High-Tech Mergers: Top of the Antitrust Enforcement Agenda

Jacqueline Grise and Howard Morse
Cooley LLP

Antitrust enforcement in high-tech industries – those that employ the most advanced, cutting-edge technology – is a top priority for the Department of Justice (DoJ) and Federal Trade Commission (FTC).

The drumbeat is only getting louder, with a slew of recent speeches and congressional testimony putting a spotlight on the unique antitrust issues raised when companies in the high-tech sector propose to merge with competitors.

The DoJ has recently noted:

> while the rapid pace of change in technology markets can sometimes minimize the potential for the accumulation or misuse of market power, other common attributes of high-tech markets counsel careful scrutiny.1

FTC officials have likewise noted the agency’s commitment to devote ‘significant resources to promoting competition in [the pharmaceutical industry] as one way to contain health care costs’.

The FTC recently reported in Congressional testimony:

> in the last two years alone the Commission required divestitures to remedy competitive concerns stemming from seven proposed transactions involving drug makers, preserving competition in the sale of over 48 drugs used to treat a variety of condition, from hypertension and diabetes to cancer.3

Technology mergers appear to be wearing targets on their back, evidenced by numerous challenges to non-Hart–Scott–Rodino (HSR) reportable deals, including the DoJ’s recent successful suit against Bazaarvoice/PowerReviews, as well as a string of recent FTC challenges in the pharmaceutical and life sciences industries.

Understanding the unique issues that drive enforcement in the technology arena – from the importance of intellectual property and innovation competition, to network effects and Food & Drug Administration regulations, as well as new trends such as an increased focus on data as a barrier to entry and follow-on biologics – is essential to achieving merger clearance in close cases.

No deal too small: antitrust challenges target non-reportable high-tech deals

The DoJ and FTC successfully challenged at least five non-HSR reportable deals in 2013 – as many as the agencies have collectively challenged in at least the past 10 years. Two of those five challenges were in the tech industry: Solera Holdings’s acquisition of Actual Systems of America; and Bazaarvoice’s acquisition of PowerReviews.

Like the FTC’s challenge in Solera, the DoJ began investigating Bazaarvoice’s acquisition of PowerReviews only after it was consummated in June 2012. While the transaction was valued at $168 million, PowerReviews had insufficient assets to meet the HSR size-of-person test.

The government often learns of non-reportable transactions from competitors that want to throw a monkey wrench into the deal, from customers who experience or fear price increases, or from press reports. Interestingly, the DoJ recently disclosed that it learned of the Bazaarvoice transaction when a staff attorney read about the deal in a trade publication.

The DoJ has been quick to point to its challenge of the Bazaarvoice transaction as illustrative of its enforcement approach to high-tech transactions and transactions that do not trigger an HSR filing. DoJ

US v Bazaarvoice: DoJ litigates non-reportable, consummated acquisition

Like the FTCs’ challenge in Solera, the DoJ began investigating Bazaarvoice’s acquisition of PowerReviews only after it was consummated in June 2012. While the transaction was valued at $168 million, PowerReviews had insufficient assets to meet the HSR size-of-person test.

The government often learns of non-reportable transactions from competitors that want to throw a monkey wrench into the deal, from customers who experience or fear price increases, or from press reports. Interestingly, the DoJ recently disclosed that it learned of the Bazaarvoice transaction when a staff attorney read about the deal in a trade publication.

The DoJ has been quick to point to its challenge of the Bazaarvoice transaction as illustrative of its enforcement approach to high-tech transactions and transactions that do not trigger an HSR filing. DoJ

The size-of-person test is met if one party to a transaction has $151.7 million or more in annual sales or total assets, and the other has $15.2 million or more in annual sales or total assets. If the seller is not engaged in manufacturing, and many high-tech firms are not, the applicable test is whether the acquired person had annual sales of $151.7 million or total assets of $15.2 million.

The size-of-transaction test is met if the buyer will hold voting securities or assets of the seller valued in excess of $75.9 million.

In addition, if the value reaches a significantly higher level – now set at $303.4 million – a filing can be required even if the size-of-person test is not satisfied.

Perhaps more so than any other industry, the government pays attention to high-tech deals that fall below the HSR reporting thresholds. This frequently occurs in the tech sector, either because the transaction value is under the HSR ‘size-of-transaction test’ (as was the case in Solera) or because the to-be-acquired firm does not meet the requisite ‘size-of-person’ threshold (as was the case in Bazaarvoice).

