The Threshold

**Newsletter of
the Mergers &
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CONTENTS

FROM THE CO-CHAIRS

To All Committee Members:

Welcome to the Summer edition of The Threshold! We have several interesting articles that merger practitioners should find both useful and timely.

First, we have two articles involving the FTC's challenge to the Sysco/US Foods merger. Mark Seidman and Melissa Davenport, two members of the FTC trial team, provide an "inside baseball" look at the FTC's approach to defining the relevant product market for broadline services to national customers, the defendants' arguments in opposition to the FTC's approach, and the court's analysis of the national customer market. Next, Megan Browdie and Howard Morse discuss recent attempts by merging parties to litigate the fix. That article assesses the antitrust agencies' arguments against judicial consideration of proposed remedies in preliminary injunction proceedings to block proposed mergers and acquisitions, how courts have addressed the burden of proof when considering proposed remedies, and strategies for parties considering proposing remedies.

Our next four articles involve international issues. David Dueck, Fraser Malcolm, and Mike Maodus discuss a number of noteworthy developments in merger control around the world. Next, Neil Campbell examines the Canadian Competition Bureau's recent challenge to portions of the *Parkland Industries / Pioneer Petroleum* retail gasoline transaction before the Competition Tribunal. The article focuses on the Bureau's approach to timing issues and interim measures on a second phase merger review, the legal standard for obtaining interim relief under Canada's Competition Act, and the treatment of factual evidence by the Competition Tribunal in injunction proceedings.

Brian Facey and Julia Potter discuss the different standards for considering efficiencies in merger analysis in the United States and Canada (and a number of other countries) and how efficiencies are treated in cross-border mergers. This article not only provides a useful overview of recent developments, but also includes practical guidance for arguing the efficiencies defense in cross-border merger review. Finally, Maria Eugênia Novis and Ursula Pereira Pinto discuss the hot topic of gun jumping under the Brazilian antitrust law.

The next Threshold will be out in early November. As always, we would be delighted to publish letters to the editor commenting on any past articles, and we would be doubly delighted to hear from you about any articles you would like to write yourself. In addition, if there are any "inside baseball" stories you could tell that you think would be of interest to our committee membership, please let us know.

Enjoy the newsletter!

Norm Armstrong, Jr. and Ronan Harty

How Do You Define a "National Customer"? Lessons from *FTC v. Sysco*

Melissa Davenport and Mark Seidman[*]

In the Federal Trade Commission's suit against Sysco and US Foods to block their proposed merger, *Federal Trade Commission et al. v. Sysco Corp. et al.*,[1] the case involved demonstrating that a certain subset of broadline foodservice customers were national—or at least multi-regional—in scope, and valued the national distribution networks of the merging parties. The existence of such customers was not in doubt. And it was clear that Sysco and US Foods, the two largest broadline foodservice distributors in the United States, battled head-to-head for many of these customers on a daily basis. Nevertheless, because each customer has unique needs, the defendants were able to point to examples of superficially similar "national" customers who appeared to rely less on the integrated national networks of the merging parties. At the margins, the line between local customers and national customers—at least as delineated by the defendants in their normal course of business—was unclear. Many customers whose contracts were negotiated centrally as part of Sysco's or US Foods' national sales groups had relatively few locations, often with footprints that looked similar to true "local" customers. As the FTC argued and the court agreed, however, in a market characterized by price discrimination, it is not necessary to define the borders of a market rigidly in order to show that harm would clearly affect some significant portion of customers within that market. Importantly, the fact that some customers on the margins defied easy categorization did not undermine the existence of a large and visible group of customers who clearly fit the national customer parameters and would be vulnerable after the merger.

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[*] The authors are attorneys in the Mergers IV division of the Federal Trade Commission's Bureau of Competition, and both were members of the *Sysco* trial team. The views expressed herein are solely those of the authors and do not necessarily represent the views of the Commission or any individual commissioner. The authors appreciate the helpful review by Sophia Vandergrift, Debbie Feinstein, and Stephen Weissman.

[1] No. 1:15 cv 00256, 2015 U.S. Dist. LEXIS 83482 (D.D.C. June 23, 2015).

This was never a case about a merger to monopoly for national customers. Yet, it was important to the Commission's case to demonstrate the significance of the competition between Sysco and US Foods at a national level. The FTC and its economic expert, Dr. Mark Israel, approached this market definition challenge from three angles: geographic market, product market, and a "targeted customer" analysis. Despite arguments to the contrary from the defendants, the *Sysco* court ultimately validated the FTC's market for broadline services sold to national customers, which served as one of the key bases for liability in the court's opinion. What follows are some observations about the market definition exercise, the defendants' arguments in opposition to the FTC's approach, and the court's analysis of the national customer market.

Multiple Pathways to the Same Result: The FTC worked to articulate the national customer concept in ways that fit the facts and were analytically appropriate. While the defendants tried to gain traction by pointing out apparent discrepancies in the approaches in the Commission's pleadings and Dr. Israel's analysis, the court found that any perceived inconsistency was a distinction without a difference. Whether analyzed as a geographic market issue, a product market issue, or through a targeted customers framework, the court recognized that market definition is a tool to understand the competitive dynamics surrounding the products sold by merging parties. The relevant end point of the analysis is whether the facts supported a different competitive dynamic for national customers, which would allow the merging parties to exert pricing power on customers in that segment following the merger.

Below is an overview of the different avenues the FTC used to describe the national customer dynamic in the broadline foodservice market:

1. Geographic Market

In this case, the most intuitive way to distinguish national customers and local customers was through geographic market analysis. Indeed, most of the Commission's advocacy for a national customer market is found in the geographic market sections of its complaint and briefing. Sysco and US Foods have the most geographically expansive networks of distribution centers, a point that differentiates them from every other broadline distributor. The "national" aspect of the market does not mean, however, that a customer could turn anywhere within the United States for service, as a national geographic market would generally be understood; instead, it refers to the fact that many multi-regional customers use or require a broadliner that can offer a single source for full nationwide coverage. Similarly, the court in *FTC v. Cardinal Health* examined a market for national customers of wholesale pharmaceuticals through a geographic market framework.[2]

2. Product Market

Despite the intuitive appeal of using a geographic market framework to differentiate broadline services sold to national customers from those services sold to local customers, there is also a relevant product market component to this distinction. The ability to coordinate seamlessly across a national or multi-regional network of distribution centers is an aspect of the services that Sysco and US Foods provide. Accordingly, in its complaint, the FTC alleged a separate <u>product</u> market for broadline foodservice distribution to national customers. The court's opinion reflects the FTC's characterization of the national customer discussion as a subset of the broader broadline product market, observing that in this case the "customer's requirements [for national service] operate to define the product offering itself."[3]

3. Targeted Customers

In his analysis, Dr. Israel also examined the national/local customer distinction through another lens: a "targeted customer" analysis. Using the *Horizontal Merger Guidelines* Sections 3 and 4.1.4, Dr. Israel isolated national broadline customers to determine if this group would be particularly vulnerable to

[2] *F.T.C. v. Cardinal Health* , 12 F. Supp. 2d 34, 49-50 (D.D.C. 1998).

[3] *Fed. Trade Comm'n. v. Sysco*, 2015 U.S. Dist. LEXIS 83482, at *73.

a price increase based on their distinct needs as a customer group and the sellers' ability to identify and price discriminate against them. As noted in the *Guidelines*: "The Agencies also often consider markets for targeted customers when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product."[4] This inquiry is ultimately addressing the same question that standard product and geographic market definition are designed to answer: Which customers are likely to be susceptible to anticompetitive effects from a transaction?[5] Further, the court observed that the D.C. Circuit has wrestled with the issue of targeted customers before in *FTC v. Whole Foods*,[6] but the court concluded that it did not have to resolve the *Whole Foods* debate (regarding the merging parties' ability to target core customers versus the risk of losing marginal customers) here because other evidence supported the relevant market as discussed below.

Back to Basics with *Brown Shoe*: Even setting aside the debate about the correct market definition framework, the parties further disagreed about the relative importance of the qualitative and quantitative evidence in defining the market. The court ultimately confirmed that both types of evidence were important and supported the FTC's view of the national market. The defendants attempted to portray *Brown Shoe Co., Inc. v. United States*,[7] which sets forth a number of factors as "practical indicia" of a relevant product market, as out of date, recommending that the court instead accept defendants' experts' views that the FTC's economic evidence was unpersuasive. The court rejected this invitation, however, noting that *Brown Shoe* remains controlling precedent, and relying upon the practical indicia as an important source of evidence supporting

[4] *Merger Guidelines* § 4.1.4.

[5] Dr. Israel explained that it is appropriate to identify the targeted customer segments first, then to do the rest of the Guidelines analysis on each targeted customer group. In this case, both local and national customers share the same product market, so it was logical to describe that jointly.

[6] 548 F.3d 1028 (D.C. Cir. 2008).

[7] 370 U.S. 294 (1962).

the market for national customers. The court noted that "Brown Shoe remains the law, and this court cannot ignore its dictates."[8]

The defendants urged a greater reliance upon—perhaps even displacement of the qualitative factors by—econometric methods, and suggested that the FTC had failed to provide sufficient econometric evidence supporting the national market. In particular, the defendants attacked the market share data used by the FTC as unreliable because—on the margins—there appeared to be some ambiguity about which customers were properly classified as "national" and thus counted in the market shares. This view ignores the bigger picture market definition guidance of *Brown Shoe*, which is designed to illuminate the interchangeability of use among products,[9] and fails to acknowledge that the practical indicia remain an important method that coexists in harmony with newer econometric tools designed to answer the same question. The *Sysco* court found that these qualitative factors—including evidence from industry participants, the defendants' internal documents and business operations, and the very existence of a third-party conglomerate of regional distributors that was formed to compete for national business—were probative when assessing the competitive dynamics among various product offerings and deriving a well-defined market.

Precise Contours Are Not Necessary in a Price Discrimination Market: The parties also argued vigorously about where to draw the line between national and local customers for purposes of calculating market shares, and whether the blurriness at the margins between the groups rendered the FTC's proposed market shares meaningless. Dr. Israel used Sysco's and US Foods' own internal designation system for identifying customers whose accounts are handled at the local (or distribution center) level, and those handled centrally by a corporate (or national) sales team. The defendants argued that their "national

[8] *Fed. Trade Comm'n. v. Sysco*, 2015 U.S. Dist. LEXIS 83482, at *39-40, n.2.

[9] "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325.

account" designations were not representative of any meaningful economic distinction but rather a superficial administrative tag, and often indicative of nothing more than the quirks of an individual customer. While the court agreed that the designation may not be perfect in every case, it was "a useful proxy for customers requiring geographically dispersed distribution and attendant services."[10] Importantly, the court believed that the designation was correctly applied to a sufficient proportion of large customers to be economically meaningful.

Moreover, the defendants argued that a price discrimination market could only be formed around a segment of customers that share objectively observable characteristics. The court, however, cited the *Merger Guidelines* in support of its conclusion that price discrimination can occur even when customers "do not share specific identifiable traits," noting that a market characterized by individual negotiations—like broadline foodservice distribution—enables sellers to target specific customers.[11] The question is not whether the FTC or some other outside observer could accurately categorize each customer but rather whether the merging parties can single out the vulnerable customers. Indeed, the *Merger Guidelines* make clear that price discrimination is possible to either "individual customers to which different prices are offered *or* [when] offering different prices to different types of customers based on observable characteristics."[12]

The defendants also challenged the plausibility of a price discrimination market by suggesting that the "targeting" of customers would necessarily involve a centralized plan by Sysco salespeople to identify customers on whom they could impose a price increase—a scenario the defendants characterized as far-fetched.[13]

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[10] *Fed. Trade Comm'n. v. Sysco*, 2015 U.S. Dist. LEXIS 83482, at *92.

[11] *Id.* at *96.

[12] *Merger Guidelines* § 3 (emphasis added).

[13] *See, e.g.*, PI Hr'g Tr. 71, May 5, 2015 ("Mr. Parker: [] Does anybody think our client can sit here and say, well, let's target these guys for a price increase because they're totally dependent on us? And the answer to that question is obviously, no.").

In reality, however, "targeting" is a much more mundane concept; it merely reflects the fact that in individualized negotiations, Sysco and US Foods would be keenly aware of the competitive dynamics that apply to a specific customer and would seek to optimize their contract prices and terms accordingly. Whereas in the pre-merger world, Sysco and US Foods would have reacted specifically to each other by lowering prices and offering other incentives to win a contract, the absence of that competitive threat after the merger would lead to higher prices and less favorable terms to those same customers. This relatively straightforward dynamic is all that is necessary for targeting; the "price discrimination" occurs directly as a result of the reduction in competitive pressure for a specific customer. It need not be some evil scheme hatched in Sysco's headquarters.

