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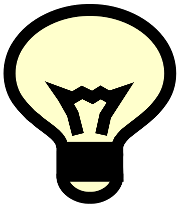

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Antitrust Agencies Action in 2012: A Look Ahead by Assessing the Year Behind

Deborah Feinstein and Andrew Macurdy

An election year is always an interesting time in Washington, D.C. The gridlock in Washington is generally worse during election season, affecting agencies throughout the federal government. And that is certainly true of the antitrust enforcement agencies. The FTC is currently operating with only four Commissioners. A fifth Commissioner, Maureen Ohlhausen, former Director of FTC's Office of Policy Planning, now in private practice, was nominated in July, but has yet to be confirmed. The DOJ Antitrust Division has been headed by Acting Assistant Attorney General Sharis Pozen, since August; she has announced that she will step down at the end of April. Bill Baer, currently at Arnold & Porter, and Director of the Bureau of Competition during the Clinton administration, has been nominated by President Obama to serve as AAG, but it is unclear when Congress will act upon his nomination.

In the meantime, however, the agencies continue with existing leadership to be active, particularly in challenging mergers. As has typically been the case, many merger challenges were resolved at both agencies through consent decrees. But what made 2011 stand out was the extent of litigation activity. The merger enforcement highlights from 2011 and what they might mean for 2012 are set forth below.

The DOJ's 2011 actions included an enforcement action against AT&T's acquisition of T-Mobile that led to the deal's abandonment, and the DOJ's first merger victory in about a decade. For the FTC, it was a year of both losses and victories. The FTC's actions were focused on the health care sector. While the FTC Chairman has made health care a priority, the large number of health care cases is largely a function of the industry's significant role in the U.S. economy and the fact that economic challenges – especially for hospitals – are driving them to combinations. In a time when the Agencies and some courts have suggested an increased role for evidence of a transaction's direct effects, this past year's challenges and court decisions made clear the continuing relevance of traditional market definition.

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Merger Trends at DOJ

The DOJ ended 2011 with a high-profile win, as AT&T abandoned its attempted $39 billion purchase of T-Mobile. The DOJ's lawsuit, filed in August, coupled with pressure from the Federal Communications Commission, caused AT&T to walk away from a deal that would have created the nation's largest cell phone service provider and to pay T-Mobile $4 billion in break-up fees.

In October 2011, the DOJ scored its other major victory in a suit to block H&R Block's acquisition of TaxACT, its first merger trial in seven years and its first success in even longer. The district court enjoined the transaction on the grounds that it would create an anticompetitive duopoly in the "digital do-it-yourself" tax preparation software market.[1] After a lengthy discussion defining the relevant market, the court found that the government had established a *prima facie* case, based on market concentration data.[2]

This decision focused on product market definition, rather than turning directly to competitive effects analysis, as the *Whole Foods* court of appeals decisions and the 2010 Merger Guidelines might suggest. The court held that other forms of tax preparation, such as the pen and paper method, did not constrain the price of "digital do-it-yourself" tax preparation software. While the DOJ and FTC Guidelines highlighted the agencies' use of the "upward pricing pressure model," an economic model that abandons market definition to look at direct effects, *H&R Block* gave it a mere footnote mention. Nevertheless, both sides did use economic models in an attempt to show the extent of switching that would occur in the event of a price increase, and the court favored the government's model. Thus, *H&R Block* shows that the DOJ will challenge anticompetitive mergers and that it is capable of winning – by means of old fashioned market definition *and* newer economic tools.

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The DOJ began 2012 by approving Google's high-profile $12.5 billion purchase of U.S. cell phone maker Motorola after issuing a second request for information. The Agency's scrutiny focused mainly on Motorola's significant number of patents; it concluded that transfer of ownership to Google would not lessen competition in the consumer electronics market. At the same time, it cleared the acquisitions by Apple Inc., Microsoft Corp. and Research in Motion Ltd. of certain Nortel Networks Corporation patents, and the acquisition by Apple of certain Novell Inc. patents. In an unusually lengthy statement covering all these investigations, DOJ noted that: "The division took into account the fact that during the pendency of these investigations, Apple, Google and Microsoft each made public statements explaining their respective SEP licensing practices."[3] DOJ did not, however, require that those practices be codified in a consent decree.

Merger Trends at the FTC

The year of ups and downs for the FTC began with a loss. In February 2011, the FTC lost its bid for a preliminary injunction halting Laboratory Corporation of America's ("LabCorp") acquisition of newly bankrupt rival clinical laboratory testing company, Westcliff Medical Laboratories. Although the court noted that Westcliff's financial distress would factor into a balancing of the equities,[4] the decision did not reach that far as the injunction was denied based on market definition. The FTC defined the market as "capitated" laboratory testing services, arrangements between laboratories and doctor groups that charge groups on a monthly per-physician basis, to the exclusion of fee-for-service laboratories.[5] The court disagreed and stated that alternative payment methods do not sort identical products into separate markets.[6] Interestingly, Commissioner Rosch voted against an

1 United States v. H&R Block, Inc., No. 11-00948, 2011 WL 5438955, at *47 (D.D.C. Nov. 10, 2011).
2 *Id.*at *28 – 29.
3 Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc., and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd., February 13, 2012, available at: http://www.justice.gov/atr/public/press_releases/2012/280190.htm.
4 F.T.C. v. Lab. Corp. of America, No. SACV 10-1873, 2011 WL 3100372, at *23 (C.D. Cal. Mar. 11, 2011).
5 *Id*. at *3.
6 *Id.* at *18.

enforcement action, also believing that the market definition proposed by staff would not hold.[7] Significantly, although the court acknowledged that the "Agencies' analysis need not start with market definition,"[8] it promptly began its conclusions by stressing market definition's analytical importance.[9] The FTC subsequently withdrew its *LabCorp* appeal before the Ninth Circuit and closed the pending administrative hearing.