Solera/Actual Systems: FTC challenges $8.7 million technology deal

In July 2013, the FTC announced that it had reached agreement with Solera, a provider of software and services to the automobile insurance claims processing industry, to divest assets to resolve FTC charges that Solera’s consummated $8.7 million acquisition of rival Actual Systems violated antitrust law.4

According to the FTC, Solera and Actual Systems were two of only three meaningful competitors providing yard management systems software for the automotive recycling industry. The FTC did not allege that the acquisition – which had closed in May 2012 – had resulted in a price increase, but did contend that the acquisition would allow Solera to exercise market power. Solera agreed to sell the US and Canadian yard management systems software business that it acquired from Actual Systems to settle the FTC’s allegations.

US v Bazaarvoice: DoJ litigates non-reportable, consummated acquisition
officials have called the decision 'a reminder that even transactions that are not reportable under the Hart-Scott-Rodino regulations may violate the antitrust laws'.

**US v Bazaarvoice: a case study for assessing high-tech mergers**

In technology mergers, parties routinely argue that rapid innovation, low barriers to entry and the threat of dynamic competition from tech giants prevent any hypothesised ability to exercise market power, even in concentrated markets.

This was a central issue in the Bazaarvoice litigation, as Bazaarvoice strenuously emphasised the dynamic nature of the market for online product ratings and review platforms, and argued that well-funded technology companies in adjacent spaces would constrain the merged firm.

In January 2014, following a three-week trial, Judge William Orrick of the Northern District of California disagreed, holding that Bazaarvoice’s acquisition of its ‘closest and only serious competitor’ was likely to substantially lessen competition in violation of section 7 of the Clayton Act. The 141-page decision has been called out by DoJ officials as ‘important reading for technology companies and their counsel’.

The Bazaarvoice Court undertook a fairly orthodox assessment of competitive effects, defining a relevant market and assessing market shares, emphasising ‘the high concentration of the relevant market is the key to this case’. The Court recognised that the 2010 DoJ/FTC Horizontal Merger Guidelines’ ‘appear to signal a turn away from the pivotal significance with which the antitrust community has traditionally imbued market definition’, but nevertheless reasoned that even under the revisions ‘market definition can be informative regarding competitive effects’.

In many ways, Bazaarvoice reprises the DC District Court decision enjoining H&R Block’s proposed acquisition of TaxACT, which was the last litigated merger in the tech sector. There, the Court relied on the Supreme Court’s 1962 Brown Shoe decision for the proposition that ‘merger analysis begins with defining the relevant product market’. In both He-R Block and Bazaarvoice, a finding of high concentration played a key role in sinking the merger. Some may read into these decisions reluctance by courts to embrace the ‘more flexible framework’ set out in the agencies’ 2010 Merger Guidelines.

The bottom line, however, is that the agencies and courts are willing to consider arguments that the evolving nature of high-tech markets can trump hypothesised anti-competitive effects, but evidence that the merging parties ‘operate in a dynamic and evolving field’ is not enough. The parties must prove ‘that the evolving nature of the market itself precludes the merger’s likely anti-competitive effects’. The problem for Bazaarvoice, ultimately, was that the court found the evidence that new firms would enter the market unpersuasive.

In this regard, Bazaarvoice is consistent with earlier merger decisions challenging mergers among high-tech firms, including United States v Oracle and United States v SunGard, where the courts similarly demonstrated a willingness to consider the dynamic nature of high-tech markets – as long as the parties could prove that rapid change meant current market shares were not a good predictor of future market power. As one DoJ official remarked, the Bazaarvoice decision ‘confirms that merger analysis in high-tech markets, as in other markets, is highly fact-specific’, and that ‘[h]igh tech mergers do not get a free pass’.

**Innovation competition: a central issue in tech mergers**

The 2010 Merger Guidelines set out an analytical framework for assessing whether a transaction may ‘diminish innovation competition by encouraging the merged firm to curtail its innovative efforts’.

The Guidelines theorise that where a firm is engaged in efforts to introduce new products that would capture substantial revenues from the other merging firm, incentives to continue existing product development efforts may diminish. They also suggest that innovation may decline where a merger would combine two of a small number of firms with the capabilities to successfully innovate in a specific direction.

By now it is clear that innovation competition is an important issue for enforcers. As one senior Antitrust Division official recently emphasised, ‘protecting innovation is often a decisive factor in our enforcement decisions’, and evidence of ‘pre-merger “one-upmanship” is a significant red-flag’.

Concern about reduced innovation is a common trigger for merger enforcement against high-tech mergers. The FTC’s challenge to media research company Nielsen Holdings NV’s acquisition of Arbitron Inc is a good example. There, both firms were developing national syndicated cross-platform audience measurement services, which allow audiences to be measured accurately across multiple platforms, such as TV and online.