Conclusion

The interplay of geography, product offering, and customer type presented important issues for the court in analyzing the impact of the merger of Sysco and US Foods on national customers. While the *Merger Guidelines* provide a framework that ultimately guided the court's decision, the nature of the particular issues in this case allowed for vigorous arguments about the appropriate methodology and execution for defining a market around services provided to national customers. Ultimately, the market definition inquiry is intended to illuminate the competitive effects, and the exact path for arriving at that destination may mean less than the directional consistency of the evidence. The court rightly focused on how customers would view their choices should the top two competitors for broadline foodservice distribution combine into one mega-supplier. The *Sysco* court concluded that the evidence—both qualitative and quantitative—was sufficient to support the FTC's national market, and its opinion provided new insights into how to approach similarly complicated market definition issues in the future.

Proposing a Fix? Ready to Litigate the Fix? Recent Cases Should Guide Strategy

Megan Browdie and Howard Morse*

Companies considering mergers or acquisitions that raise serious antitrust issues should have a strategy for getting through the Hart-Scott-Rodino review process before finalizing the deal. That strategy may include proposing a "fix"—a divestiture, license, or conduct remedy—to resolve competitive concerns.

Acquiring firms at times state their intention to remedy antitrust concerns early in the process either to get the deal done quickly or because the need for a remedy is clear. At other times, parties will first try to convince the reviewing agency that a proposed transaction will not lessen competition and that no remedy is necessary. Counsel may wait to offer a remedy until the prospect for closing the deal without a fix looks bleak, sometimes only after going up the chain at the DOJ or FTC.

Often, parties will negotiate a divestiture or other remedy with the agency. They may, for example, negotiate over lines of business to be shopped to a buyer after the proposed transaction closes or agree to find a buyer for a defined package of assets up-front. In other cases, parties will come in with a "pre-baked" offer or even a signed agreement to divest to a specific buyer. Parties may propose a remedy to the agencies at any time: early in the review process, once the staff advises that they intend to recommend a challenge, after meeting with more senior officials at the agency, after a complaint is filed, or even on the eve of a preliminary injunction hearing or trial.

In some cases, the parties will adopt self-help measures by unilaterally restructuring the transaction to remedy any alleged lessening of competition. Typically, however, the acquirer will enter into a contract with a third-party

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purchaser to sell assets contingent upon the closing of the main deal. If the case ends up in court, the parties will often attempt to "litigate the fix," i.e. attempt to persuade the court to consider the restructured deal rather than the original transaction.

Whether a court will consider the deal only as originally proposed, or instead consider the proffered "fix" can have a substantial impact, not only on the ultimate outcome of litigation but also on the negotiating dynamic with agency staff regarding whether to settle the matter through a consent decree or consent order that embodies the proposed fix. If staff attorneys know they will be litigating against the original deal with no evidence of the proposed measures to address competitive concerns, they may be more confident in their case and may take a harder line in settlement negotiations. On the other hand, if they have to weigh whether to accept a proffered remedy against having to litigate a restructured deal in court, they may be motivated to accept a weaker remedy rather than risk losing. It is therefore important to consider how to maximize the probability that the court will consider evidence on the fix in the event of litigation challenging the transaction.

This article explores recent attempts by merging parties to litigate the fix. First, we assess the agencies' arguments against courts considering proposed remedies in preliminary injunction proceedings to block proposed mergers and acquisitions. Second, we discuss how courts have addressed the issue of burden of proof in considering proposed remedies. We then review two recent cases in which parties attempted to introduce evidence of fixes. In *FTC v. Ardagh*, the court refused to admit evidence about proposed divestitures.[1] In *FTC v. Sysco*, by contrast, the agency and the parties briefed and the court assessed the impact of

[1] *FTC v. Ardagh Group S.A.*, No. 13-cv-01021 (D.D.C. 2013).

Sysco's agreement to divest assets to a specific buyer.[2] Finally, in light of these precedents, we discuss strategies for parties considering proposing remedies.

I. Some Courts Have Considered Evidence of Proposed Fixes

The agencies have repeatedly argued that courts should not consider evidence of proposed divestitures or other remedies when weighing issuance of a preliminary injunction to block a proposed merger or acquisition alleged to lessen competition.

The agencies regularly file motions in limine to prevent courts from hearing any evidence of proposed fixes. The agencies have argued that evidence of the fix "is irrelevant to the issue for trial, which is solely whether the proposed merger will violate §7."[3]

Despite the agencies' protests, courts have been willing to consider the fix, for example: *FTC v. CCC Holdings* (2009), *FTC v. Arch Coal* (2004), *FTC v. Libbey* (2000), *United States v. Franklin Electric* (2000), *FTC v. Atlantic Richfield* (1977), and *United States v. Atlantic Richfield* (1969).[4]

The agencies have advanced several arguments to explain why it is inappropriate for courts to consider the fix and that the court should instead only hear evidence on the competitive impact of the originally-proposed transaction.

[2] *FTC v. Sysco Corp.*, No. 15-cv-00256, Slip Op. (D.D.C. 2015).

[3] Order at 2, *United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025 (W.D. Wis. 2000) (No. 00-C-0334-C, ECF No. 96).

[4] *United States v. Atl. Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969); *FTC v. Atl. Richfield Co.*, 549 F.2d 289 (4th Cir. 1977); *Franklin Elec.*, 130 F. Supp. 2d 1025; *FTC v. Libbey Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002); *FTC v. Arch Coal*, 329 F. Supp. 2d 109 (D.D.C. 2004); *FTC v. CCC Holdings*, 605 F. Supp. 2d 26 (D.D.C. 2009).

Agency Argument 1: The deal filed under HSR should be the one litigated. The government has argued that the parties must be held to the deal they negotiated and reported in their HSR Act filings.[5]

However, it is clear that parties will not necessarily be required to litigate the acquisition described in their HSR filings if the parties subsequently modify their proposed deal so that the buyer acquires fewer assets than initially proposed. For example, in *Libbey,* the court held that:

> [P]arties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in an effort to address the government's concerns. And when they do so . . . it becomes the new agreement that the Court must evaluate in deciding whether an injunction should be issued.[6]

Thus, parties may amend an acquisition agreement to transfer fewer assets than originally proposed, and the government must prove that amended acquisition is likely to lessen competition.

Agency Argument 2: Allowing continuous amendments will make agency and judicial review impossible. In *Libbey*, the FTC argued that parties could avoid government and judicial review by continuously amending an agreement, making review impossible.

While "not unsympathetic to the FTC's argument," the court concluded that, upon the facts in front of it, it was "not convinced that defendants were in fact purposely attempting to avoid judicial and FTC review of their agreement. Rather, they made a good-faith effort to address the FTC's concerns regarding the agreement, which it seems is consistent with the policies underlying Section 7."[7]

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[5] *See Atl. Richfield*, 297 F. Supp. at 1068 ("The Government takes the curious position that the sale to BP should be completely ignored by the court and that the merger should be treated as if it would result in a combined Atlantic-Sinclair operation in the Northeast.").

[6] *Libbey*, 211 F. Supp. 2d at 46.

[7] *Id*. at 46 n.27.

Courts may refuse to consider a proposed remedy that has been repeatedly altered during the review process, but have been willing to consider good faith efforts to address competitive concerns.[8]

Agency Argument 3: The proposal may be a sham. A related concern expressed by the agencies is that the purported fix is a sham—that a proffered fix is merely a litigation ploy and/or that there is a risk that the parties will abandon the proposed fix after winning in court.

Courts have rejected this argument when based on pure speculation. In *Atlantic Richfield*, for instance, the Court reasoned that "the Government suggests that since the sale is not to be completed until shortly after the merger has taken effect there is the possibility it may be abandoned . . . . The record does not lend the slightest support to such speculation."[9]

In *Arch Coal*, the FTC argued that the proposed divestiture was not incorporated into an amended merger agreement, but was a side agreement with a third party which could be renegotiated and might not close.[10] The *Arch Coal* court accepted the acquirer's and divestiture buyer's testimony that each was "fully committed" and the proposed divestiture would "definitely occur."[11] In doing so, the court rejected the FTC's argument that the form of the agreement was dispositive.[12]

Agency Argument 4: The proposed fix is not reasonably certain. Courts have been more receptive to the government's argument that a proposed

[8] *See* Memorandum Opinion at 5, *Arch Coal*, 329 F. Supp. 109 (No. 04-0534, ECF No. 67) ("*Arch Coal* Mot. in Limine Ruling") ("The uncontroverted facts . . . reveal that the [divestiture] transaction was proposed as a good faith response to the Commission's investigation and concerns regarding the competitive effects of the Arch-Triton merger.").

[9] *See, e.g.*, *Atl. Richfield*, 297 F. Supp. at 1068.

[10] Memorandum in Support of Plaintiff Federal Trade Commission's Motion in Limine at 4, *Arch Coal*, 329 F. Supp. 109 (No. 04-0534, ECF No. 50) ("*Arch Coal* Mot. in Limine").

[11] *Arch Coal* Mot. in Limine Ruling at 5.

[12] *Id*.

fix was not sufficiently certain to be considered and appropriately vetted by the agency.

While it has been clear since before the HSR Act was even passed that courts will not hear evidence about proposed fixes that amount to mere "promises," "intentions," or non-binding offers that had not yet matured into contracts,[13] it is less clear what is required to be sufficiently definitive.

This issue resurfaced in the FTC's recent challenge to Ardagh's acquisition of Saint Gobain, which is discussed below.

Agency Argument 5: Judicial review of the fix usurps FTC authority. The FTC has also argued that it has expertise in fashioning antitrust remedies that the courts lack. Thus, by considering a fix rather than the initial deal, when the FTC is seeking an injunction under Section 13(b) of the FTC Act, pending an administrative trial, the court usurps power granted to the Commission. The FTC argued, for instance, in *Arch Coal*:

> Consideration by this Court of what remedy would be necessary and appropriate would preempt the Commission's ability to carry out its responsibilities under the Acts and . . . order the necessary and appropriate relief . . . Through its adjudicative proceeding, the Commission will apply its administrative expertise to explore the issues presented . . . and, ultimately, fashion appropriate permanent relief for any violations found . . . [I]f the sale of Buckskin were in fact consummated, an important asset of Triton would be placed beyond the reach of the Commission . . . In this sense, failure to enjoin the Arch-Triton merger based on consideration of the proposed Buckskin sale effectively would amount to imposition of a permanent divestiture remedy by this Court that would deprive the Commission of its jurisdictional authority on the merits.[14]

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[13] *See Consol. Gold Fields, Inc., v. Newmont Mining Corp.*, 698 F. Supp. 487, 502 (S.D.N.Y. 1988), *rev'd in part on other grounds*, 871 F.2d 252 (2d Cir. 1989); *Chemetron Corp. v. Crane Corp.*, 1977 WL 1491, at *7 (N.D. Ill. 1977).

[14] *Arch Coal* Mot. in Limine at 1-2, 11; *see also* Thomas J. Horton, *Fixing Merger Litigation Fixes*: *Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. REV. 165, 212 (2010) (discussing argument that courts considering such fixes "unwittingly have overstepped substantial constitutional, statutory, and judicial boundaries, and

The *Arch Coal* court rejected the argument, reasoning that the FTC had already determined that the fix did not resolve its concerns and that the court's "task in determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition . . . requires the Court to review the *entire* transaction in question."[15] The court went on to review the amended transaction to determine if it was likely to lessen competition. It explained that "the burden is on the FTC to convince this Court that its judgment is correct that the Arch-Triton merger including the Kiewit transaction raises questions so serious, substantial, difficult and doubtful as to make the challenged transactions fair ground for permanent injunction proceedings before the Commission."[16]

II. Courts Are Not Consistent Regarding Who Bears the Burden of Proof When Considering Proposed Fixes

In *United States v. Baker Hughes*, the D.C. Circuit laid out the burdens of production and persuasion borne by the agencies and the parties in a horizontal merger case:

> By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition. The burden of producing evidence to rebut this presumption then shifts to the defendant. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.[17]

Courts have not consistently addressed where the proposed fix fits in the *Baker Hughes* burden-shifting framework. Underlying the disparity is the

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effectively declared their right to replace the executive branch as America's front-line Clayton Act merger enforcement authority").

[15] *Arch Coal* Mot. in Limine Ruling at 7.

[16] *Id*. at 6.

[17] United States v. Baker Hughes Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990).

question of whether the "transaction" includes the "fix." If the "transaction" includes the fix, then the burden logically should be on the government to show that the transaction, as fixed, will substantially lessen competition. If, on the other hand, the fix is a method through which the parties can rebut the presumption of competitive harm, the government need only show that the original deal will substantially lessen competition. If it does so, the burden shifts to the parties to produce evidence of the fix sufficient to rebut the presumption of competitive harm.[18] Courts have adopted both approaches.