The FTC rebounded in March 2011 with its first court victory in a preliminary injunction action against a hospital merger in over a decade. ProMedica and St. Luke's Hospital, the defendants, conceded that the relevant markets were general acute hospital care and obstetrics services in Lucas County, Ohio.[10] The opinion made the decision appear an easy one, as pre-merger conversations between the hospitals evidenced an intent to increase prices by double digits.[11] Nine months later, in December, an administrative law judge ruled for the FTC and ordered ProMedica to divest St. Luke's.[12] The decision is pending before the full Commission.

The same week the FTC prevailed in its hearing against ProMedica, it also suffered a defeat with respect to Georgia-based Phoebe Putney Health System's combination with Palmyra Park Hospital. The Eleventh Circuit unanimously affirmed the lower court's holding that the proposed acquisition of a for-profit hospital, Palmyra, by a county hospital authority, and its subsequent lease to a private entity, Phoebe, was immune from antitrust challenge under the state action doctrine.[13] The Hospital Authority of Albany-Dougherty County, Georgia, operates Phoebe and is authorized by state law to acquire other hospitals; accordingly, the Eleventh Circuit ruled any anticompetitive effects irrelevant, despite the subsequent lease to the for-profit Phoebe.[14]

In another action within the health care sector, the FTC in January 2012 decided not to pursue Supreme Court review of the Eighth Circuit's *Lundbeck* decision, despite calling the result "profoundly wrong."[15] The FTC charged the defendant drug maker with acquiring rights to the only two drugs that treat a fatal birth defect and then raising prices for the drugs nearly 1,300 percent. Again, market definition was at the forefront; the district court ruled that the FTC did not satisfy its burden of proving the drugs were in the same market,[16] relying on testimony from doctors that they would not consider price in choosing between the two drugs.[17] The Eighth Circuit affirmed on the narrow grounds that the lower court's factual determination was not "clearly erroneous."[18] [The FTC then closed the case, although one Commissioner dissented and faulted the district court with overemphasizing cross-price elasticity of demand to the exclusion of important non-price considerations.[19]] In choosing not to appeal *Lundbeck*, the FTC declined an opportunity to solicit the Supreme Court to clarify modern merger law.

In choosing not to appeal *Lundbeck*, the FTC declined an opportunity to solicit the Supreme Court to clarify modern merger law.

Two current FTC merger cases warrant attention. First, the FTC is presently reviewing Express Scripts' planned $29 billion acquisition of rival Medco Health Solutions, after issuing a second request in September 2011. The proposed merger would create the nation's largest pharmacy benefits manager, commanding a third of the prescription drug market, and leave CVS Caremark as the only national competitor. The FTC's investigation will likely focus on whether the relevant

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7 *Id*. at *6.
8 *Id*. at *14.
9 *Id*. at *17 – 21.
10 F.T.C. v. ProMedica Health Sys., Inc., No. 3:11 CV 47, 2011 WL 1219281, at *54 – 55 (N.D. Ohio Mar. 29, 2011).
11 *Id*. at *16.
12 In the Matter of ProMedica Health Sys., Inc. No. 9346, 2011 WL 2415402 (F.T.C.), at *33 (May 24, 2011).
13 F.T.C. v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369, 1376 (11th Cir. 2011).
14 *Id*. at 1376 – 78.
15 Statement of Chairman Leibowitz, Commissioner Ramirez, and Commissioner Brill *F.T.C. v. Lundbeck* (Jan. 12, 2012) *available at* http://www.ftc.gov/os/closings/publicltrs/120120lundbeck-jdl-brill-ramirez.pdf.
16 F.T.C. v. Lundbeck, Inc., No. 08-6379, 2010 WL 3810015, at 21 (D. Minn. Aug. 31, 2010).
17 *Id*. at *19 – 21.
18 F.T.C. v. Lundbeck, Inc., 650 F.3d 1236, 1242 (8th Cir. 2011).
19 Statement of Commissioner J. Thomas Rosch in *F.T.C. v. Lundbeck*, at 2 (Jan. 20, 2012), *available at* http://ftc.gov/os/closings/publicltrs/120120lundbeck-rosch.pdf.

competition should be defined narrowly to include only companies with national reach, or more broadly to encompass regional managers.

Also pending is a court challenge, before the same Minnesota jurisdiction that decided *Lundbeck*, to Graco's acquisition of Illinois Tool Works' finishing division. The FTC alleges the combination would reduce competition in the national market for industrial liquid-finishing equipment and the market for circulation pumps. While the FTC has pressed for a very expedited hearing, arguing that the real trial is before the FTC's administrative law judge, the defendants requested a more fulsome hearing. That preliminary decision could have a significant effect on the ultimate outcome of the case.

The past year's developments suggest more rigorous enforcement priorities in the merger area by the Agencies. Major victories, such as *AT&T, H&R Block* and *ProMedica*, show that the Agencies will bring challenges they believe in – and can win in court. Yet, the Agencies' recent successes are not without exceptions, as the FTC's setbacks this past year indicate. Moreover, as the *Lundbeck* case's closing implies, the Agencies' worry about losing cases – and the long-term precedent such losses have. Finally, given decisions like *LabCorp* and *H&R Block*, the most significant takeaway from 2011 may be that despite earlier predictions of its death, market definition is alive and well.

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Through The Looking Glass: Documents Hosted Overseas And Grand Jury Subpoenas

Micah C. Osgood and James H. Mutchnik

If U.S. enforcement agencies cannot easily acquire a foreign company's overseas documents or electronically stored information through a grand jury subpoena, may it acquire them indirectly from the company's U.S. lawyers who *remotely* review the documents to render legal advice? Probably not, but interestingly not because of the attorney-client privilege. Rather, counsel cannot be compelled to produce documents they do not possess. Reviewing documents remotely is in a way like reading them through a very powerful, very specific telescope: viewing them through the telescope neither changes their location nor grants the reader ownership. The technical details of how the documents are remotely reviewed, however, could determine the documents' discoverability in a criminal enforcement action if copies of the documents are imported.

The technical details of how the documents are remotely reviewed, however, could determine the documents' discoverability in a criminal enforcement action if copies of the documents are imported.