The FTC contended that as a result of the acquisition, advertisers, ad agencies and programmers would likely pay more for such services because Nielsen and Arbitron were best positioned to introduce such products, as they were the only firms with the technology, assets and brand recognition necessary to enter.

While acknowledging that competitive effects can be difficult to predict when a product is not yet on the market, a majority of FTC Commissioners reasoned that merger enforcement should interdict competitive problems in their incipency and that ‘certainty about anti-competitive effect is seldom possible and not required for a merger to be illegal’. FTC Chairwoman Ramirez asserted that “[e]ffective merger enforcement requires that we look carefully at likely competitive effects that may be just around the corner.”

One-upmanship was at issue in the FTC’s challenge to Integrated Device Technology’s proposed acquisition of PLX Technology. The FTC emphasised that the two semiconductor manufacturers had competed to add features and functionality, and the acquisition would eliminate such competition. Similarly, in Bazaarvoice the DoJ relied on documents suggesting competition between the merged firms had been an important driver of innovation.

At the same time, merger enforcement involving markets that do not yet exist remains controversial, as one Republican FTC commissioner dissented in Nielsen on the ground that:

> it is inherently more difficult in future market cases to define properly the relevant product market, to identify likely buyers and sellers, to estimate cross-elasticities of demand or understand on a more qualitative level potential product substitutability, and to ascertain the set of potential entrants and their likely incentives.

The Commissioner would instead acknowledge the FTC’s ‘institutional limitations’ and the ‘present inability of economic theory and evidence to support confident and reliable prediction’.

‘Big data’ as a barrier to entry

US antitrust enforcers also keep a close watch on mergers that may consolidate databases and have recently focused on ‘Big Data’ as a barrier to entry.
The FTC’s challenge to CoreLogic’s proposed acquisition of DataQuick Information Systems exemplifies this trend. In CoreLogic, the FTC alleged that the merger would lessen competition in the market for national assessor and recorder bulk data, which provides information regarding the ownership, status and value of properties. Like other cases involving data, the competitive concern was not about access – the underlying data was available from local government offices. Rather, the Commission alleged that effective competition requires ‘several years of national historical data and an ability to provide go-forward national data,’ which posed a barrier because it would be ‘cost-prohibitive for a potential entrant to collect the necessary historical and go-forward data.’

A similar analysis led the FTC to challenge Fidelity National Financial’s proposed acquisition of Lender Processing Services, which involved local markets for title information services. The FTC alleged that entry would require ‘any potential entrant to assemble a complete and accurate index of historical property records,’ which would be ‘costly and time-consuming.’

**Remedies in the high-tech sector**

Numerous recent merger enforcement settlements illustrate the government’s willingness to at times accept a remedy short of divestiture in challenges to high-tech deals, where concerns often revolve around access to intellectual property that can be addressed through licensing and other behavioural remedies.

In CoreLogic, for instance, the FTC required CoreLogic – which had previously licensed its data to DataQuick – to grant a licence that would allow another firm to ‘step into the shoes of DataQuick as CoreLogic’s licensor.’ The fix included provisions to provide the licensee with ‘information and support’ necessary to compete, including information regarding customers and data management, technical support, waiver of provisions in employment contracts to help the licensee hire and retain former DataQuick employees, and requirements that CoreLogic provide customers the opportunity to terminate existing contracts and switch to the licensee.

The FTC’s consent agreement in Nielsen/Arbitron similarly required Nielsen to permit another firm to replicate the seller’s efforts to develop a national syndicated cross-platform audience measurement service.

**Developments in FTC enforcement against life sciences mergers**

All signals indicate that the FTC is continuing its role as aggressive antitrust watchdog, standing guard over mergers in the life sciences industries, particularly pharmaceutical mergers. FTC data provide powerful evidence that the Commission is keeping the pharmaceutical industry on a short leash.

FTC statistics reveal:

- that over the past 15 years the FTC has taken enforcement action against 98 per cent of the pharmaceutical markets it identified during the course of second request investigations, far greater than its overall enforcement average of 75 per cent following issuance of a second request;
- that in its last fiscal year the FTC conducted preliminary investigations in approximately 43 per cent of transactions reported in the pharmaceutical and biological product manufacturing industries (including other chemical manufacturing), as compared to approximately 11 per cent of all transactions notified under the HSR Act during that year; and
- perhaps most striking, that the agency took enforcement in nearly 100 per cent of those pharma and life science matters in which it issued a second request in the most recently completed fiscal year.