The *Arch Coal*, *Libbey*, and *Atlantic Ritchfield* courts, for example, placed the burden on the agency to prove that the amended transaction may substantially lessen competition.[19] The *Arch Coal* court explained that "the burden is on the FTC to convince this Court that its judgment is correct that the [transaction, as fixed] raises questions so serious, substantial, difficult and doubtful as to make the challenged transactions fair ground for permanent injunction proceedings before the Commission."[20] The court made clear that its decision depended on being

[18] FTC Commissioners are split on this issue. When Reynolds American Inc. agreed to acquire Lorillard, Inc., the parties proposed a three-way deal under which certain tobacco brands would be sold to Imperial Tobacco Group, plc simultaneously with the close of the acquisition. Three Commissioners approved a consent decree, which treated the sale to Imperial as a remedy. In dissent, Commissioner Wright asserted that "[a]s a matter of principle, when the Commission is presented with a three (or more) way transaction, an order is unnecessary if the transaction—taken as a whole—does not give reason to believe competition will be substantially lessened. The fact that a component of a multi-part transaction is likely anticompetitive when analyzed in isolation does not imply that the transaction when examined as a whole is also likely to substantially lessen competition." Dissenting Statement of Commissioner Joshua D. Wright In the Matter of Reynolds American Inc. and Lorillard Inc., Docket No. C-4533 (July 31, 2015). Commissioner Brill separately dissented, arguing that even the three-way transaction was not sufficient to remedy the anticompetitive harm caused by the Reynolds-Lorillard transaction. Dissenting Statement of Commissioner Julie Brill In the Matter of Reynolds American Inc. and Lorillard Inc., Docket No. C-4533 (July 31, 2015).

[19] *Arch Coal* Mot. in Limine Ruling at 6 (placing burden on FTC with respect to entire transaction including proposed divestiture); *Libbey*, 211 F. Supp. 2d at 51 ("the FTC has established a prima facie case that the *amended* agreement may substantially lessen competition") (emphasis added); *Atl. Richfield*, 297 F. Supp. at 1069 ("the arrangement *viewed as a whole* indicates that, instead of competition being eliminated, a new, vigorous and viable competitive force will be substituted for the present competitor") (emphasis added).

[20] *Arch Coal* Mot. in Limine Ruling at 6.

convinced that the proposed fix "will in fact occur as agreed if the [originally-proposed] merger goes forward."[21]

In *Sysco*, *CCC Holdings*, and *Franklin Electric*, the courts placed the burden on the parties to show that the fix remedied the presumption of harm established by the agency.[22] These courts did so without much analysis. The *CCC Holdings* court, for example, seemed to treat the fix as an argument by the parties that future entry, as assisted by the divestiture, would cure the competitive harm.[23] As discussed further below, the *Sysco* court did not even address the possibility that the burden might lie with the agency. Rather, it lamented the "lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger."[24]

III. Recent Cases: Why Did the Court Consider the Fix in *Sysco* but not *Ardagh*?

Review of two recent merger challenges helps to further clarify the steps parties must take to be able to "litigate the fix," that is, to ensure that a court will consider a proposed remedy when ruling on a government's motion for a preliminary injunction to block a proposed transaction.

In *Ardagh*, the FTC convinced the district court not to consider a proposed fix: the divestiture of four plants. In *Sysco*, the FTC addressed the proposed fix in its complaint, alleging "Defendants' plan to divest 11 of US Foods' distribution centers to Performance Food Group . . . does not remedy the competitive harm caused by the Merger," and the court considered and rejected the fix.

[21] *Id.* at 7.

[22] Memorandum Opinion at 101, *Sysco*, No. 1:15-cv-00256 (ECF No. 192) ("*Sysco* Opinion"); *CCC Holdings*, 605 F. Supp. 2d 26, 46-47, 56-59 (D.D.C. 2009) (treating proposed fix as one of the parties' rebuttal arguments); *Franklin Elec.*, 130 F. Supp. 2d at 1033 ("defendants have the burden of proving their contention that because of the proposed [fix] the number of competitors will not change.").

[23] *CCC Holdings*, 605 F. Supp. at 56-59.

[24] *Id*. at 101.

A. *FTC v. Ardagh*

In *Ardagh*, after failing to agree with the FTC on a divestiture package, Ardagh decided to "unilaterally agree" on a divestiture proposal and reported it was "in negotiations" to sell four plants, when the court addressed whether it would consider the fix, three weeks before a scheduled preliminary injunction hearing.[25]

Ardagh argued that its proposed fix should be considered because (a) the identity of the four plants that Ardagh was planning to sell had been disclosed to the FTC two weeks earlier (which was five weeks before the preliminary injunction hearing would commence); (b) the FTC had detailed information about each of the plants for months; and (c) the FTC had deposed Ardagh's CEO, as well as the chairman who was leading the process, about the proposed divestiture. Ardagh asserted that this was plenty of time for the FTC to review the proposal: "in the context of lawsuits that often take five, six, seven, eight weeks, five weeks before the hearing gives them plenty of time to address what is really only one sub-issue of the case."[26]

The FTC, on the other hand, argued that Ardagh "[d]ropp[ed] these facts on [the FTC] the night before the CEO's deposition, which [was] already being taken after the close of discovery."[27] The FTC argued that "[w]ithout a buyer in hand, if the proposed set of assets has not been operated as an ongoing business in the past, Commission staff will need time to evaluate the proposal to check whether a potential buyer could operate the assets in a way that preserves the

[25] Transcript of Pre-Hearing Conference, *FTC v. Ardagh Grp.*, No. 13-1021 (D.D.C. 2013) ("*Ardagh* Transcript") at 18, 21.

[26] *Id*. at 22.

[27] *Id*. at 24-25.

competitive dynamics in the market. Part of that test is a check that interested and approvable buyers exist."[28]

The court also found the lack of a definitive buyer troubling, and ruled from the bench that it would not consider the proposed divestiture, reasoning that the FTC could not be expected to address whether it would be "an adequate cure" and so it would be "premature and precipitous" to consider it.[29] The court asked counsel for Ardagh rhetorically, "You don't even have a definitive name for them to do discovery from or ask about. That's not reasonable, is it?"[30] The court also asked, "Do you think there is a chance that if the commissioners had your current plan in front of them they might come out with a different result?"[31] While the court did not suggest a signed agreement needed to have been presented to the FTC, it suggested any divestiture proposal would have had to be definitive enough to allow the FTC to evaluate it before the court would consider it.[32]

In a subsequent blog post, FTC staff asserted that the court's ruling "reinforces the Commission's approach to designing effective remedies for problematic rulings, the goal of which is to preserve or restore competition." The staff took the position that "[p]arties may present a divestiture proposal at any point in the process, including post-complaint . . . [but] Commission staff will need time to evaluate the proposal to check whether a potential buyer could

[28] Angelike Andrinopoulos Mina and Jim Abell, Federal Trade Commission, *The fix is (not) in: lessons from the Ardagh case*, Competition Matters (Apr. 9, 2014), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2014/04/fix-not-lessons-ardagh-case ("FTC Blog Post").

[29] *Ardagh* Transcript at 29; *id*. at 35 ("I think the most I can do at this point is say we will go ahead with the hearing as scheduled. It will concern the issues that I understood it to concern before I came out here today, i.e., we will not be discussing any divestiture of plants that one side sort of knows about and the other side doesn't. It's not going to be fruitful for me to hear any testimony on that.").

[30] *Id*. at 28.

[31] *Id*. at 23.

[32] *Id*. at 36 ("I use the word 'definitive' in a sort of sliding scale here — but enough for them to be able to do some evaluating of what you're suggesting.").

operate the assets in a way that preserves the competitive dynamics in the market."[33]

After the court ruling and before trial commenced, Ardagh and the FTC agreed on a broader divestiture of six plants, along with Ardagh's headquarters, mold facility, engineering facility, as well as customer contracts, molds, and intellectual property.[34]

B. *FTC v. Sysco*

In the FTC's recent challenge to the Sysco-US Foods merger, the FTC did not seek to exclude evidence about the proposed divestiture. Notably, Sysco publicly announced the proposed divestiture more than two weeks before the Commissioners authorized the filing of a complaint to block the proposed acquisition, i.e. before post-complaint discovery had even commenced.[35] Sysco had not only identified a buyer for the assets,[36] it had signed a definitive agreement with that buyer.[37]

The FTC's complaint included detailed allegations supporting its conclusion that the proposed fix was "inadequate" and would not "prevent the substantial competitive harm" allegedly caused by the merger. The FTC asserted that the divestiture would not address competitive concerns in many local markets and that the proposed buyer lacked the necessary geographic coverage to serve

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[33] FTC Blog Post.

[34] Agreement Containing Consent Orders, Ardagh Grp., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, No. 9536 (FTC 2013).

[35] Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act at p. 34, *Sysco*, No. 15-cv-00256 (ECF No. 11-1) ("*Sysco* Compl.").

[36] *Id*.

[37] Press Release, Sysco Reaches Agreement to Sell 11 US Foods Distribution Centers to Performance Food Group Contingent on Consummation of Sysco-US Foods Merger (Feb. 2, 2015) *available at* http://investors.sysco.com/press-releases/Press-Release-Details/2015/Sysco- Reaches-Agreement-to-Sell-11-US-Foods-Distribution-Centers-to-Performance-Food-Group-Contingent- on-Consummation-of-Sysco-US-Foods-Merger/default.aspx.

national customers. The buyer, according to the complaint, also lacked the capacity, operational efficiencies, reputation, product breadth, and industry-specific expertise to compete as effectively as the acquired firm.[38]

Interestingly, in its memorandum in support of a preliminary injunction, the FTC pointed to the divestiture proposal as recognition by the defendants of "the anticompetitive nature of the merger."[39] Of course, offering a remedy in an attempt to address stated government concerns should not be taken as an admission that the original transaction would likely lessen competition.[40]

The court granted a preliminary injunction to block the proposed acquisition, even taking into account the impact of the proposed fix.[41] The court pointed out that "there is a lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger."[42] For guidance, it looked to the U.S. Department of Justice's 2004 and 2011 Policy Guides to Merger Remedies, which concludes that for a remedy to be "successful" it must "maintain the premerger level of competition."[43]

While considering the fix, the *Sysco* court first found that the FTC had established a "strong presumption of anticompetitive harm" with respect to the

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[38] *Sysco* Compl. ¶¶ 12, 83-85. *See also* Memorandum in Support of Plaintiff Federal Trade Commission's Motion for Temporary Restraining Order and Preliminary Injunction at 5, *Sysco*, No. 15-cv-00256 (ECF No. 49-1) ("*Sysco* PI Memo").

[39] *Sysco* PI Memo at 5.

[40] This was not the first time that the Commission has made such an argument. *See Arch Coal* Mot. in Limine at 11 ("Inherent in any argument the defendants may have for insisting that this Court consider the Buckskin sale is the concession that, without it, the Arch-Triton merger raises serious and substantial questions."). The authors are not aware of any case where a court has agreed that the mere fact that a defendant attempts to litigate the fix constitutes an admission that the transaction is anticompetitive.

[41] *Sysco* Opinion at 2.

[42] *Id*. at 101.

[43] *Id*. at 110.

transaction as initially proposed.[44] The court then analyzed the proposed fix as one of the rebuttal factors to consider whether the merging parties could defeat the presumption of anticompetitive harm under a *Baker Hughes* burden-shifting framework. The court found that the divestiture and other rebuttal evidence was insufficient to overcome the presumption of anticompetitive harm that the FTC had established.[45] Interestingly, from the public record it does not appear that the parties briefed the argument that the FTC should have had the burden to prove that the entire transaction, as-fixed, would substantially lessen competition.

IV. How to Position a Remedy for Consideration in Court

Parties to future mergers that expect serious antitrust scrutiny should consider all of the precedents addressing "litigating the fix," including *Ardagh* and *Sysco*, in developing their strategy to design and propose a fix to get the deal done.

Propose fix early enough for agency to vet. While parties can go up the chain of command, arguing that a proposed transaction is not anticompetitive, it is clear they must give the agencies a chance to vet a proposed fix, which may mean vetting a proposed buyer or the existence of interested buyers, if they want to maximize the chances a court will consider the fix. As in *Sysco*, if the agency has enough time to assess the proposed remedy, it might not even contest whether the Court should assess the issue. Providing the agency with adequate time to review

[44] *Id*. at 100; *see also Franklin Elec*., 130 F. Supp. 2d at 1030 (concluding that despite a fix offered by the parties, "[t]he presumption the government starts with, which is that a merger of the only two competitors in the market is a violation of § 7, remains unrebutted").

