Review of Consummated Mergers: Are Changes in Store?

BY TERRY CALVANI AND JUSTIN HEDGE

REVIEW OF CONSUMMATED MERGERS has moved from being a paragraph of antitrust texts to the front pages.[1] This new currency for the topic is, in part, attributable to the attention politicians[2] and "progressive" interest groups have given it.[3] COVID-19 has only added fuel to the fire. The press,[4] public interest groups,[5] and congressional leaders have entered the fray, and the federal agencies have indicated an increasing interest in post-consummation review.[6] Most concretely, the FTC has initiated a study of consummated mergers by large technology companies.[7]

In light of these developments, the ABA Antitrust Law Section's Competition/Consumer Protection Policy and North American Comments Task Force recently published a discussion paper on the topic.[8] The document, written for an international audience, sets out the various policy issues that competition enforcement agencies confront as they consider the benefits and costs of post-consummation merger enforcement. That ABA paper merits attention by those interested in this timely subject. This modest note focuses specifically on the treatment of the issue under current U.S. law.

The topic is not new. For many years, the two U.S. enforcement agencies have reminded the competition law community that the review of non-reportable transactions is an active part of their enforcement agenda.[9] Lest companies forget the message, the agencies have made good on their commitment through enforcement actions.[10] Yet one senses that the current attention is more than business as usual.

A Brief Background

Almost all merger review in the United States was ex post until the passage of Title II of the Antitrust Improvements Act of 1976 (HSR Act). One of the purposes of that law was to remedy the difficulty of "unscrambling the eggs" posed by ex post review.[11] Most, although not all, antitrust regimes have followed the U.S. example. For those that have not, and do not have premerger notification review, post-consummation merger review is the only game in town. In some other jurisdictions, the substantive merger law and the pre-merger notification requirement are coextensive. The Merger Regulation of the EU, for example, requires certain transactions to be notified. The European Commission may then challenge only notifiable transactions.[12] Thus, some jurisdictions challenge only consummated transactions, while others challenge only notifiable transactions.

In jurisdictions with pre-merger notification programs, review of consummated transactions generally falls into one of two categories.[13] The first includes those deals that were not reportable in the first place, e.g., small deals that did not cross the filing thresholds. The second includes deals that the agency only examined later but then decided to challenge.

Consummated Transactions Not Subject to Pre-Merger Review

Small, unreportable deals clearly can be anticompetitive. And one easily could reduce this universe of cases simply by decreasing the filing threshold. But as the Task Force Report recognizes, this presents a trade-off, as the costs to both the enforcement agency and the parties associated with filing and review often are very significant. Those costs can impair the value of smaller transactions. The difficult question is where to draw that line—sufficiently low to catch most transactions of interest, yet sufficiently high to avoid the costs associated with unnecessary reviews. The Task Force Report recognizes that an appropriately-set threshold would generate a group of unreviewed mergers that merited examination. Although the Task Force did not opine on where to draw the line, it did recommend that research be undertaken to explore this issue further, and this makes perfect sense rather than relying on supposition or guesswork.

Consummated Transactions Previously Subject to Pre-Merger Review

The more difficult issue is presented by those transactions that were reviewed, but then at a later time, the authorities decide they have an interest in re-reviewing them. This can result from a perceived error in the first review or because circumstances have changed and the transaction, while considered benign or even procompetitive at the time of the first review, is now thought to be problematic.[14]

Terry Calvani is Senior Advisor, Brunswick Group LLC, Washington, D.C. Justin Hedge is Counsel, Arnold & Porter Kaye Scholer, LLP, Washington, D.C.

These possible scenarios present two important legal issues: how long after a transaction's close can it be challenged, and at what point in time should the effect of the transaction be evaluated?

With respect to the first issue, in theory a case could be brought at some considerable period after closing if it is considered an ongoing violation of Section 7 of the Clayton Act. (Private actions, of course, would be limited in the available damages by the Clayton Act statute of limitations.[15]) Practically speaking, however, enforcement activity post-closing tends to occur in short order, as those adversely affected, for example, are happy to point to new facts and circumstances as the transaction and its effects become more public and visible to market participants.

The main outlier case for post-hoc government enforcement is *United States v. E.I. du Pont de Nemours & Co.*,[16] where the Supreme Court upheld the Justice Department's challenge to stock acquisitions by du Pont some 30 years later.[17] This decision gave rise to what is often called the "Time of Suit Doctrine"—the concept that suggested mergers can be challenged whenever the anticompetitive effects of a transaction ripen. While the 63-year-old *du Pont* decision has not been overruled, it was written more than 20 years before the introduction of the U.S. pre-merger notification system. It is unclear whether the Court would affirm a broad application of the decision in the fundamentally changed merger system of today, but in any event the decision has not played an important role in the case law in the intervening years. At a minimum, *du Pont* suggests that at least in some contexts, challenges years after consummation can be viable.