Based on available evidence, saying that ‘the past is prologue’ for pharmaceutical and life sciences mergers portends that the FTC will examine life sciences mergers under a microscope and will challenge acquisitions involving actual or potential competitors in narrowly drawn markets.

**Trend towards pre-litigation settlement continues post-Lundbeck**

Historically, nearly all FTC challenges to pharmaceutical industry mergers have been resolved, most often with the merging parties agreeing to divest or license a few drugs to address FTC concerns.

In 2011, the FTC suffered a significant loss in the first-ever appellate antitrust decision dealing with a pharmaceutical industry merger. In FTC v Lundbeck, Inc, the Eighth Circuit affirmed the district court’s ruling that the FTC failed to prove that the two drugs at issue, Indocin and NeoProfen, were in the same relevant market, even though both drugs were used to treat the same clinical indication, a serious and potentially deadly congenital heart defect affecting premature babies. The district court was swayed by testimony from doctors that they prescribed the drugs based on their effectiveness and side-effect profile without paying attention to price, indicating a low cross-elasticity of demand between the two drugs.

Similar to the recent Bazaarvoice decision and He-R Block before that, the Lundbeck decision again demonstrates that, despite the ‘more flexible’ merger analysis framework set forth in the 2010 Guidelines, market definition can remain central in antitrust enforcement before the district courts.

Despite the FTC’s loss, Lundbeck remains the only litigated merger case in the pharmaceutical industry, with parties continuing to settle by agreeing to divestitures or other remedies. While Lundbeck specifically highlights the litigation risk that the FTC faces relating to market definition in the pharmaceutical industry, it may not have dramatically moved the needle when it comes to leverage at the negotiating table. In part, this is because large pharmaceutical deals often combine firms that sell a broad portfolio of drugs, where the vast majority of the parties’ products do not raise competitive concerns. Rather than holding up the entire deal pending lengthy litigation proceedings, parties often agree to divestitures in order to close quickly.

This trend continued throughout FY2013, with consent decrees in four pharmaceutical and life science transactions: Actavis/Warner Chilcott; Mylan/Agilia; Watson Pharmaceuticals/Actavis; and Corning Incorporated. FY2014 has already witnessed settlements in three pharmaceutical and life sciences transactions: Endo Health Solutions/Boca Life Science and Boca Pharmacal; Thermo Fisher Scientific/Life Technologies; and Akorn/Hi-Tech Pharmacal.

**Enforcement against deals threatening elimination of future competition in branded/generic combinations**

Recent merger enforcement in the pharmaceutical industry has targeted transactions that the FTC has alleged may substantially lessen competition by putting a pioneer drug and a future generic in the hands of the same company.

The FTC is concerned that combining control over a branded drug and a generic drug under development will lead a firm to delay the introduction of the generic and, in that way, deny consumers the increased competition and price reductions that would have occurred with generic entry.
The recent Actavis/Warner Chilcott enforcement action provides a good example. There, the FTC required divestitures of the rights to four drugs to resolve charges that Actavis’ proposed $8.5 billion acquisition of Warner Chilcott would be anti-competitive. In three of the alleged markets, Warner Chilcott sold the branded drug and no generic equivalent had been introduced. The Commission required divestitures in all three of these markets: Loestrin 24 FE, Loestrin FE and Atelvia. For each of these products, the Commission alleged that Actavis was likely to be the first generic competitor against Warner Chilcott’s branded version, and that the transaction would harm future competition because the combined firm would have the ability and incentive to delay generic entry.

Exclusive marketing periods may raise FTC concerns in the context of a merger

In two of the markets alleged in Actavis/Warner Chilcott, Actavis was challenging Warner Chilcott patents. Despite the presence of other potential competitors challenging Warner Chilcott patents, since there was uncertainty over which generic would receive marketing exclusivity the FTC required Actavis to relinquish its claim to ‘first-filer status’. According to the FTC, this was necessary to resolve potential concerns that Actavis could be the first and only generic competitor to the Warner Chilcott branded product for a period of 180 days, allowing the merged firm to raise price at least during that period.

Strong medicine: divestitures cure alleged anti-competitive generic drug deals

The Commission continues to challenge mergers between generic manufacturers, often requiring multiple divestitures to resolve competitive concerns.

In its enforcement action against Mylan’s proposed $1.85 billion acquisition of Agila Specialties, the agency alleged that the acquisition would have reduced competition, either by eliminating current or imminent competition in concentrated existing markets, or by eliminating potential competition among a small number of likely competitors in a future market. The agency required divestures of 11 generic injectable drugs before allowing the merger to proceed.

