle Entertainment/Ameristar Casinos. The FTC also sued to enjoin Pinnacle Entertainment's $2.8 billion acquisition of Ameristar Casinos in May 2013. The FTC alleged that the merger would reduce competition in two geographic markets for casino services, which would lead to higher prices and a lower quality of casino services.[9] The parties settled the action a few months later, in August 2013, via a consent order that required divestitures in the two affected geographic markets.[10]

Non-Reportable Transactions

Further evidence of the agencies' continued aggressive enforcement can be found in their increasing willingness to challenge transactions that do not meet the filing thresholds of the HSR Act—even in cases where a transaction has already closed. The agencies both issued challenges to non-reportable, consummated transactions in 2013, including the FTC's challenges of Solera Holdings' 2012 acquisition of Actual Systems of America Inc. (ASA) and St. Luke's Health System Ltd.'s 2012 purchase of Saltzer Medical Group, and the Justice Department's challenge of Bazaarvoice Inc.'s 2012 acquisition of PowerReviews Inc.

Solera/ASA. In *Solera/ASA* the FTC forced Solera to divest all of the assets it had acquired from ASA more than a year earlier for $8.7 million.[11] According to the FTC, ASA and Solera were close competitors, and two of the only three manufacturers in an already concentrated market for yard management systems (YMS) used by automotive recycling yards.[12] The FTC claimed the transaction likely would have resulted in higher prices and reduced innovation for YMS.[13] The Solera matter underscores that no transaction is too small to escape antitrust scrutiny if the agencies believe the transaction may harm consumer welfare.

St. Luke's/Saltzer. In early 2013, the FTC and Idaho's attorney general sued St. Luke's over its 2012 purchase of Saltzer, a 44-doctor physician practice group that had been the state's largest independent multispecialty group in Idaho.[14] According to the FTC, the acquisition of Saltzer created a dominant single provider of adult primary care physician services in Nampa, Idaho, with enough market power to charge higher rates for primary care services in the area.[15]

The FTC's suit followed a private antitrust suit brought in late 2012 by St. Luke's competitors, St. Alphonsus Health System and Treasure Valley Hospital. The bench trial ended in November 2013 and is currently being considered by the judge, who has yet to rule. The FTC's challenge in *St. Luke's/Saltzer* serves as a reminder that the FTC continues its aggressive enforcement in health care regardless of transaction size and reportability.

Bazaarvoice/PowerReviews. In a trial that recently concluded with no opinion issued as of the time of this publication, the Justice Department relied heavily on excerpts from company documents to challenge Bazaarvoice's acquisition of PowerReviews, a competing provider of product ratings and reviews (PRR) platforms. According to the Justice Department, Bazaarvoice's internal documents showed intent by the company to raise prices for PRR platforms and exclude PowerReviews as a competitor through the acquisition.[16] In *Bazaarvoice/PowerReviews*, the Justice Department is seeking an order requiring Bazaarvoice to divest assets sufficient to create a separate and distinct competing business that can replace PowerReviews in the marketplace, and has made clear that an effective remedy may need to include assets beyond those previously held by the acquired firm.[17]

In the face of significant antitrust risk, sellers may seek a premium or back-end compensation, such as reverse break-up fees, and may also consider the potential harm to their ongoing business if the agencies decide to enjoin a transaction.

Practice Tips

Given the agencies' willingness to aggressively investigate and litigate potentially anticompetitive transactions, companies contemplating mergers should consider the following practice tips.

Assess antitrust risk early. In order to accurately calculate deal value and execution risk, companies must be able to factor in the prospect of agency litigation and potentially court-ordered injunctive relief. In the face of significant antitrust risk, sellers may seek a premium or back-end compensation, such as reverse break-up fees (RBUFs), and may also consider the potential harm to their ongoing business if the agencies decide to enjoin a transaction. As part of this early assessment, it is advisable to hire economists and other experts, especially in mergers within highly concentrated industries.

Explore the feasibility of divestiture and other remedies. If the antitrust risk is significant, and depending on the nature of the risk, companies also should consider whether a structural remedy (e.g., a divestiture) or a behavioral remedy (e.g., requiring an upstream firm to deal on fair, reasonable and non-discriminatory terms with downstream competitors) would both mollify the agencies' concerns and maintain deal value. While behavioral remedies may be more difficult to formulate in horizontal mergers, they are fairly standard in vertical mergers.[18] Either way, in this litigious environment, potential settlements must be part of the early assessment and risk calculus.