[45] From the redacted briefings on the FTC's Motion for Preliminary Injunction, it does not appear that either the agency or the parties argued where the burden of production lies with respect to evidence related to the fix. However, the parties argued that the proposed divestiture would "replace[] the competitive intensity lost as a result of the merger," thereby arguably conceding the point that the fix was separate from the "transaction." Memorandum of Defendants Sysco Corporation, USF Holding Corp., and US Foods, Inc., In Opposition to Plaintiffs' Motion for a Preliminary Injunction at 38, *Sysco*, No. 15-cv-00256 (ECF No. 137-1). It is therefore not surprising that the court, while noting "a lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger," did not note the split of authority on where to allocate the burden and simply placed the burden on the parties. *Sysco* Opinion at 101.

the proposed fix makes it harder for the agency to argue, as the FTC did in *Ardagh*, that it did not have the opportunity to do sufficient discovery or to obtain the opinions of customers on the divestiture proposal. Proposing the fix early enough in the process also demonstrates that the parties are attempting to remedy the competition concerns in good faith.

While it is not entirely clear what "early enough" is, precedents suggest that the courts may be receptive to fixes proposed even after the agency has filed suit. In *Franklin Electric*, the defendants executed licensing and supply agreements with a third party more than three weeks after the DOJ filed suit.[46] In *Libbey*, a week after the FTC had filed suit, the defendants amended their merger agreement so that the seller would retain sufficient assets (according to the defendants) to remain a viable competitor.[47] In both cases the court considered the fix, and in both cases the court ultimately issued a preliminary injunction, despite considering the fix. By contrast, in *Ardagh* the parties' attempt to introduce evidence of a fix after the close of discovery, a few weeks before trial and without an identified buyer was insufficient.

In both *Libbey* and *Arch Coal* the court noted that the Commission itself had considered the fix before authorizing the staff to file a complaint challenging the transaction.[48] Presenting a fix before the Commission votes, so that the fix can be considered by the Commissioners in assessing the competitive impact of

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[46] *Franklin Elec*., 130 F. Supp. 2d at 1030. The defendants and the third party had signed a letter of intent a month before the filing of the complaint. *Id*.

[47] *Libbey*, 211 F. Supp. 2d at 41. The FTC later amended its complaint to allege that the revised merger agreement "did not materially change the original agreement or its likely detrimental effect on competition." *Id*. at 42. The court ultimately issued the preliminary injunction given concerns about the seller's cost structure after the acquisition would prohibit it from remaining a viable competitor.

[48] *Arch Coal* Mot. in Limine Ruling at 4 ("Arch informed the Commission in late January 2004 that it had signed an agreement and the FTC then issued its administrative complaint challenging the merger <u>after</u> 'determin[ing] that the competitive concerns posed by Arch's acquisition of Triton were not remedied by Arch's offer to sell the Buckskin mine to Kiewit.'"); *Libbey*, 211 F. Supp. 2d at 46 ("The FTC remains capable of vetting the amended agreement, and in fact, in response to the Court's March 29th Order, the Commission submitted a statement indicating that it had indeed voted to enjoin the amended merger agreement.").

the transaction, should enhance the likelihood that a court will subsequently consider evidence about the fix.

Enter into a definitive agreement. The courts have emphasized that the parameters of a proposed fix must be reasonably certain for the agencies and courts to evaluate it.[49] When the defendants present—before the close of discovery—an executed contract, with a specific buyer or licensee, the courts have tended to consider evidence of the fix.[50] Although an identified buyer adds to certainty, it is possible that the agencies and courts would entertain a fix in which no agreement has been reached with a specific buyer. If, for example, the divestiture assets have operated as an ongoing business in the past a court may not insist on an up-front buyer in order to consider the merits of a fix.[51]

V. Strategic Implications for Proposing a Fix to the Agencies

While a proposed fix that is sufficiently definitive and presented early enough likely will be considered by a court in a preliminary injunction hearing, most parties would rather not find themselves in litigation against the government. It is therefore important to consider the strategic implications of adopting a self-help strategy in dealing with the agencies and the courts.

Companies may choose to negotiate a fix with the agency staff initially, come to agreement, and find an up-front buyer after the scope of the fix is identified. This process benefits from increased likelihood that the agency will accept the agreed-upon divestiture, but risks a broader fix. An up-front buyer

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[49] *See Ardagh* Transcript at 29.

[50] *See Arch Coal* Mot. in Limine Ruling at 4 (rejecting challenge to consideration of the fix because, inter alia, the fact that the complaint issued several months *after* the side agreement was signed meant that "the FTC has assessed and is in reality challenging the merger agreement including the [] divestiture"); *see also Libbey*, 211 F. Supp. 2d at 46 n.27 ("based upon the facts of this case, the Court is not convinced that defendants were in fact purposely attempting to avoid judicial and FTC review of their agreement. Rather, they made a good-faith effort to address the FTC's concerns regarding the agreement, which it seems is consistent with the policies underlying Section 7.").

[51] *See* Richard Feinstein, Director, Statement of the Bureau of Competition of the Federal Trade Commission, Negotiating Merger Remedies at 4-5 (January 2012); FTC Blog Post.

requirement also increases the risk of having to sell the assets quickly at below-market prices.

Companies should, however, also consider whether there is strategic value in proposing a fix, which includes a signed agreement with a divestiture buyer that is conditioned only upon the main deal closing. Because the fix is offered as a *fait accompli*, parties offering a serious fix may enjoy more bargaining leverage even if it is not the exact remedy the agency would fashion itself, because the agency would have to recognize the risk of losing (and only ending up with a unilateral fix) if it takes the case to litigation. Because the court is likely to consider a good faith effort to fix all serious anticompetitive concerns, it is presumably harder for the agency to prove that the transaction as modified should be enjoined.[52] That said, the agency may perceive its downside for losing reduced because even if it loses, the market will benefit from the fix, even if it is not the remedy the agency would have liked.

While these strategies will help ensure that the merits of a proposed fix are heard in court,[53] there will still be debate regarding whether the government or the parties bears the burden of proof on the adequacy or inadequacy of the fix. As discussed above, the courts have split on this issue. As the dust settles on the law regarding whether the court will consider a fix at all, this issue is likely to take center stage.

[52] Of course, firms should also consider substantively what remedy is likely to be accepted by the agencies, as well as the courts. *See* Feinstein, Negotiating Merger Remedies at 4; U.S. Department of Justice, Antitrust Division, Antitrust Division Policy Guide to Merger Remedies at 4-5 (June 2011). Some courts have looked to agency guidance on the subject, which suggests that the answer may be similar. *Sysco* Opinion at 100-101; *but see Libbey*, 211 F. Supp. 2d at 47-48 (concluding that the fix was inadequate based in part on a higher cost structure of the proposed divestiture buyer).

[53] It is important to note that just because the parties are successful in convincing a court to consider evidence of a proposed fix does not mean that they will ultimately prevail. In *Franklin Electric*, *Libbey*, and *Sysco*, the courts ultimately sided with the government and enjoined the proposed transaction, despite allowing the parties to litigate the fix.

International Roundup

David Dueck, Fraser Malcolm, and Mike Maodus*

Over the last several months, there have been a number of noteworthy developments in merger control around the world. For the first time in Canada, the Competition Tribunal (the "Tribunal") heard a contested application for an interim injunction requiring two merging companies to preserve and hold separate six retail gas stations for the duration of the Commissioner of Competition's (the "Commissioner's") challenge to their proposed merger. In the United Kingdom, the Competition and Markets Authority ("CMA") fast-tracked a merger for the first time, moving BT Group plc's ("BT's") planned €12 billion takeover of EE Limited ("EE"), the UK's largest mobile phone network, directly to an in-depth phase 2 investigation. Meanwhile, in Africa, the Common Market for Eastern and Southern Africa ("COMESA") Competition Commission adopted several amendments to the COMESA Competition rules, raising notification thresholds previously set at zero and lowering the unusually high merger filing fee.

In addition, there have been a variety of non-traditional remedies implemented in certain jurisdictions. For the first time, the Turkish Competition Authority (the "TCA") has accepted the implementation of a compliance program as a remedy to a proposed merger. At the European Commission (the "Commission"), SNCF Mobilités's ("SNCF's") purchase of Eurostar International Limited ("Eurostar") was approved with conditions requiring that SNCF make concessions to facilitate entry or expansion by potential competitors. In addition, after its takeover attempt of Aer Lingus Group plc ("Aer Lingus") was blocked several years ago, Ryanair Holdings plc ("Ryanair") has lost its appeals against a decision requiring it to also sell most of its minority stake in Aer Lingus.

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I. Canada

On May 29, 2015, the Tribunal granted an interim injunction ordering Parkland and Pioneer to preserve and hold separate retail gas stations and supply agreements in six local markets for the duration of the Commissioner's challenge to their proposed merger.[1] The injunction order marked only a partial victory for the Commissioner, who was seeking a hold separate order in all 14 local markets where the Commissioner is seeking to challenge the transaction (out of the 181 corporate stations and 212 supply agreements being acquired). This decision represents the first time the Tribunal has considered a contested application for an interim hold separate order in circumstances where an application challenging the merger has already been filed by the Commissioner.[2]

The Tribunal's decision clarifies the applicable test for the issuance of interim injunctions under the merger provisions of the Canadian *Competition Act* and the evidentiary burden the Commissioner will need to satisfy in order to meet that test.[3] The Tribunal confirmed that on an application for an interim order, the test for an interim injunction under the *Competition Act* is based on the standard for injunctive relief used in Canadian courts, requiring the Commissioner to:

1. Demonstrate that there is a serious issue to be tried;

2. Establish that irreparable harm will result if the interim relief is not granted, using "clear and non-speculative" evidence; and

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[1] *The Commissioner of Competition v. Parkland Industries Ltd,* 2015 Comp. Trib 4, File No CT-2018-003 [*Parkland*].

[2] Ian Macdonald, "Canadian Competition Tribunal Issues First Contested Hold Separate Order In a Merger Case" (9 June 2015), online: Mondaq <http://www.mondaq.com/canada/x/403224/Antitrust+Competition/Canadian+Competition+Tribunal+Issues+First+Contested+Hold+Separate+Order+In+A+Merger+Case>.

[3] Blake, Cassels & Graydon LLP, "Important Implications for Merger Planning: Canadian Competition Tribunal Issues Decision on Interim Remedies and Use of Hold Separates" (4 June 2014), online: Blake, Cassels & Graydon LLP <http://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=2140>.

3. Demonstrate that the balance of convenience supports the granting of relief.[4]

Under the first branch of the test, the Tribunal found that there was a serious issue to be tried in all 14 markets because, although Parkland had offered its own partial remedy, it did not offer any remedy in three markets and did not provide a sufficiently detailed remedy in the remaining eleven markets. However, the Tribunal found that the Commissioner did not demonstrate that irreparable harm would result in eight of these 14 markets because the Commissioner's expert failed to provide basic evidence regarding how the geographic markets were defined. This left the Tribunal unable to determine any potential anti-competitive effects of the merger in those geographic markets, and the Tribunal found that the only markets meeting the "clear and non-speculative" evidence standard were the six markets where the merging parties did not contest the Commissioner's evidence. Finally, the Tribunal found that the balance of convenience favoured granting the hold separate order in these six markets, since the inconvenience to Parkland would be minimal while the potential harm to the public interest was significant.[5]

This decision has important implications for parties planning complex mergers. First, the decision emphasizes the need for parties to carefully consider interim remedies – not just final remedies – early in the planning process, which may be key factors when it comes to closing contested transactions.[6] In addition, the confirmation of a requirement for "clear and non-speculative evidence" reinforces the need for both the merging parties and the Commissioner to ensure they have prepared robust and persuasive evidence at the outset of any litigation.[7]

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[4] *Parkland*, supra note 1, para 26.

[5] Blake, Cassels & Graydon LLP, "Important Implications for Merger Planning", *supra* note 3.

[6] *Id*.

[7] Omar Wakil, "Competition Tribunal Grants Interim Injunction in Parkland/Pioneer Merger" (17 June 2015), online: Mondaq

II. United Kingdom

On June 9, 2015, the CMA announced that it was fast-tracking BT's planned €12 billion takeover of EE, the UK's largest mobile phone network, to an in-depth phase 2 investigation.[8] This is the first time that the CMA has fast tracked a merger review, which will allow the parties to avoid 40 working days of phase 1 review and result in a shorter overall review period.[9]

BT and EE are the largest suppliers of fixed communication services and mobile communication services in the UK. In addition, BT provides several fixed services to other communications providers, including backhaul services to mobile communications providers such as EE, O2, Three and Vodafone, who connect their radio masts to the core network. EE also provides wholesale mobile services to other mobile service providers.[10]

For a case to be fast-tracked to a phase 2 investigation, the CMA must be satisfied that the proposed plan objectively gives rise to a "realistic prospect of a substantial lessening of competition".[11] In this case, the CMA found this prospect to arise in relation to the supply of wholesale access and call origination services to mobile virtual network operators and in relation to the supply of fiber mobile backhaul services to mobile network operators throughout the UK. The CMA also noted that significant competition concerns were raised regarding the impact of the merger on other markets, including the retail mobile market in the UK.