Courts have recently enforced at least certain grand jury subpoenas for foreign documents against U.S. law firms. *In re Grand Jury Subpoena*, 646 F.3d 159 (4th Cir. 2011); *In re Grand Jury Subpoenas*, 627 F.3d 1143 (9th Cir. 2010), *cert. denied*, 131 S. Ct. (2011); *Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165 (2nd Cir. 2003). As the Ninth Circuit held, foreign documents in the U.S. only within the hands of counsel "have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip." 627 F.3d at 1144. Importing documents, even for the purposes of rendering legal advice, may allow a grand jury subpoena to reach them.

There are three issues here: 1) Does the attorney-client privilege protect the U.S.-based counsel's review of foreign document; 2) Can a grand jury subpoena force a law firm to produce a client's documents that are reviewed remotely; and, 3) Does such remote viewing somehow constructively import the overseas documents such that they are now within the grand jury's "grasp."

Attorney-Client Privilege

Avoiding U.S.-based physical review of documents is sensible. For practical reasons, overseas documents are outside the government's practical reach.[1] To counter this, the government will subpoena law firms for clients' otherwise-foreign documents. But shouldn't the attorney-client privilege prevent subpoenaing outside counsel for documents brought into the country solely for the purpose of obtaining legal advice?

The answer may be no. Providing documents to counsel alone does not protect them. "The courts are in agreement that documents that came into existence outside the attorney-client relationship . . . do not acquire a privileged status" through the client's passing of them to its attorney. 1 Attorney-Client Privilege in the U.S. §5.18 (West 2011). But there appears to be an exception. The attorney-client privilege arguably protects documents provided to counsel that would otherwise be undiscoverable if never provided. *See Fisher v. United States*, 425 U.S. 391 (1976).

The New York Law Journal has recently published an excellent article addressing whether *Fisher* and the cases interpreting it would shield otherwise-foreign documents held in a U.S. counsel's office purely for assessment of criminal exposure. Michael Gertman & James Beha II, *Deciding Where to Review Overseas Client's Documents*, New York Law J., vol. 246-No.110

[1] It is important to note that the rules for civil discovery are significantly different. Civil discovery of overseas documents is easier. This is because criminal discovery raises issues of sovereignty and comity -- namely, a nation's prerogative to investigate crime within its own borders -- in addition to challenges of jurisdiction and service.

(Dec. 8, 2011). The authors note the "conflict" between the general "principle that a client's documents are not privileged in the hands of counsel" and *Fisher's* reasoning that the attorney-client privilege would be frustrated by a client's reluctance to share documents with counsel when such documents would otherwise be unavailable to the government.

Neither Fisher nor its progeny encountered a ***preserved*** claim of attorney-client privilege over otherwise-foreign documents, thus leaving the issue undecided. Messrs. Gertman and Beha conclude that "*Fisher* leaves open the possibility that courts may decline to enforce grand jury subpoenas to counsel seeking their client's overseas documents" but nevertheless "the safest course is to review [a] client's documents overseas." Their article did not consider reviewing of documents remotely, with its attendant cost savings.

The Law Firm's Possession of Remotely-Viewed Documents

While there are reasonable arguments that the attorney-client privilege protects documents in counsel's hands, can a subpoena still compel the production of documents reviewed remotely? The answer is likely no. "A subpoena may reach documents, electronically stored information, or tangible things in the 'possession, custody, or control' of the person." 9 Moore's Federal Practice 3D, § 45.10[3][b], 45-40. Control is the right to obtain the documents on demand. *See id.*; *see also In re Citric Acid Litig.*, 191 F.3d 1090, 1107-08 (9th Cir. 1999). Control must be proven for a criminal contempt conviction arising from flouting a grand jury subpoena. *United States v. Metropolitan Disposal Corp.*, 622 F. Supp. 1262 (D. Or. 1985); *In re Schuffman*, 386 F. Supp. 177 (S.D.N.Y. 1974); *United States v. Jacobs*, 322 F. Supp. 1299, 1304 (C.D. Cal. 1971).

The benefits of remote reviewing become apparent. Counsel does not possess the documents hosted on a remote server owned by the foreign client or its overseas vendor. Nor does counsel "control" the overseas documents because it has no legal right to demand that its client provide them. Access to the documents is not sufficient to create control if the party with access does not have a legal right to demand the documents, take exclusive possession, and then provide them to the grand jury. *See In re Grand Jury Subpoena*, 646 F.2d 963, 969 (5th Cir. 1981). A law firm could not comply with a subpoena where it would have to unlawfully seize a client's documents in order to produce them.

This raises important practical considerations. To keep the documents overseas and out of their possession, custody, or control, U.S. counsel must recommend to their clients the use of the correct document review tool. The selected review tool must maintain the documents overseas and simply allow the U.S attorney to view them without saving a copy even temporarily. Most Citrix-hosted and other "cloud" review tools accomplish this purely remote viewing. These document review tools do allow you to save a copy of the document to your computer or print it but only through deliberate action. It may be prudent to disable those features.

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In addition to document review tools, appropriate for large scale reviews, other cloud-based storage solutions could be used. For example, a third-party service like Google Documents, assuming the server and service-provider are overseas (likely disqualifying Google), could allow more impromptu sharing of documents. Services like Google Documents store the actual document in the cloud and logging into the system and viewing the document simply displays the document on the screen through a web browser. Using a service like Google Documents does not download a copy of the document onto the local computer. There may also be a way to display documents on a foreign client's secured-access website, although many popular web browsers store images and other information from websites on the local computer. Consult an IT professional.

With the increasing development of cloud-based storage solutions, such as Apple's iCloud, options for U.S. counsel to remotely review and share documents, without importing a document into the U.S., will undoubtedly increase. Care should be taken, however, to distinguish solutions that allow for storage and viewing of documents remotely, from those that simply host the document remotely, but require downloading the document to the local machine for view. FTP sites and other document repositories often require downloading the documents to view them, and would upon download arguably bring the documents within the U.S., within the law firm's possession, and so within the reach of the grand jury. Similarly, even opening attachments on an email, then closing the attachment, could save a temporary-in-name-only copy in Windows hidden tmp. file architecture.

