

This article originally appeared in the June 2006 issue of *Butterworths Journal of International Banking and Financial Law*.

US Regulators Move to Streamline Merger Reviews

George L. Paul and **Douglas M. Jasinski**
White & Case

Marking an important reform to US antitrust policy, regulators at the Federal Trade Commission ('FTC') have announced changes meant to simplify the process of in-depth merger reviews for foreign and domestic companies.

In February, the FTC, the agency that shares antitrust oversight of mergers and acquisitions with the US Department of Justice ('DOJ'), implemented changes to its merger review process that seek to make compliance with in-depth investigations less burdensome to companies. The goal is to curtail such investigations in several key areas, including demands for documents, empirical data, backup tapes, privilege logs, and de-duplication procedures.

Many of these objectives have been recognised negotiating points between the FTC staff and companies for many years. With the FTC's recent policy announcement, however, the objectives now have some strings attached most notably, that the parties must relinquish control over when to trigger the end of the review, an important bargaining chip that should not hastily be surrendered. Therefore, companies and their counsel must be attuned to these conditions before accepting the FTC's proposal.

Second Requests

Certain proposed mergers and acquisitions in the US are reportable to the FTC and the DOJ under the Hart-Scott-Rodino Act ('HSR Act'). Either agency may decide to investigate a proposed transaction, although most corporate combinations are allowed to close within 30 days without a probe.

A relatively small number of M&A deals, however, may pose potential antitrust issues, prompting the DOJ or FTC to launch a more detailed analysis by requesting additional information about the deal, a process known as a 'second request'.

The FTC's second request process is similar to the US 'discovery' process that takes place between litigants in US courts, albeit on a much more aggressive timetable. This is unlike the process in the European Union ('EU'), where antitrust regulators do not seek anywhere near the same amount of documents or data in conducting merger reviews. But like EU investigations, the second request is one-sided the FTC (or DOJ) is the only party with the power to compel testimony and documents from the parties and interested third parties, such as competitors and customers.



George L. Paul
Partner



Douglas M. Jasinski
Associate

US Regulators Move to Streamline Merger Reviews

The stakes are high parties cannot close the transaction until they certify substantial compliance with the second request and then must wait an additional 30 days. If the FTC's investigation leads the agency to decide that a proposed merger may be anticompetitive, it can take the parties to court to stop the deal or can negotiate divestitures or other structural changes to the terms.

The stated rationale behind the additional 30-day waiting period is to allow the FTC staff sufficient time to review the supplemental information provided by the companies, especially in cases where companies quickly respond because of the limitations instituted by the reforms. But to avail themselves of the FTC's reforms, the merging parties must agree upfront to a doubling of the statutory 30-day waiting period for substantial compliance (or some other timing concession) and agree to further delays if the matter heads to federal court.

Clearly, a second request is often a serious obstacle to resolving a merger investigation quickly. It is usually expensive, burdensome on a company's resources, and requires several months to comply with the regulators demands. It is increasingly common for companies to end up producing more than 1 million paper and electronic documents, as well as other data requested in an FTC merger investigation. The proliferation of email and other electronic documents in recent years is responsible.

This explosive growth of information led FTC Chairman Deborah Platt Majoras to note, when announcing the reforms in mid-February, that [a] core objective is to lower the costs of merger investigations for the FTC and the parties by reducing the volume of materials that parties must produce.

Easing The Burden

To achieve this core objective, the FTC's reforms establish certain presumptions targeted at reducing the scope and complexity of the second request investigation. According to the FTC:

The primary reforms to the merger review process establish presumptions that the FTC will: (1) limit the number of employees required to provide information in response to a second request, provided the party complies with specified conditions; (2) reduce the time period for which a party must provide documents in response to the second request; (3) allow a party to preserve far fewer backup tapes and produce documents on those tapes only when responsive documents are not available through more accessible sources; and (4) significantly reduce the amount of information parties must submit regarding documents they consider to be privileged.

Of the above four presumptions, the most notable are that the number of employees whose files may be searched will be 35 or fewer, and the relevant period for responsive documents is now presumed to be two years prior to the date of the second request, as opposed to three years.

These presumptions should help to restrain the previously uncurtailed second requests, although the 35-employee presumption does not apply to corporate or central files, and the two-year relevant period presumption does not apply to data. It also should be kept in mind that these reforms are 'resumptions' to guide investigations, and the FTC can exceed the presumptions if necessary for a particular investigation. Moreover, all the reforms currently apply only to FTC investigations, not to those by the DOJ.

Bargaining Chip

As noted above, parties that wish to employ these new presumptions must pay a price: relinquishing control over when to trigger the end of the FTC's review.

In the US, the parties control the timing to the extent that the agency has only 30 days to complete the investigation once the parties certify compliance with the second request. In the past, proactive

US Regulators Move to Streamline Merger Reviews

parties have been able to comply promptly with the second request, thereby forcing the agency to either allow the transaction to proceed or to sue to block the transaction on short notice. In this aspect, the agency's merger-review procedures differ from those in place across the EU and many other jurisdictions outside the US, where there are often set periods for review, and when time is up, regulators must either block the deal or let it go through.

Therefore, it is crucial for EU-based and other non-US companies to be attuned to the fact that a second request is similar to a US discovery battle. They must be prepared to recognise the strategic decisions on the timing of the review before responding to the second request. Parties able to respond quickly, control their destiny and the timing of their transaction.

Key Issues

The decision to accept the FTC's presumptions, in exchange for less control over timing in the latter stages of the investigation, should not be made in haste. Issues to consider in addressing this and other antitrust risks include:

Key competitive issues raised by the transaction, likely areas of FTC concern, and the likelihood of a second request.

Organisational or internal corporate obstacles to producing documents and data, such as a decentralized sales force or legacy systems where data are not centrally linked or aggregated.

Settlement and divestiture scenarios, so that parties can move quickly once the final 30-day clock starts ticking.

Litigation strategies, in the event that the FTC files to enjoin the transaction.

The FTC's reforms, which apply to all HSR notifications filed with the FTC on or after 17 February 2006,

should lead to real cost and time savings for many parties saddled with a second request. As Chairman Majoras recognised, this is especially true where the parties and the FTC 'approach the merger review process in a spirit of cooperation.'

Nonetheless, given the real risk that a second request can lead to divestitures, some other remedy, or even a FTC court challenge, parties should closely consider their options before accepting the FTC's new presumptions even if such a decision could be wrongly perceived by the FTC as a sign that the parties are unco-operative, perhaps, or that there are significant competitive issues yet to be uncovered. It often is in the best interest of the parties to control the timing of 'substantial compliance' and the 30-day clock, thereby creating an incentive for the FTC to conclude its investigation, negotiate a settlement, or go into federal court to challenge the transaction.

This leverage over timing may be important at the end-stage of an FTC investigation, and in some cases, the parties may want to forgo the benefits of the FTC's second request reforms in order to maintain control over the timing.

George L. Paul and Douglas M. Jasinski are antitrust lawyers practicing in Washington, DC with the Global Competition Group of White & Case.

The information in this article is for educational purposes only; it should not be construed as legal advice.

Copyright © 2006 White & Case LLP