<http://www.mondaq.com/canada/x/405352/Antitrust+Competition/Update+Competition+Tribunal+Grants+Interim+Injunction+In+ParklandPioneer+Merger>.

[8] Competition and Markets Authority, Press Release, "Competition: BT/EE merger fast-tracked to phase 2 investigation" (9 June 2015), available at: <https://www.gov.uk/government/news/btee-merger-fast-tracked-to-phase-2-investigation> [CMA Press Release].

[9] Simon Holmes, "BT/EE merger fast-tracked by UK's CMA directly to phase 2" (11 June 2015), online: King and Wood Mallesons <http://www.kwm.com/en/uk/knowledge/insights/bt-ee-merger-fast-tracked-directly-to-phase-2-20150611#>. The predecessor to the CMA, the UK Office of Fair Trading, had previously used the fast-track procedure twice in the Thomas Cook/Co-op and Global Radio/GMG Radio mergers.

[10] CMA Press Release, *supra* note 8.

[11] *Id.*

However, given that the criteria for a fast-track reference had been met with respect to services to mobile network operators, the CMA did not reach a conclusion on these other issues during the phase 1 investigation.[12]

Third parties – many of whom include rivals that have been calling for the CMA to take a closer look – will now have an opportunity to present their views on the merger.[13] A group of independent panel members overseeing the investigation will be receiving these submissions, and the panel will have 24 weeks to publish their final report on the merger.[14]

III. Africa

On March 26, 2015, the COMESA Competition Commission adopted amendments to the COMESA merger control regime intended to address a number of concerns that had existed since the creation of the organization, which currently includes 19 Eastern and Southern African States. The initial COMESA merger control regime had no notification thresholds, requiring notification of many transactions that had no material connection to COMESA. In addition, the filing fees were much higher than those in most other jurisdictions, creating a potential disincentive for parties to submit notifications.[15] The amendments to the COMESA merger control go a long way towards dealing with both of these concerns.

First of all, merger notification thresholds were introduced, which had previously been set at zero under the initial COMESA merger regime. A

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[12] CMA Press Release, *supra* note 8.

[13] The Guardian, "BT urges competition regulator to fast track decision on €12bn takeover of EE" (12 May 2015), online: The Guardian <http://www.theguardian.com/business/2015/may/18/bt-competition-regulator-fast-track-decision-takeover-ee-cma-merger>.

[14] CMA Press Release, *supra* note 8. The inquiry group may extend the 24-week period by no more than 8 weeks if it considers that there are special reasons why the report cannot be published within that period.

[15] Herbert Smith Freehills LLP, "The Comesa Merger Control Regime: One Year On" (11 March 2014), online: < http://sites.herbertsmithfreehills.vuturevx.com/196/7027/landing-pages/middle-east-client-briefing-comesa-merger-control-11-03-14-final.pdf>.

notification to the Competition Commission is now required whenever the following conditions are met:

- Either the acquiring firm or target firm, or both, operate in two or more COMESA member states;
- The combined turnover or value of assets in the COMESA region of all parties is equal to or exceeds US $50 million; and
- The annual turnover or value of assets in the COMESA region of at least two parties to a transaction is equal to or exceeds US $10 million.[16]

An exception to these conditions exists if each of the parties to the transaction have at least two-thirds of their aggregate turnover or assets in the COMESA region within only one and the same member state of COMESA. Although a COMESA filing would not be required in this case, national filings may still be required depending on the laws of the COMESA member state in question.

In addition, the merger filing fee under the COMESA regime has been lowered. The filing fee is now set at 0.1% of the combined annual turnover or value of assets of the parties in the COMESA region, with a maximum ceiling of US$200,000. This marks a notable decrease, as the previous merger filing fee was 0.5% of the turnover or assets of the merging parties in the COMESA region, subject to a cap of US$500,000.[17]

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[16] Herbert Smith Freehills LLP, "Welcome amendments to the COMESA merger control regime" (13 April 2015) online: Lexology <http://www.lexology.com/library/detail.aspx?g=559d6a5b-7a87-477a-a194-a364284929e6>.

[17] Tony Woodgate, "The Council of Ministers adopts amendments to COMESA merger control rules" (10 April 2015) online: Simmons & Simmons elexica <http://www.elexica.com/en/legal-topics/antitrust-and-merger-control/10-the-council-of-ministers-adopts-amendments-to-comesa-merger-control-rules>.

IV. Non-Traditional Remedies

A. European Union

One recent example of a non-traditional remedy was provided on May 13, 2015 when the Commission approved the planned acquisition of Eurostar by French rail operator SNCF conditional on compliance with commitments meant to facilitate the entry of competitors on certain routes. Eurostar had been jointly controlled by SNCF and the UK government since it was established in 2010, with SNCF holding a minority share. However, on March 5, 2015, the UK government announced that it had agreed to sell its stake privately, and SNCF subsequently negotiated a new shareholder agreement to gain sole control of Eurostar. [18]

During its review, the Commission found that the planned merger would have limited the entry of competitors on the London-Paris and London-Brussels routes where Eurostar already had a dominant position. The Commission was specifically concerned that capacity limitations and management of the infrastructure by Eurostar and its shareholders would make it more difficult for potential competitors to access stations and services provided in France and Belgium as well as maintenance centres located in France, Belgium, and the UK.[19]

In response to these competition concerns, the parties agreed to several commitments that would give any potential competitor entering the market "fair and non-discriminatory access" to:

[18] European Commission, "Mergers: Commission gives conditional authorization for SNCF to acquire sole control of Eurostar" (May 13, 2015), online: <http://europa.eu/rapid/press-release_IP-15-4976_en.htm>.

[19] *Id*.

1. standard and cross-channel areas in stations and services, such as ticket offices and passenger information services, in France and Belgium;

2. maintenance centers for services, such as light maintenance, servicing and cleaning of trains, and overnight storage; and

3. access to train paths at peak times if a new entrant is not able to obtain such access through the usual procedure for path allocation.[20]

The Commission ultimately took the view that these commitments would be sufficient to reduce the barriers to entry for any new operators seeking to offer service on the London-Paris and London-Brussels routes. As a result, instead of blocking the merger or requiring divestitures, the Commission approved the plan conditional on compliance with these commitments.[21]

B. UK

On June 11, 2015, the UK CMA confirmed that an Irish discount airline, Ryanair, will be required reduce its shareholding in Aer Lingus from 29.8% to 5% following a blocked takeover attempt more nearly a decade ago.[22] After first acquiring its minority stake in Aer Lingus, Ryanair then attempted a takeover of the entire company in 2006 but was prohibited from during so by the Commission in 2007.[23]

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[20] *Id*.

[21] *Id*.

[22] UK Competition Merger Authority, "CMA confirms requirement for Ryanair to reduce Aer Lingus shareholding" (June 11, 2015), online: UK CMA <https://www.gov.uk/government/news/cma-confirms-requirement-for-ryanair-to-reduce-aer-lingus-shareholding>.

[23] European Commission, "Mergers: Commission prohibits Ryanair's proposed takeover of Aer Lingus" (June 27, 2007), online: European Commission: <http://europa.eu/rapid/press-release_IP-07-893_en.htm>.

Following the rejection of its takeover bid by the Commission, Ryanair was left with a 29.8% share in Aer Lingus, and subsequent decisions by the CMA and its predecessor required Ryanair to reduce this minority stake partly due to concerns that this stake would prevent Ryanair from being acquired by another airline.[24] Ryanair recently requested a re-examination of previous rulings requiring the share reduction after an English Court of Appeal had dismissed Ryanair's appeal of an earlier CMA decision. Ryanair argued that both the length of time that had passed since the previous decision and a recent bid for Aer Lingus by International Airlines Group ("IAG") – conditional on Ryanair selling its shares – amounted to a material change in circumstances warranting reconsideration of these decisions.[25]

However, the chair of the Ryanair/AerLingus inquiry indicated that the IAG bid was a factor in upholding the decision for Ryanair to reduce its shareholding, stating that the conditionality of IAG's bid on Ryanair's sale of its shareholdings was "consistent with … our original assessment that Ryanair's presence was likely to deter other airlines from entering into, pursuing or concluding combinations with Aer Lingus."[26] Nevertheless, Ryanair appears eager to continue the fight, with a spokesperson for the company stating that the CMA's decision was manifestly wrong and that appeals are being planned.[27] Subsequently, Ryanair announced on July 13, 2015 that it would accept the IAG

[24] UK Competition Commission, "CC requires Ryanair to sell shareholding in Aer Lingus down to 5 per cent" (Aug 28, 2013), online: UK Competition Commission: <http://webarchive.nationalarchives.gov.uk/20140402141250/http:/www.competition-commission.org.uk/media-centre/latest-news/2013/Aug/cc-requires-ryanair-to-sell-shareholding>.

[25] *Id*.

[26] *Id*.

[27] "Ryanair will appeal CMA's ridiculous ruling" (June 11, 2015), online: Ryanair <http://corporate.ryanair.com/news/news/150611-ryanair-will-appeal-cma-s-ridiculous-ruling/?market=en>.

bid but would still continue with the appeal of the CMA's decision to avoid letting it set a precedent going forwards.[28]

C. Turkey

In another example of an unusual remedy, the TCA accepted the creation of a compliance program as a merger remedy in its review of the purchase of a domestic yeast company, Dosu Maya, by Özmaya, a rival yeast company. The compliance program – which is the first to ever be accepted as a remedy by the TCA during a merger review – will take place annually for three years and will involve regular reporting to the TCA. In addition to the compliance program, the remedy with the TCA also required divestitures and an acquisition freeze for Özmaya.[29]

The rationale for this unusual remedy may lie in the underlying context, with increases in the notification thresholds in Turkey resulting in few merger reviews and a greater corresponding focus by the TCA on cartels and abuse of dominance cases.[30] In October 2014, both companies were fined for participating in a cartel, with Özmaya receiving a fine of 5.7 million Turkish lira and Dosu Maya receiving a fine of 2.5 million lira. Therefore, it is suspected that the merger may have undergone a more detailed second phase review because of concerns over previous competitor collaboration. As a result, both companies likely believed that showing an intention to comply with competition laws

[28] Tom Madge-Wyld, "Ryanair accepts IAG bid but prolongs CMA appeal" (July 13, 2015), online: Global Competition Review <http://globalcompetitionreview.com/news/article/39057/ryanair-accepts-iag-bid-prolongs-cma-appeal/>.

[29] Mark Briggs, "Turkey accepts compliance programme as merger remedy" (June 26, 2015), online: Global Competition Review <http://globalcompetitionreview.com/news/article/38959/turkey-accepts-compliance-programme-merger-remedy/>.

[30] "Merger control in Turkey: An interview with Gönenç Gürkaynak and M Hakan Özgökçen", online: Getting The Deal Through <https://gettingthedealthrough.com/intelligence/19/article/2841/merger-control-turkey>.

through the creation of a compliance program would go a long way to mitigate such concerns.[31]

[31] Mark Briggs, "Turkey accepts compliance programme as merger remedy", *supra* note 29.

Holding Some Separate and Scrambling the Rest: The Competition Tribunal's Split Decision on a Retail Gasoline Merger Injunction

A. Neil Campbell[*]

Litigated merger cases are rare, and merger injunction proceedings are rarer still. This article examines the Canadian Competition Bureau ("CCB")'s recent experience in challenging portions of the *Parkland Industries / Pioneer Petroleum* retail gasoline transaction before the Competition Tribunal (the "Tribunal").[1] The case is informative regarding:

(i) the Bureau's approach to timing issues and interim measures on a second phase merger review;

(ii) the legal standard for obtaining interim relief under the *Competition Act*[2] ("the Act"); and

(iii) the treatment of factual and expert evidence by the Competition Tribunal in injunction proceedings.

The Tribunal's[3] split decision – issuing the requested hold separate order in 6 of 14 markets – has sent a strong signal that the CCB must bring forward solid evidence in order to interfere with a proposed merger transaction. At the same time, the Tribunal indicated that when the CCB does so, it will be entitled to considerable deference as an enforcement agency with an important mandate to protect consumers and the public interest in competition.

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[1] *Commissioner of Competition v. Parkland Industries et al.*, 2015 Comp. Trib. 4.

[2] *Competition Act*, R.S.C. 1985, c. C-34, as amended.