Documents could also be arguably under the control of a law firm, even if they are still overseas, if the law firm has the legal right to possess them where they are located. For example, client documents hosted on behalf of a client on a server in the firm's foreign office might be deemed under the law firm's control. Furthermore, if the law firm directly contracts with a foreign e-discovery vendor or translation vendor, the firm would similarly likely have control over — the legal right to access and possess — the documents in the vendor's possession.

Documents could also be arguably under the control of a law firm, even if they are still overseas, if the law firm has the legal right to possess them where they are located.

Remote Viewing's Effect on the Document's Location

While overseas documents reviewed remotely permanently exist on a server overseas, is there any argument that the documents' temporary appearance in the United States while being viewed creates a U.S. presence? That answer also appears to be no, for logical and technical reasons. Remote reviewing of documents hosted overseas uses software to display the image of the foreign document on a U.S. screen. This might be akin to reading a document through a telescope in the physical world — the mere act of viewing the document remotely does not change its location. In order to save or print the document within the U.S., further electronic commands need to be sent to the foreign server.

The government might argue that the documents were "constructively" within the U.S. based on the foreign documents becoming available at will to U.S. counsel. Using most remote reviewing tools, the documents can be called up at any time. Creating a physical or electronic copy in the United States requires the mere push of a button. Additionally, there could be a claim that coding of documents from the U.S. creates some sort of increased nexus with the U.S., just as interactive websites create a greater nexus with the forum state for personal jurisdiction purposes. *See, e.g., Revell v. Lidov*, 317 F.3d 467, 470-71 (5th Cir. 2002) (discussing the sliding scale test for website interactivity in creating sufficient contacts for personal jurisdiction).

Ultimately these arguments would appear to fail under practical realities. No matter how often viewed in the U.S., once the review tool is closed, no copy of the document exists in the U.S. or in counsels' possession. It would be impossible for the government to seize such documents via a warrant as taking the computer and forensically examining it would not yield a copy. Just as a foreign corporation can effectively avoid having its documents subpoenaed directly, it could avoid having its documents subpoenaed indirectly by terminating its counsel's access to the review tool. The foreign client could literally pull the plug on the server hosting the documents and foreclose all U.S. access. This ultimate control demonstrates that the documents, even if remotely reviewed from the U.S., are not in reality within the U.S. and not within the possession, custody, or control of any counsel located there.

Conclusion

As discussed above, no Court has definitely held that foreign documents reviewed by U.S. counsel are or are not protected by the attorney-client privileged. Thus, if those documents were to be imported into the U.S., they could potentially be subpoenaed even if only in counsel's hands for the purposes of providing legal advice. While there are some claims to privilege, there are stronger arguments that remote reviewing of documents by U.S. counsels protects the documents from criminal discovery. Attention must be paid to ensure that the remote review does not cause any documents to be saved or printed locally and care must be taken to ensure the law firm does not have a legal right to access the documents.

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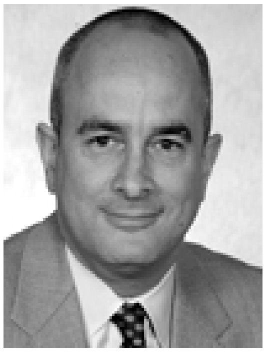

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No Man Is An Island: Transatlantic Cooperation in Merger Investigations

Martim Valente

In October 2011, the European Commission ("Commission"), the U.S. Department of Justice ("DOJ"), and the U.S. Federal Trade Commission ("FTC", together with the DOJ, the "US agencies") published revised Best Practices with respect to merger investigations undertaken by the two jurisdictions (the "Revised Best Practices").[1]

Cooperation between the Commission and the US agencies has been a feature of international merger control for at least two decades and the relationship between the agencies has generally been a good one. Indeed, a mere two years following the adoption of the EU Merger Regulation, the US-EU bilateral cooperation agreement was signed.[2] At the time of signing, then-Acting Attorney General Barr stated that: "the increasing integration of [the US and EU] economies and the emergence of an international business environment make cooperation between [the US and EU] governments in the area of antitrust enforcement absolutely essential."[3]

However, there have been some difficult moments, the most significant and well publicized of which was the merger between GE and Honeywell. Here, the Commission blocked the merger of two major US companies after it had been approved by the DOJ.

This article discusses the principle characteristics of the Revised Best Practices. In addition, two mergers that caused tensions between the two jurisdictions are described (*GE/Honeywell* and *Oracle/Sun*). Finally, some practical considerations that should be kept in mind when dealing with a transatlantic merger are highlighted.

I The Revised Best Practices

The 2002 Best Practices. The basis for cooperation between the EU and the US in competition matters is the US-EU bilateral agreement, which dates from 1991. In 2002, the first version of the Best Practices between the EU and the US regarding merger investigations was adopted (the "2002 Best Practices").[4] The genesis of the 2002 Best Practices was the controversial *GE/Honeywell* merger, discussed below (though a US-EU Working had been in place since 1999 to share experiences gained with respect to merger control).

The purpose of the 2002 Best Practices was to promote "fully-informed decision making" between the two jurisdictions, to facilitate coherence and compatibility when it came to remedies, to achieve administrative efficiencies for both the regulators and the merging parties, and to increase "overall transparency of the merger review processes".[5]

The Revised Best Practices. The Revised Best Practices have two principal objectives: (1) to increase transparency regarding inter-agency cooperation and (2) to highlight to merging parties and third parties what they can do to facilitate the coordination and resolution of the cross-Atlantic review process. With respect to the latter, FTC counsel have noted that" "Despite twenty years of

The Revised Best Practices have two principal objectives: (1) to increase transparency regarding inter-agency cooperation and (2) to highlight to merging parties and third parties what they can do to facilitate the coordination and resolution of the cross-Atlantic review process.

[1] *See* http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf

[2] Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (OJ L 95, 27/04/1995 pp. 47-52.

[3] Quoted in BRANDENBURGER, R., "Twenty Years of Transatlantic Antitrust Cooperation: the Past and the Future", Competition Policy International (October 2011) (https://www.competitionpolicyinternational.com/twenty-years-of-transatlantic-antitrust-cooperation-the-past-and-the-future/).