Determine how to allocate antitrust risk in the transaction agreement. As a practical matter, these risk assessments and allocations will find a home in the deal documents. Several provisions in a transaction agreement may be used to allocate antitrust risk. Common risk allocation provisions include a "hell-or-high-water" clause, which requires buyers to do all that the agencies require to close a deal. Less onerous, a provision may limit the amount of business a buyer would be required to divest, while other provisions could simply require buyers and sellers to undertake their best efforts or reasonable best efforts to achieve antitrust clearance, with the parties going their own way if the deal is challenged.

"Material adverse change" (MAC) provisions permit buyers to opt out of a transaction in the event of a MAC, which, depending on the terms of the contract, can require payment of the RBUF. Standard provisions also dictate how the parties will cooperate on strategy in negotiating with and potentially litigating against the agencies.

While none of these risk-allocation provisions are particularly new, in today's enforcement environment they certainly can be critical in setting the parameters under which a potentially risky deal will be pursued. And until the agencies' approach to threatened litigation—even with settlement potential—changes, these provisions often will come into play as the parties seek to complete their transaction.

1. See Jacob Gershman, The Wall Street Journal Law Blog, A Harder Line on Merger Enforcement, available at http://blogs.wsj.com/law/2013/08/13/a-harder-line-on-merger-enforcement/ ("The Obama administration…is litigating the antitrust cases harder and further than its predecessors, pushing for more substantial compromises and shrinking room for a fix").

2. Amended Complaint at 3-7, *United States v. US Airways Group*, No. 1:13-cv-01236 (D.D.C. Aug. 13, 2013).

3. Id. at 4-5.

4. Proposed Final Judgment at 5-12, *United States v. US Airways Group*, No. 1:13-cv-01236 (D.D.C. Aug. 13, 2013).

5. Complaint at 2-4, *United States v. Anheuser-Busch InBEV SA/NV*, No. 1:13-cv-00127 (D.D.C. Jan. 31, 2013).

6. Final Order at 10-13, *United States v. Anheuser-Busch InBEV SA/NV*, No. 1:13-cv-00127 (D.D.C. Oct. 24, 2013).

7. Complaint at 2, *Ardagh Group S.A.*, No. 9356 (F.T.C. Dec. 18, 2013).

8. See Order Rescheduling Hearing Date and Staying Proceeding at 1, *Ardagh Group S.A.*, No. 9356 (F.T.C. Dec. 18, 2013) ("In their Joint Motion, the Parties represent that they are engaged in settlement discussions in an effort to reach agreement on a package of glass container plant divestitures that could resolve Commission concerns regarding the proposed acquisition's allegedly anticompetitive effects").

9. Complaint at 1-2, Pinnacle Entertainment Inc., No. 9355 (F.T.C. May 28, 2013).

10. Decision and Order at 14-18, *Pinnacle Entertainment*, No. 9355 (F.T.C. Dec. 4, 2013).

11. Decision and Order at 7-9, *Solera Holdings,* No. 4415 (F.T.C. Oct. 22, 2013).

12. Complaint at 2, *Solera Holdings*, No. 4415 (F.T.C. Oct. 22, 2013).

13. Id. at 3.

14. Complaint for Permanent Injunction at 7, *FTC v. St. Luke's Health System*, No. 1:12-cv-00560 (D. Idaho March 26, 2013).

15. Id. at 2.

16. See Complaint at 2-4, *United States v. Bazaarvoice Inc.*, No. 13-cv-0133 (N.D. Cal. Jan. 10, 2013) ("[T]he company's business documents are saturated with evidence that Bazaarvoice believed the acquisition of PowerReviews would eliminate its most significant competitive threat and stem price competition").

17. Id. at 20.

18. See, e.g., Final Judgment at 14-15, *United States v. Google*, No. 1:11-cv-00688 (D.D.C. Oct. 5, 2011) (requiring Google to deal on FRAND terms with its potential downstream competitors that were customers of software company Google acquired).

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