[3] The Tribunal is a specialty court composed of Federal Court judges and lay experts. Injunction applications are heard by a single judge. The decision in *Commission v. Parkland* was rendered by Justice Gascon who was recently appointed as Chairperson of the Tribunal after a career in private practice in the competition and trade law fields.

I. Interim Measures – Timing and Process

Parkland is a major independent marketer of petroleum products. It owns 143 corporate gas stations and has supply agreements with 539 stations operated by independent dealers.[4] On September 17, 2014, it agreed to acquire the assets of Pioneer, which included 181 corporate stations and supply agreements with 212 independent dealers.

The Act was amended in 2009 to introduce a two-stage merger review process modelled significantly on the U.S. *Hart-Scott-Rodino Act* pre-notification regime. The *Parkland Industries / Pioneer Petroleum* review proceeded through both stages and beyond as summarized in the following chronology:

Milestone	Date	Elapsed Time
Pre-Notification Filings (accompanied by Application for an Advance Ruling Certificate)	October 6	-
Supplementary Information Request ("SIR")	November 5	30 days
Compliance with SIR (covering 21 local markets) (approximately 70,000 documents produced)	January 23	79 days
End of SIR Waiting Period	February 22	30 days
Continuing Review pursuant to Timing Agreement until Notice of Intention to Close on May 13th issued by Parkland	April 27	64 days
Parkland Remedy Proposal related to 10 Local Markets	April 29	2 days
CCB Application to Competition Tribunal (challenging the Merger in 14 Local Markets	April 30	1 day
Injunction Application	April 30	_____
Exchange of Factual and Expert Affidavits and Written Submissions	May 11	11 days
Injunction Hearing	May 12	1 day
Tribunal Decision and Reasons	May 29	17 days

[4] The factual summary in this section is based on the Background, in *Commissioner of Competition v. Parkland Industries et al.*, paras. 5-21.

Several notable points emerge from this chronology:

- Parkland's responses to the SIR were completed in less than 90 days. Speedy responses to SIRs are strongly incentivized by the refresh obligations contained in the CCB's standard SIR instructions. This has generally proven to be achievable under the Bureau's SIR regime (which effectively functions as a "Second Request Lite" process).

- While historically there have been periods of time where the CCB was relatively hostile to timing agreements, this mechanism was used in this case to extend the 30-day waiting period that follows SIR compliance by an additional 2 months, resulting in a total investigation period of almost 7 months.

- The injunction process from application through hearing was completed by the parties in 14 days, before the expiry of the 15-day period covered by the notice of intention to close issued by Parkland in accordance with the timing agreement. This is a blistering pace for substantive litigation. The decision on the injunction took another 17 days, resulting in a one month injunction process from start to finish.

- The CCB did not seek a no-close order, which would have blocked the entire transaction. Instead it applied for a targeted hold separate order relating to the 14 overlap markets in which it is seeking a divestiture. Historically the CCB has also had periods of hostility towards hold separate orders, but it clearly recognized that this technique was an appropriate and adequate mechanism for dealing with the small subset of relevant geographic markets where there were concerns in this case.[5] One would hope and expect that the CCB would adopt a similar approach when it identifies Canadian concerns in the context of a large international transaction where the parties are eager to close in other jurisdictions.

II. Legal Framework for Injunctive Relief

A. Which Type of Injunction?

The *Competition Act* provides two different types of injunctive relief for two distinct purposes. The Tribunal's approach to injunctive relief was informed by the different roles of the two injunction options:

- Prior to Closing of a Merger – The CCB may seek a 30 (extendable to 60) day no-close interim order if it needs additional time to complete a merger review and the parties are about to take actions (e.g., closing) that would substantially impair the CCB's subsequent ability to obtain an effective remedy for any substantial lessening of competition which may eventually be demonstrated because the actions would be difficult to reverse.[6]

- After Applying to Challenge a Merger (before or after the merger has closed) – The CCB may seek injunctive relief until its challenge to the merger is adjudicated on the merits under the principles ordinarily applied by courts in granting interlocutory or injunctive relief.[7] The form of relief could include no-close, hold separate or other measures.

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[5] These markets implicate less than 5% of the Pioneer corporate or independent stations and less than 2% of the Parkland stations.

[6] *Competition Act*, s. 100. An order can also be sought if there has been non-compliance with the pre-notification requirements in Part IX of the *Act*.

[7] *Competition Act*, s. 104.

In this case, the CCB's merger analysis was well advanced and it decided to file the application challenging the merger[8] followed immediately by the application for a hold separate order. This was a sensible choice, since the prior jurisprudence had made it clear that the impairment and reversibility elements of a no-close order are difficult to meet in cases where divestitures are a viable remedy.[9] The Tribunal reinforced this with an *obiter* hint that, since the 2009 amendments, an order seeking more time may be difficult to obtain in situations where a SIR has been issued and responded to.[10]

B. The Test for an Interlocutory Injunction

The ordinary test for injunctive relief in Canadian courts has three well-established components:

- Serious Issue to be Tried – This involves a relatively low threshold (which was easily met in this case)

- Irreparable Harm – This relates to the *nature* (rather than the *magnitude*) of the harm and generally requires a demonstration that the expected harm cannot be quantified and/or cured.

- Balance of (In)convenience – This requires comparison of whether the harm to the respondent from the granting of the order or the harm to the applicant from the refusal to grant the order will be more substantial. Where, as here, the applicant is a public official

[8] See *Competition Act*, s. 92(1), which provides that the Competition Tribunal may issue a prohibition, dissolution or divestiture order (or other orders on consent) if it determines that a merger is likely to prevent or lessen competition substantially.

[9] See *Canada (Director of Investigation and Research v. Superior Propane Inc*. (1998), 85 C.P.R. (3d) 194 (Comp. Trib.) (under a previous formulation of section 100), and *Commissioner of Competition v. Labatt Brewing Co. Ltd. et al*, 2007 Comp. Trib. 9, aff'd 2008 FCA 22 (both of which are discussed in *Commissioner v. Parkland*, paras. 32 and 33).

[10] *Commissioner v. Parkland*, para. 36. It noted that the "review of the Proposed Merger has extended over a period of almost seven months"

discharging a mandate to represent the public interest, those broader interests will be included in the balance.[11]

The test itself was not in dispute, nor was the fact that, as the applicant, the CCB bears the burden of establishing all three elements on a balance of probabilities.[12] However, there was a dispute between the CCB and the respondent regarding the level of evidentiary burden that applies.

The Tribunal applied two somewhat competing general principles from injunction jurisprudence:

- Given the future uncertainties in play, the applicant must provide "clear and non-speculative evidence allowing the Tribunal to make inferences that irreparable harm will result if relief is not granted, using the cautious approach called for in *quia timet* [because he fears] injunctions".[13]

- The public interest nature of the CCB's mandate should be considered not only when assessing balance of convenience but also in the irreparable harm assessment: "In all cases the Tribunal must proceed with the understanding that the actions taken by the Commissioner pursuant to the provisions of the Act are directed to protect competition and serve a valid public purpose."[14]

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[11] The test was set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1, S.C.R. 311. It has been applied in multiple decisions under the Act, including *Canada (Director of Investigation and Research) v. Southern Inc.* (1991), 36 C.P.R. (3d) 22 (Comp. Trib.), *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 16; *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 52, and most recently, *Kobo Inc. v. Commissioner of Competition*, 2014 Comp. Trib. 2 (all of which are briefly summarized in *Commissioner v. Parkland*; paras. 27-29).

[12] *Commissioner v. Parkland*, paras. 56-57.

[13] *Id*, para. 58.

[14] *Id*, para. 63.

C. Irreparable Harm

There are two concerns that typically motivate applications for interim relief in merger cases: preserving the viability of divestiture or dissolution remedies if the merger is found to be anti-competitive, and protecting consumers against the possible exercise of market power in the interim period while the case is being litigated. In this case, the CCB only advanced arguments related to interim period market power and the Tribunal limited its analysis to that type of irreparable harm. While the CCB's approach may have reflected an expectation that it would be difficult to demonstrate irreparable harm when local market divestitures would be expected to remain viable throughout the Tribunal proceedings, it is likely that the CCB will continue to use remedy preservation as a species of irreparable harm in other cases where such risks are more significant.

As will be described more fully below, the CCB succeeded in demonstrating irreparable interim period harm in 6 markets, but in 8 other markets the geographic market definition and market concentration evidence was insufficient. It appears that the Tribunal was influenced by the more extensive time period for investigation and the CCB's ability to compel the production of documents and data through the SIR process under the 2009 amendments when applying the "clear and non-speculative standard" to the injunction application. While the CCB foundered on the clear and non-speculative evidentiary standard in this case, it is likely to be able to avoid repeating this deficiency in future cases and will also benefit from Justice Gascon's clear comments about the importance of the public interest of consumers in the irreparable harm analysis.

D. Balance of Convenience

Justice Gascon reiterated the strong emphasis on the CCB's representation of the public interest in applying the balance of convenience test. On the other side of the ledger, Parkland's claim that a hold separate order would require it to maintain a separate legal entity at extra cost was rejected, and the other costs, losses and harms it anticipated were found to be "uncertain and speculative".[15] As a result, the Tribunal only considered the estimated costs of management for the business to be held separate and losses from delayed efficiencies. Collectively, these were insufficient to offset the public interest during the interim period in the 6 markets where irreparable harm had been established.[16]

III. Market Definition and Competitive Effects Evidence

Since the interim period harm alleged by the CCB focused on the possibility that Parkland could exercise market power in the 14 local markets in dispute, the Tribunal properly concluded that it was necessary to analyze to some degree the competitive effects of combining the Parkland and Pioneer businesses in such markets. It employed the same market definition and competitive effects analytical framework that will later be used in the main "substantial lessening of competition" proceeding on the merits,[17] but with the recognition that the available factual and expert evidence was more limited. This dynamic, combined with the use of the clean and non-speculative standard discussed above, leaves open the possibility that an injunction might be granted in respect of a local market where it is eventually determined that competition will not be lessened substantially, or *vice versa*.

In this case, the key issue in dispute was geographic market definition, which had potentially significant impacts on the post-merger combined market share and industry concentration calculations that were being used by the CCB as the core basis for an inference that unilateral and/or coordinated anti-competitive effects would likely occur during the interim period.

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[15] *Id*, para. 111.

[16] *Id*, paras. 109 and 110.

[17] See generally, *Competition Act*, ss. 92-93; and the analytical framework in Commissioner of Competition, *Merger Enforcement Guidelines* (2011), particularly parts 4 ("Market Definition"), 5 ("Market Shares and Concentration") and 6 ("Anti-Competitive Effects")

The CCB's evidence was put forward in a factual affidavit from one of the investigating case officers plus two reports filed by an economic expert. While the case officer's affidavit asserted that the CCB had considered numerous factors set out in the *Merger Guidelines* that are relevant for geographic market analysis, the Tribunal observed that he had only provided "some limited illustrative examples for five markets out of the 14" and only "a total of four documents relating to three of the markets."[18] The examples were "virtually silent" on the application of the general market definition criteria that had been identified, and there was "no clear explanation as to how the various market concentration figures summarized in the table were arrived at."[19] In contrast, Parkland submitted detailed factual evidence and analysis related to commuting and purchase patterns from Pioneer loyalty card data in various local markets which were more compelling than the "limited and speculative" evidence tendered by the CCB.[20]

The CCB's economic expert focused heavily on the potential for unilateral as well as coordinated anti-competitive effects in retail gasoline markets where a merger would lead to high concentration.[21] However, the Tribunal observed that he based his entire analysis on the geographic market definitions and market concentration calculations provided to him by the CCB, without conducting any independent analysis of this crucial underlying issue.[22]

The Tribunal's scepticism about the CCB's factual and economic evidence on geographic market definition was fortified by the fact that an economic analysis Parkland submitted to the CCB in February had not effectively been responded to in the materials supporting the injunction application over two months later. Parkland's analysis suggested that the CCB concentration

[18] *Commissioner v. Parkland*, para. 75.

[19] *Id*, para. 76.

[20] *Id*, para. 82.

[21] *Id*, paras. 95-98. Parkland's challenges to the adequacy of this evidence (in relation to the 6 markets that were found to have high market concentration) was rejected.