[4] U.S.-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations (2002), available at http://ec.europa.eu/competition/mergers/legislation/best_practices_2002_en.pdf.

[5] *Ibid.*

practice, the authorities still observe that some companies and their counsel appear surprised at the extent of communication and cooperation between the U.S. agencies and DG Competition and that they are sometimes less coordinated than the authorities in their approaches to the analysis and resolution of a case."[6]

The Revised Best Practices are divided into four topics: (1) communication; (2) timing; (3) evidence and evaluation of evidence; and (4) remedies and settlements.

- **Communication.** The Revised Best Practices identify the key points at which inter-agency cooperation may be beneficial, namely: (1) before a "no action" decision or the issuance of a second request by the US agencies; (2) no later than three weeks into a EU Phase I investigation; (3) before the Commission opens a Phase II investigation or before it decides not to open Phase II; (4) when the Commission closes a Phase II investigation or before DG Competition anticipates adopting a Statement of Objections ("SO");[7] (5) before the US agencies make their case recommendation; (6) at the commencement of remedies negotiation; and (7) before an agency decides to adopt a decision blocking a merger.[8]
- **Timing.** With respect to timing, it is noted that efforts will be made to ensure "meaningful communication". To achieve this objective, the Revised Best Practices explain that the reviewing agencies will "endeavor to coordinate the phases of their investigations, including by holding joint calls or meetings with the merging parties". The role of the merging parties is also highlighted. For example, it is suggested that the timing of the parties' filings should allow the agencies to "communicate and cooperate meaningfully at key decision-making stages".[9]
- **Evidence.** The important issue of waivers is addressed in this section. It is noted that waivers "enable more complete communication between the reviewing agencies and with the merging parties regarding evidence that is relevant to the investigation". It is also noted that these waivers have become "routine practice" and that they help avoid "inconsistent or conflicting analyses and outcomes as well as expediting merger review".[10]
- **Remedies.** The theme of consistency is also present in the Revised Best Practices treatment of remedies. Here, the Revised Best Practices ask merging parties to coordinate across the two jurisdictions with respect to timing and substance of remedy proposals. In this respect, it is noted that: "Cooperating on the design of possible remedies may result in a single proposal for a remedial package",[11] which will usually be attractive to the merging parties.

In sum, the Revised Best Practices provide a useful and detailed blueprint for merging parties, in particular with respect to important the timing and coordination considerations usually at the center of the merger review process.

In sum, the Revised Best Practices provide a useful and detailed blueprint for merging parties, in particular with respect to important the timing and coordination considerations usually at the center of the merger review process.

II. GE/Honeywell and Oracle/Sun

GE/Honeywell. The GE/Honeywell transaction is generally considered the most high profile example of divergence between the two agencies in the area of merger control. The transaction was announced in October 2000 and notified to the DOJ that same month. Notification to the

6 KATONA K., & PARISI J., "The New, Improved Best Practices Guidelines for US/EU Merger Enforcement Coordination", The Threshold (Vol. XII, No. 1, Fall 2011) (http://www.ftc.gov/oia/speeches/2011KatonaParisiUSEC.pdf).

7 In EU competition proceedings, a Statement of Objections ("SO") outlines the Commission's concerns regarding a particular transaction or certain conduct. If adopted in merger proceedings, the SO will be issued once the Commission opens a Phase II investigation.

8 *Supra*, note 1, p. 3.

9 *Supra*, note 1, pp. 4-5.

10 *Supra*, note 1, p. 6.

11 *Supra,* note 1, p. 7.

Commission followed later, in February 2001. In May 2001, the DOJ cleared the deal subject to certain commitments. However, on July 3, 2011, the Commission blocked the transaction.[12] At the heart of the Commission's concerns were conglomerate theories of harm, specifically that the merged entity would be able to foreclose competitors through so-called "packaged offers".[13]

The Commission's decision was not well received in the US. The then US Treasury Secretary called the Commission's decision "off the wall" and said that the Commission was "the closest thing you can find to an autocratic organization that can successfully impose their will on things that one would think are outside their scope of attention".[14]

Anger from the other side of the Atlantic was not limited to the political class. The Deputy Assistant Attorney General of the DOJ Antitrust Division, Deborah Platt Majoras, publicly questioned the European Commission for blocking the transaction. The principal criticisms made were that (1) the Commission's conglomerate effects theory was outdated and misguided; and (2) that the fact that the Commission was "prosecutor, judge, and jury" in the administrative process likely played a material role in the Commission's decision:

> "After fifteen years of painful experience with now long-abandoned theories like entrenchment, the U.S. antitrust agencies concluded that antitrust should rarely, if ever, interfere with any conglomerate merger […] Our strong belief in markets and our humility in our won predictive abilities lead us to be skeptical of claims by rivals that a merger will lead to their ultimate demise".[15]

Other commentators were equally dismissive of the Commission's apparent openness to conglomerate-based theories of harm, which they argued were based on a desire to protect competitors rather than competition: "In North America, mergers expected to lead to lower prices are regarded as pro-competitive; in the EU, such mergers can be branded anti-competitive based on the fear that added pressure on rivals will ultimately cause them to exit the market. We believe the EU approach is unsound as a matter of competition policy, and that it is more accurately regarded as a form of industrial policy."[16]

Oracle's acquisition of Sun is another example of a transatlantic merger that caused some controversy.

