Key Takeaways

Skadden

Trends and Developments in Merger Control

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On February 18, 2016, Skadden's Antitrust and Competition Group presented the webinar "Trends and Developments in Merger Control." The webinar, led by partners Steven Sunshine and Maria Raptis and counsel Kenneth Schwartz, explored topics relating to the most critical merger enforcement issues from 2015 — a record year for M&A activity — including the current enforcement climate, key developments and trends to watch in 2016, and the challenges associated with clearing complex deals.

Recent Merger Enforcement Statistics and Key 2015 Cases

Ms. Raptis began the webinar by discussing global merger enforcement statistics and provided a brief summary of recent statistical trends in enforcement activity by the U.S. and European Union antitrust authorities, as well as by merger control regimes worldwide. She said that, while the number of transactions receiving in-depth review in 2015 remained consistent with historical averages, the number of transactions challenged in U.S. court or proceeding to Phase II review in the EU has increased significantly.

Mr. Schwartz provided an overview of recent mergers challenged in court by the Federal Trade Commission (FTC), beginning with its successful bid to block Sysco Corp.'s proposed acquisition of US Foods. Mr. Schwartz emphasized the FTC's narrow definition of the relevant market, which focused on a small set of customers with a national footprint, and the court's acceptance of the relevant market based on supporting econometric data and the parties' ordinary course documents. Mr. Sunshine said the FTC's use of price discrimination — namely, the parties' ability to charge different prices based on the location of customers — to define a national market was particularly aggressive. He also noted the parties' proposed divestiture of assets to PFG, the third-largest competitor industry. (The proposed remedy ultimately was rejected by both the FTC and the court as inadequate to restore any lost competition from the merger.)

Mr. Schwartz highlighted another, more recent example of parties introducing remedies during litigation after the agencies had already rejected the sufficiency of the suggested fix, in the proposed Staples/Office Depot merger. According to publicly available reports, Staples' recent agreement to transfer contracts to office supply wholesaler Essendant has already been considered and rejected by the FTC. Mr. Schwartz drew parallels between Sysco/US Foods and the FTC's theory in Staples/Office Depot, which also hinges on the court's acceptance of a narrow market defined by reference to large business

customers that derive unique benefits from competition between the merging parties. Ms. Raptis noted that, unlike Sysco/US Foods, in which the FTC specifically addressed the inadequacy of the parties' proposed fix in its complaint, the posture of the Staples case may raise a number of interesting procedural and substantive issues, including whether the court should permit *any* evidence relating to the revised deal (known as "litigating the fix") and, if so, which party should bear the burden of proof with respect to the remedy. Mr. Sunshine said that some courts have reached different conclusions and noted two extremes of "litigating the fix": promising a remedy without a specific proposal, which, unsurprisingly, was rejected as speculative in the Ardagh/Saint-Gobain merger, and forcing the agencies to confront a completed transaction, as in the *Libbey* and *Arch Coal* cases.

Mr. Schwartz next discussed the Steris/Synergy case, which focused on a "potential competition" theory: But for the merger, Synergy would have entered — and competed with Steris — in the highly concentrated relevant market for sterilization services. Unlike the court in Sysco/US Foods, the court in Steris/Synergy denied the FTC's motion for a preliminary injunction. Mr. Schwartz said the court concluded that Synergy had abandoned its plans to enter the market for independent reasons, not because of the pending transaction. Mr. Schwartz and Mr. Sunshine agreed that, in the future, the FTC will be more likely to pursue and win cases like Sysco/US Foods and Staples/Office Depot — *i.e.*, those involving tested theories of harm and raising strong structural presumptions of anticompetitive effects. Mr. Sunshine added that Steris/Synergy is notable nonetheless, as it demonstrates the FTC's willingness to bring and litigate difficult cases.

Ms. Raptis provided an overview of recent merger enforcement cases by the DOJ, highlighting the GE/Electrolux case, which also involved a competitive effects theory based on a narrow set of customers, specifically "contract channel" buyers of home appliances who would pass price increases on to end-consumers. Ultimately, there was no decision in the case, as the parties abandoned the transaction according to the termination provisions of their merger agreement, with GE taking a sizeable reverse termination fee and selling its appliance unit to Haier, a Chinese producer. Ms. Raptis also briefly touched on another abandoned merger, the proposed Applied Materials/Tokyo Electron deal, which demonstrates the difficult, time-consuming nature of achieving clearance for complex transactions in multiple jurisdictions across the world.

Merger Trends

The panelists next discussed whether the recent successes of the DOJ and FTC are due to more aggressive policy, shifting legal standards or other factors. Ms. Raptis observed that merger analysis has been consistent — the agency's approach to merger review and ensuing cases reflects a "toolkit" approach that predated the 2010 revisions to the Horizontal Merger Guidelines. While the 1992 guidelines set forth a linear analytical approach to merger review, the agencies in fact have employed more fluid principles of merger analysis, and the 2010 revisions were adopted to reflect this reality, rather than to fundamentally alter merger review. The toolkit approach plays a prominent part in recent enforcement actions, which clearly show that the agencies — and courts — have not jettisoned traditional market definition and market concentration inquiries. Mr. Schwartz noted that, if anything, the recent cases are steeped in traditional antitrust principles, indicating that the agencies and courts are somewhat constrained by precedent requiring a methodical review of market definition and concentration. However, Mr. Schwartz added that the 2010 Guidelines have given the agencies greater flexibility at the investigation stage. Mr. Sunshine agreed, noting that the 2010 Guidelines have substantially increased the importance of economic analysis during the investigation stage, with economists at both agencies serving as key members of investigative teams.

One notable trend contributing to the uptick in enforcement is the high level of litigation talent within the U.S. agencies, which have recruited a number of seasoned litigators and practitioners from private practice. These litigators are building on previous successes based on drawing narrow product markets, and as a result of recent wins, the FTC and DOJ are more confident in rejecting insufficient remedy proposals and pursuing tough cases. Mr. Sunshine noted that the agencies' track record of success provides momentum for future litigation. Mr. Schwartz added that one such win, *Bazaarvoice*, which involved a transaction that was not reportable under the Hart-Scott-Rodino Act, exemplifies the agencies' willingness to unwind closed transactions and pursue divestiture and possibly disgorgement, where appropriate.

Key Takeaways

The webinar concluded with a summary of the key takeaways from merger enforcement in 2015. Ms. Raptis advised that several large and complex deals were concluded with and without remedies in 2015 — many of them very quickly — a trend that could continue, particularly given the expertise of the major

reviewing jurisdictions. She cautioned that parties need to be cognizant of and account for the agencies' prior cases when pursuing a complex deal. Mr. Sunshine added that the increase in litigation during 2015 is not due to an increase in second requests or agency lawyers, but rather because the agencies are more efficient at identifying problematic transactions. Mr. Sunshine stressed the importance of gaining and keeping momentum, namely by making arguments for clearance at the start of an agency investigation. Ms. Raptis agreed, stating that, from a practical standpoint, parties must develop substantive arguments early, take a consistent approach across the globe and consider the timeline of review for each reviewing agency when constructing the overall strategy for clearance. Mr. Schwartz emphasized the importance of understanding the parties' documents, since the agencies heavily credit the views of business experts. Mr. Sunshine highlighted the critical importance of drafting contract provisions that take into account real-world risks and the parties' willingness to undertake remedies when faced with agency concerns. Mr. Sunshine closed by cautioning that the authorities are more aggressive and have good resources and precedent in their favor, but that there are opportunities to gain clearance for complex transactions by crafting remedies that will disincentivize agency litigation.