As one would expect, the Time of Suit Doctrine finds new champions in those who seek an aggressive review of consummated transactions—principally but not exclusively in technology industries—where the merged entity is perceived to be exercising market power. Menesh Patel, a vocal proponent of this position, poses the question: "Should the antitrust agencies more readily challenge mergers that they themselves previously reviewed and cleared pursuant to the existing federal merger review scheme?"[18] Patel answers in the affirmative.[19] But he does suggest a limiting principle:

> [Enforcement agencies] should challenge a previously reviewed and cleared merger only if . . . [t]he preponderance of the . . . evidence shows that the merger has or is likely to substantially lessen competition; and . . . [t]he agencies reasonably believe there is a remedy that would correct the merger's competitive harm.[20]

But is this a sensible limitation? One might reasonably conclude that this standard should always be employed in merger review and presumably was when the transaction was first reviewed. Noting the absence of "prior work systematically evaluating this question," Patel seeks to provide "a comprehensive analysis of federal antitrust agency challenges to previously reviewed and cleared mergers."[21]

Patel's argument for increased review of consummated transactions is two-fold. First, he contends that the language of the HSR Act itself permits challenging reported mergers at any time:

> Any action taken by the [agencies] or any failure of the Federal Trade Commission or the Assistant Attorney General to take . . . action under this section shall not bar any proceeding or any action . . . at any time under any other section of this Act or any other provision of law.[22]

Yet, the statutory language is less than clear: The use of the term "other," for example, may simply address Section 2 of the Sherman Act. In certain circumstances, that law could address the problem.

Second, the Supreme Court's decision in *du Pont*, appears to support Patel's view,[23] though as noted that case is dated and antedates pre-merger review.

Even if there were more aggressive review of consummated transactions, there is the important second issue—an equitable one—of whether the legality of such a merger is to be assessed under facts at the time of the merger or, instead, under facts prevailing at the time of challenge. Patel reads the *du Pont* decision as holding that "when an agency brings a Clayton Act Section 7 claim challenging a merger, it can rely on *market conditions at the time of suit, rather than conditions at the time of the merger*."[24]

Timothy Muris and Jonathan Nuechterlein take a different view in a recent article.[25] Fundamentally, they note that re-reviewing earlier transactions would create "a regime—alien to U.S. law—of no-fault antitrust liability,"[26] relying on an array of commentators including former FTC Chairman Robert Pitofsky (not a conservative on enforcement by any means).[27]

Muris and Nuechterlein offer a number of policy arguments in support of their position that merit examination. Like the Task Force Report, they suggest that the prospect of re-reviewing transactions would inject uncertainty into the mergers and acquisitions market, which undermines the incentives to pursue efficiency enhancing deal. They also highlight the real risk that, appreciating the opportunity for another bite of the apple, staff may simply postpone making difficult calls, leaving a decision for a more robust evidentiary environment. Muris and Nuechterlein also focus on difficulties inherent in proving that the "but-for-world" would be more competitive than the actual world. The Task Force Report also questions whether merger challenges years after consummation would be fair to the companies and their shareholders.

Muris and Nuechterlein distinguish *du Pont* on the facts of the case, which they argue give it very limited application elsewhere. Following the stock acquisitions, du Pont and GM remained separate. Accordingly, the exclusion of du Pont's rivals from making sales to GM could properly be described as "an ongoing violation." The facts presented there were different—indeed, they were most unusual. Muris and Nuechterlein are not alone in taking this limited view of *du Pont*. Professors Areeda and Hovenkamp, whom they

quote as follows, have expressed a similar view:

> "Noncontrolling acquisitions of stock or temporary acquisitions of assets may be appraised for legality at any time," and "[t]his is the meaning of the Supreme Court's DuPont (GM) decision." But "[t]hese are the only situations that are always appraised . . . on the basis of the situation existing at the time of trial.". . . Mergers are thus "judged on the basis of evidence of the situation existing at the time of the acquisition," not the time of suit.[28]

The obvious question at this point is whether this issue has been examined in the rather sparse case law. The answer: it has not.[29] And why have there not been more cases? Muris and Nuechterlein suggest that enforcers have consciously taken a very cautious approach.[30]

Conclusion

The U.S. experience with the review of consummated transactions has generally worked well. A small number of transactions not subject to pre-merger review are reviewed regularly. Parties that fail to include mandatory information, e.g., strategic planning documents, can expect review should the deficiency come to light. The real issue involves the current proposals to re-review previously reviewed transactions and review non-reportable transactions long after consummation.