Oracle/Sun. Oracle's acquisition of Sun is another example of a transatlantic merger that caused some controversy.[17] The transaction was announced in April 2009, and was approved by the DOJ in August 2009. However, as in *GE/Honeywell*, the Commission opened a Phase II investigation and issued a SO. The Commission's principal concern was that the combination of the world's leading proprietary database company (Oracle) with the world's leading open source database company (Sun, through its MySQL product) in a highly concentrated market, could harm consumers. At the time, the Economist reported: "Once every few years, it seems, the European Commission likes to flex its muscles by going head to head with the toughest, most uncompromising American chief executive it can find."[18]

The DOJ reacted by issuing a statement that, while not as aggressive as the statements made following the Commission's prohibition of *GE/Honeywell*, nonetheless conveyed a clear message: the DOJ expected the Commission to clear the transaction.[19] The Commission called the DOJ's

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12 Case COMP/M. 2220, *General Electric / Honeywell*, Commission decision of July 3, 2001.
13 *Ibid*., para. 84.
14 FOX, Eleanor M., "GE/Honeywell: The U.S. Merger that Europe Stopped – A Story of the Politics of Convergence", July 2007, (http://ssrn.com/abstract=1002647 or http://dx.doi.org/10.2139/ssrn.1002647).
15 Department of Justice, "GE-Honeywell: The U.S. Decision", remarks of Deborah Platt Majoras before the Antitrust Law Section of the State Bar of Georgia, November 29, 2001.
16 PATTERSON, D. E. & SHAPIRO, C., "Transatlantic Divergence in *GE/Honeywell*: Causes and Lessons", Antitrust Magazine (2001) (http://faculty.haas.berkeley.edu/shapiro/divergence.pdf).
17 Case COMP/M. 5529, Oracle/Sun Microsystems, Commission decision of January 21, 2010.
18 Economist, "Battle of the Trustbusters", November 10, 2009 (http://economist.com/node/14840203). Jack Welch was the GE CEO at the time of the *GE/Honeywell* transaction.
19 "After conducting a careful investigation of the proposed transaction between Oracle and Sun, the Department's Antitrust Division concluded that the merger is unlikely to be anticompetitive. [It] appears that the EC holds a different view. We remain hopeful that the parties and the EC will reach a speedy

statement "unusual" and noted that the Commission had never made a public statement regarding a US investigation.[20] Ultimately, on January 21, 2010, the merger was approved by the Commission.

Later, as a result of the Wikileaks website, an interesting insight was given regarding the DOJ's efforts to convince the Commission that they ought to approve the merger: "DOJ/Antitrust views this matter as a high priority. Its senior officials and investigative staff are currently engaging productively and intensely with their DG COMP counterparts, and are in close touch with Oracle and Sun, in the hopes of preventing a divergent outcome."[21]

***GE/Honeywell & Oracle/Sun*: Exceptions, not the rule.** It is important to note, however, that the cases described above are the exception to the rule: in the vast majority of cases, transatlantic cooperation runs smoothly, much to the benefit of all concerned. For example, the *Bayer/Aventis* and *Sanofi-Synthélabo/Aventis* mergers have been identified as good case studies of efficient cross-Atlantic cooperation, in particular as concerns the coordination of remedies.[22]

III. Practical Aspects of the Transatlantic Cooperation

Privilege. One of the most important issues that companies will face in transatlantic transactions is the different approach to privilege rules in the EU and the US. In the EU, in-house counsel do not benefit from privilege,[23] whereas no such restriction exists in the US. In addition, it is not clear what type of protection privileged in-house advice given in the US will have in the EU.

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Accordingly, companies that rely on in-house advice from a mix of EU and Non-EU qualified lawyers face a particularly challenging situation. For example, companies may face document requests from the EU that include documents that include US in-house legal advice. In such a scenario, a company may face a difficult choice between complying with the request to speed up the review process and potentially waiving privilege over documents that it may not want to make subject to discovery in other proceedings. It is by no means a stretch to imagine an adversary in unrelated proceedings arguing that privilege is waived when a previously protected document is voluntarily produced to the Commission during a merger review process.

Administrative differences. One of the principle differences in the EU and US merger review processes is that, to block a merger, the US agencies must bring a court case. The EU review process is materially different: it is the Commission that both reviews a merger and decides on its merits. A Commission decision may be appealed to the European General Court, but there may be significant delays before judgment is rendered.

Contrary to what some commentators suggest, the Commission enforces rigorous internal checks in adopting merger control decisions. However, there is perhaps some basis to the argument that judicial review may act as a more effective disciplining measure for regulators, especially with respect to time-sensitive matters such as mergers where there may be a limited window of opportunity to achieve the efficiencies and synergies that often lead to a transaction in the first place. In this respect, former Deputy Assistant Attorney General Kolasky has noted:

> "If we decide in the U.S. to challenge a merger, we know we may have to convince a federal judge, by the preponderance of the evidence after an evidentiary hearing, that the merger may substantially lessen competition. This means that we know our witnesses will be exposed to the crucible of cross-examination before an independent fact-finder […]. I

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resolution that benefits consumers in the Commission's jurisdiction." (http://www.justice.gov/atr/public/press_releases/2009/251782.htm).

20 Reuters, "EU says U.S. comment on Oracle, Sun deal "unusual"", November 10, 2009 (http://www.reuters.com/article/2009/11/10/us-sun-oracle-eu-idUSTRE5A92AT20091110).

21 http://www.cablegatesearch.net/cable.php?id=09BRUSSELS1455&q=oracle.

22 GALLOWAY, J., "Convergence in International Merger Control", The Competition Law Review, Vol. 5, Issue 2, (July 2009) pp. 179-192.

23 Case C-550/07 P, *Akzo Nobel Chemicals Ltd. v. Commission*, Judgment of September 14, 2010.

cannot overstate how much knowing we may have to prove our case to an independent fact-finder disciplines our decision-making."[24]

It has been argued that the absence of (immediate) judicial review may lead the Commission to ask for, and expect, greater concessions in exchange for clearance. Granting such concessions in the EU may also give parties limited scope to prevent similar concessions in the US, especially when the parties operate in worldwide markets.

Waivers. As indicated by the Revised Best Practices, the granting of waivers by merging parties is a common characteristic of the transatlantic review process. Waivers greatly facilitate the exchange of information between the agencies and, more often than not, contribute to a faster and more efficient review process.

However, companies and their counsel have the opportunity to limit the scope of the waivers they provide. They may, of course, decide not to do so. However, including certain limitations in a waiver gives parties the possibility to maintain at least some control over what types of information the agencies share amongst themselves or, at the very least, the timing of the dissemination of such information between the agencies.