[22] *Id*, paras. 77-81.

calculations could be overstated and that the parties' combined share in several of the markets could be below the 35% unilateral effects "safe harbour" in the *Merger Guidelines*.[23]

The weakness of the CCB's factual and economic evidence on geographic market definition and market concentration affected all 14 of the markets in issue. Oddly, the basis for finding that irreparable harm was likely in 6 but not the other 8 markets derived from the economic report that Parkland had submitted and the CCB's cross-examination of its economic expert. The report showed high concentration levels that were not dissimilar to the CCB estimates for those 6 markets, and Parkland's expert admitted that the "high" or "very high" concentration levels in such markets would give rise to legitimate competition concerns.[24]

The treatment of the market definition evidence is the single most important lesson from the *Parkland* case. Despite generally being prepared to accord deference on both irreparable harm and the balance of convenience to the CCB as a public interest law enforcer, the Tribunal has sent a clear signal that injunction applications must be grounded with evidence and analysis. The CCB has enormous leverage in merger cases because of the significant time, cost, reputation and other disincentives for merging parties to engage in contested litigation. As a result, most cases in which the CCB staff conclude that competition concerns that exist are settled by the negotiation of divestitures or other consent agreements; alternatively, transactions may simply be abandoned in the face of CCB threats to apply to the Tribunal to block a transaction.[25]

Nevertheless, when a party is prepared to put the CCB to the proof of the competition concerns, as Parkland did, the Tribunal has indicated that at the end

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[23] *Id*, para. 82; *Merger Guidelines*, para. 59.

[24] *Id*, paras. 84-85.

[25] See, *e.g.*, Competition Bureau, Statement Regarding the Proposed Acquisition of Bruce Telecom by Eastlink, August 19, 2014, online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03790.html.

of a long review process with access to thousands of documents and significant time for rigorous economic analysis, it will not accept staff assertions, accompanied by a few illustrative examples, a few random documents and unsupported calculations as meeting the "clear and non-speculative" evidentiary standard.[26] As the Tribunal noted:

> "Section 104 applications are not situations where an application is made at an embryonic stage of an investigation or with little time for preparation. At this stage, the Commissioner should possess evidence supporting fundamental elements of his merger review beginning with market definition and market concentration when these are pivotal to his case."[27]

The Tribunal's approach in this case bears some similarity to the Supreme Court of Canada's recent reversal of the CCB's successful post-closing challenge of a merger in the oilfield waste services industry. In *Tervita*, the Tribunal and the Federal Court of Appeal had accepted the CCB's claim that the merger would prevent substantial competition that would otherwise likely have materialized in the future, and rejected the statutory efficiencies defence put forward by the acquirer.[28] However, the Supreme Court allowed Tervita's appeal on the basis that the CCB had not quantified those anti-competitive effects which were quantifiable, and which were required in order to undertake the balancing involved in the efficiencies defence. As a result, it assigned a value of zero to such anti-competitive effects, with the result that they were offset by the relatively small amount of efficiencies that had been established by Tervita.[29] The clear going forward message to the CCB was that, where anti-competitive effects are quantifiable, it must present the factual and economic evidence necessary to prove

[26] *Commissioner of Competition v. Parkland*, particularly para. 83.

[27] *Id*, para. 91.

[28] *Commissioner of Competition v. Tervita Corporation et al*, 2012 Comp. Trib. 14, aff'd 2013 FCA 28.

[29] *Tervita Corporation, et al. v. Commissioner of Competition*, 2015 SCC 3.

the expected effects on the balance of probabilities standard. The Tribunal's decision in *Commissioner v. Parkland* is entirely consistent with this approach.

Merger Efficiencies in the United States and Canada: An Overview and Key Takeaways for Cross-Border Mergers

Brian A. Facey and Julia Potter*

The U.S. Supreme Court has never approved efficiencies as a defense that will save an otherwise anti-competitive merger. However, lower courts in the U.S., including the Sixth, D.C., Eighth and Eleventh Circuits, and most recently, the Ninth Circuit, have suggested that efficiencies could save the day for the right merger,[1] albeit most recently cautioning "we remain skeptical about the efficiencies defense in general and about its scope in particular."[2]

In contrast to the treatment of efficiencies in U.S. courts, in its recent *Tervita* decision, Canada's Supreme Court approved a merger that prevented competition and preserved a monopoly based solely on the "efficiencies defense." The Supreme Court of Canada "could not accept that more than marginal efficiency gains are required for the defense to apply."[3]

Thus, while it is clear that merger efficiencies are relevant to merger analysis in the United States, and Canada (and a number of other countries), significant differences remain as to the manner in which they are to be considered, the weight they are to be given, and what kinds of efficiencies actually matter.

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[1] *See, e.g.*, *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, *FTC v. Univ. Health, Inc.*, 938 F.2d 1206.

[2] *St. Alphonsus Med. Ctr. – Nampa Inc. v. St. Luke's Health System, Ltd.*, 778 F.3d 775 (9th Cir. 2015) at 790 [*St. Luke's*].

[3] *See Tervita Corp. v. Canada (Commissioner of Competition),* 2015 SCC 3 at 151 [*Tervita*], citing Brian A. Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (Markham, ON: LexisNexis Canada Inc., 2013).

These different standards raise questions as to how efficiencies are to be treated in cross-border mergers, which is particularly important given the 2014 publication of the Memorandum of Understanding on *Best Practices on Cooperation in Merger Investigations* jointly issued by the U.S. Antitrust Agencies and the Canadian Competition Bureau.[4]

In this article, we provide an overview of recent developments and practical guidance for playing the efficiencies card in merger review in cross-border cases.

I. Overview of Recent Developments and the Role of Merger Efficiencies in the U.S. and Canada

In the U.S., pursuant to section 7 of the *Clayton Act*,[5] merger efficiencies are assessed by the U.S. Agencies as part of the overall analysis of the anti-competitive effects of the merger, rather than as a defense. The position of the U.S. Agencies, as stated in the 2010 Horizontal Merger Guidelines,[6] is that where cognizable efficiencies exist such that the merger is not likely to harm customers and to be anti-competitive, the merger will not be challenged.

U.S. jurisprudence has similarly recognized, but has not fully applied or endorsed, the application of an efficiencies defense to mergers.[7] In its 2015 decision in *St. Luke's*, the U.S. Court of Appeals for the Ninth Circuit noted that "a defendant can rebut a *prima facie* case with evidence that the proposed merger

[4] Competition Bureau, *Best Practices on Cooperation in Merger Investigations*, (25 March 2014) online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Canada-US-Best-Practices-en-2014-03-25.pdf/$file/Canada-US-Best-Practices-en-2014-03-25.pdf [*Canada-US MOU*].

[5] 15 U.S.C.A. 12-27.

[6] U.S. Department of Justice and the Federal Trade Commission, "*Horizontal Merger Guidelines*" (August 19, 2010), available online at: <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>, at section 10 [*U.S. Merger Guidelines*].

[7] *See, e.g.*, *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, *FTC v. Univ. Health, Inc.*, 938 F.2d 1206.

will create a more efficient combined entity and thus increase competition”.[8] However, in the course of affirming a trial court decision for the plaintiff Federal Trade Commission, the Court rejected the defendants’ proffered efficiencies defense, writing that the defendant “did not demonstrate that efficiencies resulting from the merger would have a positive effect on competition”.[9] Looking beyond the case immediately before it, the Ninth Circuit also stated that “we remain skeptical about the efficiencies defense in general and about its scope in particular.”[10]

In the U.S. a burden-shifting framework is usually adopted whereby the U.S. Agencies first establish a prima facie case that a merger is anti-competitive. The burden then shifts to the defendant to rebut the prima facie case.[11] Upon the production of such evidence, the U.S. Agencies integrate their assessment of the efficiencies into the analysis of the merger’s competitive effects. Merging parties must substantiate the efficiencies to show how they would enhance the merged firm’s ability and incentive to compete and why each would be merger-specific.[12] Efficiencies are most likely to make a difference to the U.S. Agencies’ analysis of the merger when the likely anti-competitive effects, absent the efficiencies, are not great.[13] In cases involving mergers that would create monopolies or near-monopolies, the transaction would almost never be justified by alleged efficiencies.[14]

[8] *St. Luke's, supra* note 2 at 790.

[9] *Id.* at 792.

[10] *Id.* at 790.

[11] *Id.* at 783.

[12] *U.S. Merger Guidelines, supra* note 6 at 29.

[13] *Id.* at 31.

[14] *Id.*

In Canada, by contrast, merger efficiencies, as a matter of statute and judicial rulings, carry great weight.[15] Section 96 of the *Competition Act* sets out an explicit merger efficiencies defense: if the proposed transaction is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the proposed transaction, and that the gains in efficiency would not likely be attained if the merger were to be prohibited, the Competition Tribunal cannot block the transaction.[16]

The SCC has ruled that the evaluation of efficiencies, not the impact of a proposed transaction on consumers, is the dominant purpose of merger review under the *Competition Act*.[17] So much so, that even mergers which might lead to price increases, or the creation of a monopoly, are to be allowed if substantial merger efficiencies are likely to arise from the transaction.

In Canada, parties must still prove that the alleged gains in efficiency are likely to occur from the merger. They must also show that the efficiencies would not likely be attained if "an order was made" – typically an order to prevent all or part of the merger.[18] However, at this stage, the difference between Canada and the U.S. becomes most apparent. In Canada, the efficiencies from the merger are considered to determine whether the merger is ultimately welfare enhancing to the Canadian economy.

In both *Superior Propane* and *Tervita,* the [then] Commissioners failed to properly quantify the alleged anti-competitive effects. In *Superior Propane*, the Commissioner's experts failed to adduce evidence of pre-merger market power in

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[15] *See Competition Act*, R.S.C. 1985, c. C-34, s. 96 [*Competition Act*] and *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2002), 18 C.P.R. (4th) 417, aff'd 2003 FCA 53 [*Superior Propane*].

[16] *Id, Competition Act*.

[17] *Tervita, supra* note 3 at 111-113.

[18] Competition Bureau, *Merger Enforcement Guidelines*, available online at: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf >, at para 12.13.

quantifying the producer surplus deadweight loss (DWL).[19] In *Tervita*, there was no evidence at all of DWL, despite a finding that prices would have significantly fallen in the absence of the merger.[20] In both cases, therefore, the efficiencies were greater than and offset the anti-competitive effects of the merger.

II. Key Takeaways for Cross-Border Cases

The U.S. and Canada have recently attempted to closely align their approaches to merger review. In March 2014, the U.S. Agencies and Canadian Competition Bureau released a MOU called "Best Practices on Cooperation in Merger Investigations," which addresses the current practices of the agencies in cooperating on cross-border merger reviews. The MOU recognizes that the agencies have a mutual interest in reaching consistent merger review outcomes, increasing the efficiency of the processes and reducing the burden on merging parties. In part, the agencies also recognize that it may be beneficial to coordinate on the assessment of competitive effects <u>and efficiencies</u>.[21]

However, key differences remain between the U.S. and Canada in the treatment of efficiencies. Some of these differences are as follows:

1. The efficiencies defense can be used in Canada to save a merger to duopoly or monopoly;

2. Assuming efficiencies are present, a merger in Canada can lead to higher prices, lower services and less choice;

3. There is no requirement in Canada that pricing and other benefits from efficiencies be passed-on to consumers;

[19] *Superior Propane, supra* note 15 at 169 (18 C.P.R. (4th) 417).

[20] *Tervita, supra* note 3 at 134, 136-137.

[21] *Canada-US MOU, supra* note 4.

4. Purchasing synergies that are solely wealth transfers between suppliers and the merging parties may not count as efficiencies in Canada – even if they reduce the merging parties' variable costs;

5. Fixed cost savings are important and cognizable in Canada;

6. Because all efficiencies from the merger that benefit the Canadian economy are cognizable, cost savings that arise from the merger outside of the relevant product market can count in favour of the merger in Canada; and

7. Evidence of merger efficiencies in Canada often come from third-party expert reports, rather than just from internal data and documents of the parties.

Despite the differences between the U.S. and Canadian treatment of efficiencies during merger reviews, it is possible to make the most out of merger efficiencies on both sides of the border in any given trans-border case.

First, it is important to acknowledge the differences between jurisdictions.

Second, it is possible and advisable to ensure that the evidence on efficiencies is marshalled and presented in a way that meets the test for each jurisdiction. A U.S. efficiencies report is unlikely to meet the Canadian criteria on its own given the differences discussed above. Efficiencies evidence specific to Canada is typically required to address the unique aspects of the Canadian test, just as an expert report that quantifies efficiencies based on the Canadian approach will fall short in the U.S.

In some cases efficiencies may be particularly important in Canada, as often markets are more concentrated given Canada's vast geography and smaller population. Indeed, this characteristic is the reason that section 96 was enacted in the first place,[22] and the reason the Courts have again breathed new life into the defense north of the border.

[22] *Tervita*, *supra* note 3 at 87.

Gun Jumping: Experience under the Brazilian Antitrust Law

Maria Eugênia Novis and Ursula Pereira Pinto*

I. Introduction

Since the entry into force of Law No. 12.529/2011 (the "Antitrust Law") on May 29, 2012 and the adoption of a pre-merger review system in Brazil, parties to mergers subject to mandatory filing with the Administrative Council for Economic Defense ("CADE") are prevented from consummating the transaction before antitrust clearance is granted. In other words, CADE's decision has become a condition precedent to closing, not only for domestic deals but also for foreign-to-foreign deals that are notifiable in Brazil.