The Time of Suit Doctrine was announced in the *du Pont* case decades before enactment of the HSR legislation, and the contours of that case have never been tested. Whether the current proposals gain real traction beyond the introduction of bills in Congress and the conference circuit remains to be seen. But without some limiting principle, it is not clear how to reasonably re-visit merger investigations beyond cases where new facts quickly come to light.

Interestingly, these different views may provide a peek at the future. A working crystal ball might suggest that the leadership of the agencies in a different administration would enter the fray by bringing cases challenging previously reviewed consummated mergers. In fact, the current administration already has indicated some interest in doing so.[31] Patel has provided a potential roadmap for them. Should cases be brought, that same crystal ball suggests that the matter or matters would secure appellate review. In that event, Muris and Nuechterlein provide counter arguments to be confronted. The crystal ball becomes cloudy at this point. ■

---

1 Although there is not a robust volume of literature, there have been a few quality contributions to the subject. *See, e.g.*, Scott A. Sher, *Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41, 57–66, 76–77 (2004).

2 For example, Senator Elizabeth Warren has stated: "Current antitrust laws empower federal regulators to break up mergers that reduce competition . . . . Unwinding these mergers will promote healthy competition in the market—which will put pressure on big tech companies to be more responsive to user concerns . . . ." Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

3 For example, the Open Markets Institute has applauded efforts "taking a retroactive look at approved acquisitions." *See* Press Release, Open Markets Institute, Open Markets Applauds Warren and Sanders for Taking a Clear Stand Against Monopolies (Mar. 8, 2019), https://openmarketsinstitute.org/releases/open-markets-applauds-warren-sanders-taking-clear-stand-monopolies/.

4 Nicholas Kulish, Sarah Kliff & Jessica Silver-Greenberg, *The U.S. Tried to Build a New Fleet of Ventilators. The Mission Failed*, N.Y. TIMES (Mar. 29, 2020), https://www.nytimes.com/2020/03/29/business/coronavirus-usventilator-shortage.html.

5 The American Antitrust Institute has recently observed that consummated mergers may have impeded the ability to effectively combat COVID 19. *See* Diana L. Moss, Can Competition Save Lives? The Intersection of COVID-19, Ventilators, and Antitrust Enforcement, AAI ANNOUNCEMENTS (Mar. 13, 2020), https://www.antitrustinstitute.org/can-competition-save-lives-the-intersection-of-covid-19-ventilators-and-antitrust-enforcement/.

6 *See Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. (2019) [hereinafter Hearing] (testimony of Bruce Hoffman, Director, FTC Bureau of Competition).

7 *See* Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies: Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

8 *See* ABA Antitrust Law Section, Competition/Consumer Protection Policy and North American Comments Task Force, Analyzing the Scope of Enforcement Actions Against Consummated Mergers In A Time Of Heightened Scrutiny (Apr. 2020), https://ourcuriousamalgam.com/wp-content/uploads/Consummated-Mergers-Policy-Task-Force-Apr-2020-FINAL.pdf [hereinafter Task Force Report]. The Task Force is chaired by Hollis Salzman and Koren Wong-Ervin. Its members include Terry Calvani (a co-author of this article), Vadim Egoul, Eleanor Fox, Deborah Garza, David I. Gelfand, Douglas H. Ginsburg, Ilene Gotts, Nathaniel Harris, Justin Hedge (co-author of this article), Renata Hesse, Jonathan Jacobson, James Musgrove, Jorge Padilla, John Pecman, Edith Ramirez, Timothy Snyder, Henry C. Su, Sean Sullivan, Gregory Werden, and Joshua Wright.

9 *See e.g.*, J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Consummated Merger Challenges—The Past Is Never Dead, Remarks Before the ABA Section of Antitrust Law Spring Meeting (Mar. 29, 2012).

10 *See, e.g.*, William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825 (1997).

11 Kenneth Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43 (1969).

12 *See* Task Force Report, *supra* note 8, at 2–3 (noting alternative ways of addressing competition issues arising from consummated transactions in jurisdictions like the EU).

13 Note that this excludes notifiable transactions that were either not notified or where the notification was ineffective, e.g., because necessary information was omitted or inaccurate.

14 One set of transactions securing re-review of consummated transactions is for those where the pre-merger notification was deemed insufficient. Such reviews, while ex post, are not re-reviews since the first "review" was void. *See* Task Force Report, *supra* note 8, at 7.