IV. Conclusion

Convergence between the two largest antitrust agencies with respect to merger control is important. Former Assistant Attorney General William Kolasky has highlighted three reasons why the absence of such convergence would be a problem: (1) the externalities associated with blocking a merger that may deliver benefits to consumers worldwide; (2) the increase of transaction costs of the merger review process has the potential to deter pro-competitive and efficiency enhancing combinations; and (3) the risk of undermining political consensus supporting vigorous antitrust enforcement.[25]

This view was rendered shortly after the agencies' disagreement in *GE/Honeywell*. Since then, the Commission and the US agencies have been extremely successful in avoiding a similar situation. The Revised Best Practices are a clear manifestation of this success. There will likely be disagreements in the future; however, the result of such disagreements is likely to result in outcomes closer to *Oracle/Sun* than a repeat of *GE/Honeywell*.

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[24] KOLASKY, W. J., "Conglomerate Mergers and Range Effects: It's a Long Way From Chicago to Brussels", George Mason University Symposium (November 9, 2001) (http://www.justice.gov/atr/public/speeches/9536.htm).

[25] *Ibid*,. pp. 22-23.

Key Merger Enforcement Lessons from *H&R Block* and *AT&T*

Chul Pak and Tiffany Lee

The Antitrust Division of the Department of Justice is on a roll in merger challenges. Late in 2011, the DOJ won a bench trial to enjoin H&R Block from acquiring TaxAct, viewed by many as a significant boost to the DOJ's merger litigation efforts since the 2004 loss to enjoin Oracle's acquisition of People-Soft. Shortly thereafter, AT&T and T-Mobile abandoned their proposed merger after the DOJ filed its complaint in district court. No two mergers are alike, and each must be analyzed on its unique facts. However, we see important signals emanating from *H&R Block* and *AT&T* to keep in mind for your next proposed transaction.

The Background of *H&R Block* and *AT&T*

In May 2011, the DOJ filed suit in Washington, DC to bar H&R Block, Inc. from acquiring 2SS Holdings, a provider of low cost tax preparation software and services, including TaxACT. The DOJ's position was that the combination of the number 2 and number 3 firms in the "digital do-it-yourself" market would result in a duopoly between H&R Block and Intuit, the maker of TurboTax. The DOJ argued that the merger would eliminate head-to-head competition between H&R Block and TaxACT and would make anticompetitive coordination substantially more likely; together Intuit and the merged parties would have 90% of the market. H&R Block countered that the DOJ's market share and concentration figures were wrong because the market consisted of other methods of tax preparation and was far broader than "digital do-it-yourself" software. Therefore, anticompetitive effects were unlikely. Following a 9-day bench trial, on November 1, the district court found in favor of the DOJ and entered a permanent injunction against the acquisition.

In March 2011, AT&T announced that it would acquire T-Mobile. The parties cited efficiencies for the merger, including increased spectrum for AT&T. Due to the nature of the industry, the parties faced a dual track review by both the DOJ and the FCC. The DOJ filed a complaint in August 2011, alleging that the number 2 player's acquisition of the number 4 player in a series of markets dominated by 4 firms would lead to anticompetitive effects. Several state attorney generals and private parties joined as plaintiffs. In November 2011, the FCC issued a staff report finding that the merger was likely anticompetitive, and recommended that the case be referred to an administrative law judge. Shortly thereafter, AT&T and T-Mobile pulled their FCC applications and abandoned the transaction. AT&T reportedly paid T-Mobile $4 billion as a break-up fee.

1. Market Structure Matters

H&R Block and *AT&T* illustrate a simple but critical lesson: market structure matters.

H&R Block and *AT&T* illustrate a simple but critical lesson: market structure matters. The DOJ built both cases around strong market structure theories in which each transaction would consolidate industries where the number of key players were few, markets were already highly concentrated, and entry barriers were high. The DOJ told a simple story: a merger that reduces the number of significant competitors in a market characterized by high entry barriers from four-to-three or three-to-two is likely to result in substantial lessening of competition.

Putting primary emphasis on market structure to challenge mergers has proved remarkably successful in court. Over the past ten years, the DOJ and the FTC have obtained a series of successful injunctions where the challenged merger would have reduced the number of significant players in the market from three-to-two. In 2001, the FTC won an injunction against Heinz's proposed acquisition of the third largest baby food producer in a market "dominated by three firms."[1] In 2002, the FTC obtained an injunction against Libbey and Newell Rubbermaid, the number one and three players in the food services glassware market.[2] In 2009, the FTC

1 F.T.C. v. Heinz, 246 F.3d 708 (D.D.C. 2001).
2 F.T.C. v. Libbey, 211 F.Supp.2d 34 (D.D.C. 2002).

successfully stopped CCC Holding's acquisition of Mitchell International in a merger that was posited as a three-to-two in the estimatics software market.[3]

Like those other successful injunction actions, *H&R Block* followed a three-to-two market structure theory. The DOJ claimed that the merger of the second and third largest firms would create a duopoly in the digital do-it-yourself tax preparation software market, which was characterized by high entry barriers and harm competition without offsetting pro-competitive benefits. The district court agreed with the DOJ. Citing the D.C. Circuit in *Heinz*, the court observed "[a]s far as we can determine, no court has ever approved a merger to duopoly under similar circumstances."[4]

In contrast to court decisions about three-to-two mergers, there has been no recent guidance from courts about how mergers posited as four-to-three would be treated. In that regard, *AT&T*, which the DOJ complaint characterized as a four-to-three merger, was set to chart a new path in merger litigation. Unfortunately for those waiting for new court precedent, the scrutiny on multiple regulatory fronts proved to be too much as AT&T and T-Mobile abandoned the transaction before any trial.

How one characterizes a merger's reduction in the number of participants depends entirely on the definition of the relevant market – one person's "three-to-two" can be another's "eight-to-seven." Market definition is a pivotal turning point in antitrust cases, particularly so in merger challenges. Another recent litigated merger challenge described market definition as "the key to the ultimate resolution of this type of case."[5] The court in *H&R Block* devoted nearly half of the published opinion carefully assessing company documents, expert testimony and other related evidence to define the relevant market. In *AT&T* the DOJ used as much space in the complaint to allege the relevant markets as the likely competitive impact of the proposed merger.