Under this scenario, gun jumping in Brazil has become a hot topic among members of the international antitrust community for three main reasons. First, a finding of gun jumping may lead to the imposition of a fine ranging from R$60,000 to R$60,000,000 (approximately US$19,000 to US$19,000,000), the annulment of the infringing acts carried out by the merging parties, and/or the launch of an investigation for anticompetitive behavior.[1] These penalties can be applied not only in cases where the merging parties fail to submit a notifiable transaction to CADE's scrutiny and close the deal in the absence of the necessary regulatory approval, but also where the parties file a notification and engage in acts that can be deemed to amount to premature integration before obtaining CADE's clearance. In addition to that, even though the Antitrust Law and CADE's regulations do not provide clear-cut guidance on which practices could amount to premature integration,[2] CADE started to assess gun jumping issues in

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[1] Up to the present date CADE has not declared the annulment of any infringing act or determined the prosecution of the merging parties for anticompetitive behavior as a penalty for gun jumping.

[2] The Antitrust Law provides that the merging parties shall keep their facilities and the competitive conditions unchanged up to the moment when the clearance decision becomes final and

concrete matters right after the entry of the Antitrust Law into force, showing that it would apply the severe penalties the Law provides to ensure compliance with the suspensory regime. Finally, any act aimed at carving out the Brazilian part of foreign-to-foreign transactions to allow closing abroad will subject the merging parties to the penalties identified in the Law.

II. CADE's gun jumping precedents

From August 2013 to July 2015, CADE reviewed at least seven merger filings in which possible gun jumping situations were extensively assessed.

In the *OGX/Petrobras* matter,[3] which concerned the acquisition by OGX of Petrobras' 40% interest in a block for hydrocarbon exploration, CADE's Superintendence-General found that certain contractual provisions could amount to gun jumping. The problematic provisions were kept confidential by CADE, but the analysis of the public versions of the case documents evidences that gun jumping concerns arose in connection with provisions that established the immediate assumption of rights and liabilities by the buyer; participation of the buyer in the decisions taken by the seller in relation to the asset to be sold; and the sharing of sensitive information between the parties before antitrust clearance. In view of those provisions, CADE's Superintendence-General decided to challenge the transaction before the agency's Administrative Tribunal. At the Tribunal's level, the merging parties decided to settle the matter and paid a contribution of R$3 million.

enforceable. Complementing this provision, CADE's Internal Regiment sets forth that one the parties shall not transfer any asset or exercise any type of influence over the other, and the exchange of confidential information shall be limited to the minimum level necessary to execute the binding transaction agreement.

[3] *OGX Petróleo e Gás/Petrobras Brasileiro S.A.* (Act of Concentration No. 08700.005775/2013-19).

In the *UTC Óleo e Gás/Potióleo* matter,[4] which concerned the acquisition by UTC of Potióleo's 50% interest in an exploration block, CADE's Superintendence-General again deemed some contractual provisions to be problematic, including those establishing that the transaction would be effective before the date of execution of the agreement; determining the advanced partial payment of the consideration for the purchased asset; and allowing the sharing of profit and costs realized from the purchased assets between the parties to the transaction. Moreover, the lack of a specific provision indicating that CADE's clearance was a condition precedent to closing was also deemed relevant in establishing that the parties were engaged in gun jumping. The parties also decided to settle the matter and paid a contribution of R$60,000.

The third matter was decided on the same date as the *UTC Óleo e Gás/Potióleo* matter (February 5, 2014) and also involved the acquisition of a stake in an exploration block by UTC Óleo e Gás.[5] CADE adopted the approach that the parties engaged in gun jumping because of a contractual provision that established the advanced partial payment of the consideration the buyer had agreed to pay the seller for the asset to be sold. The parties again settled the matter and undertook to pay a contribution of R$ 60,000.

In the *Fiat/Chrysler* matter,[6] which concerned the acquisition by Fiat of a 41.46% interest in Chrysler, the merging parties voluntarily informed CADE upon filing the notification that the transaction had already closed two months earlier, and submitted that it would not be subject to mandatory filing under the Antitrust Law since it related to a mere consolidation of control of Fiat over Chrysler. CADE's Superintendence-General and CADE's Attorney General did not agree with the parties' argument that the transaction was not notifiable, and concluded

[4],*Potióleo S.A./UTC Óleo e Gás S.A*. (Act of Concentration No. 08700.008292/2013-76).

[5]*UTC Óleo e Gás S.A./Aurizônia Petróleo S.A*. (Act of Concentration No. 08700.008289/2013-52).

[6] *Fiat S.P.A./Chrysler Group LLC* (Act of Concentration No. 08700.002285/2014-41).

that they had engaged in gun jumping by closing before they had received approval. The merging parties decided to settle the matter with CADE's Administrative Tribunal and paid a contribution of R$600,000.

CADE also reached a settlement was in the *GásLocal/Gasmig* matter,[7] which involved a supply and cooperation agreement for liquefied natural gas ("LNG") between GásLocal and Gasmig. The agreement was submitted to CADE nearly one year after its execution, and according to the parties it would not fall under the concept of associative agreement and consequently could not be deemed a concentration subject to CADE's scrutiny. As in the *Fiat/Chrysler decision,* CADE's Superintendence-General rejected the parties' arguments and indicated that certain acts evidenced the consummation of the transaction, including activities relating to the construction of regasification site for LNG on real estate owned by Gasmig that was being leased to GásLocal for free; payments made by Gasmig to GásLocal in return for investments made in the real estate and for the supply of LNG; Gáslocal's supply of LNG to companies that were clients of Gasmig; and the lack of a contractual provision in the agreement between Gáslocal and Gasmig establishing that CADE's approval was a condition precedent to closing. The parties also settled the matter at the Tribunal's level and paid a contribution of R$90,000.

The only gun jumping precedent in which CADE required more than the payment of a contribution to settle the matter was *Goiás Verde Alimentos Ltda./Brasfrigo Alimentos Ltda*.[8] Goiás Verde acquired the manufacturing facilities and four brands of canned vegetables from Brasfrigo through an agreement executed in October 2012, but did not notify the transaction to CADE even though the parties met the legal revenue threshold. CADE subsequently

[7] *GNL Gemini Comercialização e Logística de Gás Ltda./Companhia de Gás de Minas Gerais* (Act of Concentration No. 08700.000137/2015-73).

[8] *Goiás Verde Alimentos Ltda./Brasfrigo Alimentos Ltda.* (Act of Concentration No. 08700.010394/2014-32).

learned about the transaction and requested the merging parties to notify. In a settlement entered into on April 22, 2015, in addition to requiring the payment of a contribution of R$3 million, CADE also prohibited buyer Goiás Verde from using the main brand of seller Brasfrigo for two years.

The only precedent in which possible gun jumping issues were extensively discussed and CADE concluded that the merging parties did not breach the Antitrust Law was the *Petrobras/Total E&P* matter.[9] CADE's Administrative Tribunal, which reviews decisions of the Superintendence-General, adopted the approach that, although certain contractual provisions in the transaction agreement may indicate that the merging parties could have engaged in gun jumping, the antitrust authority must assess whether the parties to the transaction actually implemented these provisions. In view of information provided by Petrobras and Total E&P on interim period activities, the Tribunal reached the conclusion that premature consummation had not taken place.

In the *Petrobras/Total E&P* matter, CADE recapped its findings in other precedents and drafted a non-exhaustive list of practices that could lead to a finding of gun jumping, including transfer of assets; beneficial ownership of assets by the buyer; exercise any type of influence of one party over the other; exchange of commercially sensitive information; full or partial payment of the transaction consideration before CADE's approval; a transaction with an effective date prior to the date of execution of the respective agreement; and transfer to or beneficial ownership of securities (which could happen both where the seller is paid in shares of the buyer and starts enjoying the rights associated with those shares the before closing, and where the seller is paid in cash and the buyer starts enjoying the rights associated with the target's shares before closing).

[9] *Petróleo Brasileiro S.A./Total E&P do Brasil Ltda*. (Act of Concentration No.08700.007899/2013-39).

III. CADE's gun jumping guidelines

In view of the number of gun-jumping precedents in the first three years after the effective date of the Antitrust Law and the legal uncertainty that the various decisions had created, CADE and a group of Brazilian private practitioners in the drafting of Guidelines for the Analysis of Premature Consummation of Mergers (the "Guidelines").[10]

The Guidelines, published on May 20, 2015, identify three main areas that may pose gun jumping risks, to wit, (i) exchange of sensitive information; (ii) contractual clauses of the transaction agreement; and (iii) parties' activities prior to closing.

A. Exchange of sensitive information

CADE acknowledges that any transaction requires a certain degree of exchange of information between the parties, especially during the due diligence phase, and the permitted extent of such exchange varies depending of the characteristics of the deal concerned.

However, CADE clarifies that abuse in the exchange of competitively sensitive information may amount to gun jumping. The Guidelines provides examples of competitively sensitive information, such as non-aggregated information on costs; capacity and expansion plans; marketing strategies; pricing; clients' and suppliers' related information; employees' wages; competitive strategies; potential acquisitions plans and R&D plans.

The Guidelines also feature a set of recommended practices to avoid gun jumping during the negotiation phase. Such cautions include the formation of independent committees for information exchange purposes (clean teams and executive committees), whose members shall execute non-disclosure agreements,

[10] Neither the authors nor any members of Machado Meyer Advogados participate in the drafting of the Guidelines.

as well as the organization of parlor rooms where executives can discuss future integration steps, ideally under the supervision of an independent party, and thereby exchange competitively sensitive information without violating the Antitrust Law.

B. Contractual provisions

The Guidelines also shed light on which types of contractual provisions may reduce competition between the merging parties while the merger review is pending, thus amounting to gun jumping. Such provisions relate to establishing non-competition obligations between signing and closing; paying the full or partial transaction price in advance on a non-refundable basis (except in case of escrow, break-up fee and down payment); determining that the transaction would be effective before the date of execution of the transaction agreement; granting one of the merging parties powers to influence the strategic behavior of the other (e.g., joint decisions over pricing, clients, commercial policy, marketing strategy, commercial planning etc.); and governing activities that cannot be reversed or would be difficult to be reversed later on. Even though the Guidelines do not explicitly address conduct of business covenants in merger agreements, it is reasonable to assume in view of these contents that provisions granting the buyer certain rights in non-ordinary course of business situations (e.g. approval of extraordinary expenses or divestments) are acceptable.

C. Parties' activities prior to closing

According to the Guidelines, the following practices prior to CADE's clearance may pose gun jumping concerns: transfer or beneficial ownership of any asset; exercise of voting rights or influence over activities of the merging party; receipt of profits of the other merging party; joint development of sales or marketing strategies; joint development of products; appointment of board members; exclusive licensing of IP rights from seller to buyer; interruption of previously planned investments; and integration of sales department, among others.

The Guidelines also clarify which factors CADE must take into account when imposing penalties for gun jumping.

The calculation of the monetary fine shall take into account (i) the status of the transaction when the gun jumping was found (i.e., if the transaction was not yet filed, the transaction was filed after CADE's inquiries, or it was duly filed but the parties engaged in gun jumping before CADE's decision); (ii) whether the transaction raised competition concerns (i.e. was the transaction unconditionally cleared, cleared with remedies or blocked); and (iii) the duration of the conduct and the size of the merging parties.

In relation to the administrative prosecution for anticompetitive behavior, CADE shall assess if premature consummation entailed practices that may amount to antitrust violations, such as exchange of sensitive information, price fixing, output restriction, influence of a company over the counterpart etc., especially when the activities of the merging parties overlap or are vertically integrated.

As to the most controversial gun jumping penalty established by the Antitrust Law – the annulment of the acts practiced by the parties – the Guidelines generically mention that CADE must take into consideration the time elapsed between the relevant acts and CADE's decision, the adequacy of declaring the annulment of the acts, and the potential effects of such penalty on competition.

IV. Conclusion

The publication of the Guidelines are a positive development in Brazil, as they contribute to reduce the high level of legal uncertainty on which acts may pose gun jumping concerns that followed the Antitrust Law's introduction of a suspensory regime and the large number of precedents in which CADE discussed premature integration issues.

The Guidelines' section on exchange of sensitive information shows that cautions typically adopted in M&A negotiations, with which the business community is already familiar, will be sufficient to neutralize gun jumping concerns in Brazil during the due diligence and negotiation phases. However, merging parties should pay careful attention to certain contractual provisions and interim period activities that could raise concerns in the light of the clarifications introduced by the Guidelines.

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