15 *See, e.g.*, Midwestern Mach. Co. v. Nw. Airlines, Inc., No. 9701438 (DWF/AJB), 2003 U.S. Dist. LEXIS 1827 (D. Minn Feb. 5, 2003).

16 353 U.S. 586 (1957). Du Pont acquired a 23% interest in its customer General Motors in transactions between 1917 and 1919. The Department of Justice filed suit in 1949 asserting that du Pont had used its holdings to secure a favored position with GM. With three Justices recused, a majority of four found for the government. Two Justices dissented.

17 Note that the Court specifically stated "the Government" in its holding. The

subsequent case law, although sparse, has interpreted the holding as being limited to government actions and not to private suits. *See* 1 ABA Section of Antitrust Law, Antitrust Law Developments 355 (8th ed. 2017).

[18] Menesh S. Patel, *Merger Breakups*, Wis. L. Rev. (forthcoming 2020) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3469984.

[19] Patel observes that what was "[o]nce considered draconian and extremely unlikely . . . has now moved from the hypothetical into the possible." *Id.* at 4.

[20] *Id.* at 7.

[21] *Id.* at 5.

[22] Patel, *supra* note 18, at 13 (quoting 15 U.S.C. § 18a(i)(1)). Patel goes on to note that FTC letters have often contained the following language: "[T]he investigation has been closed. This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require." Patel, *supra* note 18, at 14 (citation omitted).

[23] *See also* Antitrust Law Developments, *supra* note 17, at 355 n.46 (stating that the case held: "The legality of an acquisition under § 7 can be determined at 'any time when the acquisition threatens to ripen into a prohibited effect.'").

[24] Patel, *supra* note 18, at 15 (emphasis added).

[25] Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles for Review of Long-Consummated Mergers* (Nov. 2019), 5 Criterion J. on Innovation 29 (2020).

[26] *Id.* at 31.

[27] *See* Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 Geo. L.J. 195, 223–24 (1992) (stating that any contrary rule would be "anathema to American antitrust"); *see also* Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1347 n.53 (1965).

[28] Muris & Nuechterlein, *supra* note 25, at 43–44 (quoting 5 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1205a, at 307 (1996)).

[29] Patel identifies cases in the past 20 years where the agencies have challenged previously reviewed transactions. Patel, *supra* note 18, at 16–19. The first is the Antitrust Division's suit in 2017 against Parker-Hannifin's acquisition of CLARCOR, which involved certain fuel filtration assets as a part of a larger deal. The parties had closed the deal after the expiration of the Initial Waiting Period. *Id.* at 17–18. It was settled with a small divestiture, id., and reflects little other than the willingness of the Division to bring the case. Settlements are just that; they are not litigated cases. The second is the FTC's challenge to Chicago Bridge & Iron's merger with Pitt-Des Moines in October 2001. Patel states that the challenge occurred approximately a year after "clearance," which suggests approval. Patel, *supra* note 18, at 18. However, the waiting period expired in the midst of negotiations—albeit negotiations that were proving unfruitful for the parties. Evidently tired of the delay, the parties closed and litigation ensued. *See* Pretrial Brief of Respondent Chicago Bridge & Iron as Corrected on October 29, 2002 at 4, Chicago Bridge & Iron Co., FTC Docket No. 9300 (Oct. 29, 2002), https://www.ftc.gov/sites/default/files/documents/cases/2002/11/021105respondentspretrialbrief.pdf. We do not find this case helpful one way or the other. The third is the FTC's 2001 challenge to Hearst's 1998 acquisition of Medi-Span. Patel, *supra* note 18, at 19. This case is also irrelevant. Believing the parties' HSR filing to be ineffectual for its failure to provide requisite Item 4(c) documents, the FTC sued. Complaint ¶¶ 23, 28, FTC v. Hearst Trust, No. 01-cv-00734 (D.D.C. filed Apr. 5, 2001), https://www.ftc.gov/sites/default/files/documents/cases/2001/04/hearstcmp.htm.

[30] Muris & Nuechterlein, *supra* note 25, at 44 (citing John C. Stedman, *The Merger Statute: Sleeping Giant or Sleeping Beauty?*, 52 Nw. U. L. Rev. 567, 568 (1957); Sher, *supra* note 1, at 64 ("[T]he du Pont decision did not open the floodgates of challenge to transactions that had closed years or decades earlier. The DOJ wisely recognized that to do so would cause chaos in the business community.").

[31] *See* Hearing, *supra* note 6.