Framed as a four-to-three merger, *AT&T* would have changed the existing landscape had the DOJ's market definition been fully tested at trial. Recent government merger challenges have been less successful when courts concluded that the government's posited market definition was too narrow. What started out as winnable three-to-two merger challenges at the time of the government's complaints quickly unraveled to losses by the end of the trials because the courts ruled that the relevant markets were actually much broader – not three-to-two mergers but rather six-to-five or more.[6]

The revised Horizontal Merger Guidelines ("HMG") indicate that market structure is not necessarily the first step of the merger analysis. But we can see from prior court precedent, including *H&R Block*, and the complaint in *AT&T* that for purposes of litigation, the agencies rely heavily on market structure analysis. To the extent that the risks of litigation weigh in the decision whether to proceed with a transaction (and any break-up fee), market structure analysis should, in fact, be the first step. If the government is able to prove that a proposed merger would reduce the number of significant players in a market characterized high entry barriers from three-to-two, there is substantial amount of recent analogous case law favorable to enjoining the merger.[7] Because *AT&T* did not proceed to trial, four-to-three mergers remain in the gray zone as far as guidance from the courts.

A second takeaway from *H&R Block* and *AT&T* is that not all competitors are equal – acquiring a particularly disruptive firm in a highly concentrated market significantly increases the odds that the transaction will be challenged.

2. Not All Competitors Are Equal

A second takeaway from *H&R Block* and *AT&T* is that not all competitors are equal – acquiring a particularly disruptive firm in a highly concentrated market significantly increases the odds that the transaction will be challenged. Prior examples of vigorous head-to-head competition and aggressive strategies by the target company – gleaned typically from the merging parties' own business documents – will be the focus of the government's story line in any litigated merger

3 F.T.C. v. CCC Holdings, 605 F. Supp. 2d 26 (D.D.C. 2009).
4 *Heinz*, 246 F.3d at 717.
5 F.T.C. v. Laboratory Corp. of America, 2011 WL 3100372 at *17 (C.D. Cal. 2011).
6 U.S. v. Oracle, 331 F. Supp. 2d 1098 (N.D. Cal. September 9, 2004); U.S. v. Sungard Data Systems, Inc., 172 F. Supp.2d 172 (D.D.C. 2001).
7 See H&R Block.

challenge. In both *H&R Block* and *AT&T* the DOJ characterized the target companies of the acquisitions as "maverick" competitors. While the technical antitrust definition of what constitutes a "maverick" can be elusive, in *H&R Block* the court focused on the fact that TaxACT had consistently pursued business strategies that constrained prices of H&R Block and the overall market. Similarly, the DOJ's complaint in *AT&T* focused on T-Mobile's importance as an aggressive competitor, both in terms of innovation and price.

The competitive significance of the proposed target entity can be the tipping point in a close-call merger. When the DOJ and the FTC are prepared to challenge a merger in court, they will emphasize the unique competitive role played by the target entity – based on the entity's past conduct or its potential to do so in light of its characteristics. The target entity, whether described as a "maverick" or in some similar fashion, will be lauded as the unique constraint against coordinated interaction among the remaining competitors, or the "closest competitor" capable of preventing the acquiring entity from raising prices. In contrast, we know from numerous prior examples, particularly where the government viewed the merger as a four-to-three or more, that the acquisition of a comparatively undistinguished or smaller rival will *not* prompt the DOJ or the FTC to challenge the transaction.

3. On occasion, the agencies will have concerns in both local and national markets

AT&T illustrates an important third point: one should not neglect to consider whether the merger might be thought by antitrust enforcers to raise issues in both national *and* local markets. Determining geographic markets can be as critical as product market definition in identifying how many firms compete and the level of market concentration. What appears to be a three-to-two or four-to-three market structure can be easily transformed to larger numbers if the geographic market is determined to be broader – and vice-versa. Depending on the nature of the merging parties and the types of customers that demand their services or products, the agencies may find an antitrust problem because a single firm operates in a number of local geographic markets, in a national market, or both.

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In AT&T's prior attempts to acquire mobile wireless communications companies TCI in 1998 and Dobson in 2007, the DOJ had found that the relevant geographic markets for mobile wireless telecommunications services were local.[8] AT&T was able to resolve the DOJ's concerns in both *TCI* and *Dobson* with divestitures in select local geographic markets. In AT&T's acquisition of T-mobile, the DOJ expanded its view of the relevant geographic market to include both local and national components. This is because the DOJ was concerned about competition among wireless telecommunications services providers to large enterprises and governments, separate and apart from service to individual consumers. The DOJ's complaint in *AT&T* specifically segregated "local markets in which consumers purchase mobile wireless telecommunications services" from a national market for "enterprise and government customers" with multiple offices and business throughout the United States and employees who travel frequently, thereby demanding a wireless telecommunications services provider with a national network.[9]

Once the relevant geographic market was defined nationally, the DOJ's case against AT&T/T-Mobile was reduced to a simpler market structure theory: the number 2 player's acquisition of the number 4 player would have reduced the number of significant players from four-to-three. High barriers to entry combined with the prospect of eliminating a competitor responsible for driving competition in the market made it highly likely that the merger would lead to anticompetitive effects.

Conclusion

The victories in *H&R Block* and *AT&T* provide the DOJ with new and favorable precedent that the government likely will trumpet in future merger challenges. Attempts by the government to pigeonhole a transaction into the *H&R Block* or *AT&T* box can be resisted as no two mergers are

[8] Complaint at 7, United States v. AT&T Inc. and Dobson Communications Corp., Civil Action No. 07-01952 (D.D.C. October 30, 2007).

[9] Second Amended Complaint at ¶¶ 14, 21, Civil Action No. 11-01560 (D.D.C. September 30, 2011).

alike. Nevertheless, we think these recent merger challenges provide valuable guidance on how to assess the risks and challenges you may face in your merger.

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