The FTC believes that the number of suppliers in generic pharmaceutical markets is critical because prices generally decrease as the number of competing generic suppliers increase. Moreover, as the FTC explained in Mylan/Agila, once multiple generic suppliers enter a market, they tend to compete only against each other, and – while a branded drug manufacturer may choose to lower its price to compete against generic equivalents – the branded drug usually ceases to provide any competitive constraint on the prices for generic versions.

In Mylan/Agila, the FTC expressed concern that injectable drugs generally, and the generic injectibles in particular, are ‘highly susceptible to supply disruptions caused by the inherent difficulties of producing sterile liquid drugs.’ The agency highlighted ‘recent manufacturing problems’ of some of the suppliers had experienced, leading to price increases, as an additional justification for enforcement.

The FTC’s challenge in Mylan/Agila regarding meropenem, an ultra-broad spectrum antibiotic used as a last resort to treat serious bacterial infections in an intensive care setting, is especially striking. The FTC’s complaint acknowledged that there were four existing market participants and others in addition to Mylan and Agila with a generic in development. Nevertheless, the FTC contended that divestiture was necessary because the four existing competitors used two sources of supply, and Mylan and Agila were the only likely entrants that would use alternative suppliers.

The FTC also recently required divestitures to resolve charges that Endo Health Solutions’ proposed acquisition of Boca Life Science Holds and Boca Pharmaceutical would lessen competition among generic drugs. The FTC there required divestitures in two generic markets ‘that [did] not yet exist’. The FTC alleged that the merging parties were two of only a few likely entrants into those future markets, which the FTC said would be highly concentrated at the time the firms entered.

The FTC in Endo/Boca also required a divestiture in one market with two incumbent generic competitors where Endo had commercialised a product but withdrawn it from the market and Boca was alleged to be the next likely entrant. The FTC said that Endo ‘could relaunch its product at any time’ and the merger therefore could reduce the number of competitors from four to three.

Mylan/Agila and Endo/Boca continue a line of FTC enforcement actions against current and future generic competition, including the 2012 enforcement action in Watson/Actavis, where the Commission required divestitures to remedy concerns that the transaction would substantially reduce competition in the markets for 21 current and future generic drugs.

Other FTC merger enforcement involving life sciences companies

The FTC actively reviews mergers among life sciences companies outside pharmaceuticals, though pharmaceutical deals grab most headlines.

The Commission, for instance, recently charged that Corning’s proposed acquisition of Becton, Dickinson and Company’s Discovery Labware Division would have harmed the markets for tissue culture treated (TCT) multi-well plastic plates, dishes and flasks used by researchers to grow cells. The agency alleged that Corning’s acquisition would have increased the firm’s incentives and ability to unilaterally raise prices for TCT cell culture products. Corning was required to provide assets and assistance to another life science company to enable it to manufacture Corning’s line of TCT products, thereby replacing the competition lost as a result of the transaction. In the meantime, Corning was required to supply that firm.

Medical devices scrutinised over access to patented technology

In January 2014, the Commission brought an enforcement action against Thermo Fisher Scientific’s proposed acquisition of Life Technologies Corporation, alleging an anti-competitive effect in three markets for reagents used to study gene function, cell culture media and sera used to grow cells. The FTC alleged that the merging firms were close competitors and had a 50 per cent or greater share of each relevant market. The agency highlighted that there were significant barriers to entry including access to patented technology, technical difficulties of designing as well as producing reagents, large upfront investments and the importance of suppliers having a track record and reputation for reliable, high-quality products.

The Commission sharpens its focus on follow-on biologics

In a 2009 report, ‘Follow-on Biologic Drug Competition’, the FTC questioned whether follow-on biologics could constrain pricing to the same extent as generic drugs. The FTC was primarily concerned that, unlike small molecule generics, competition from follow-on biologics is constrained by a perceived ‘lack of automatic substitution’, less favourable reimbursement and difficulty gaining market share due to safety and efficacy concerns.
The FTC remains engaged in whether follow-on biologics – both biosimilars and interchangeable biosimilars – may provide similar price competition in biologics as do generics. In February 2014, the FTC hosted a ‘Follow-On Biologics Workshop’, which brought together experts to discuss the competitive impacts of legislative and regulatory proposals regarding the substitutability and naming conventions for follow-on biologics. While acknowledging that the Food and Drug Administration has yet to approve a biosimilar drug, participants emphasised the importance of state and federal laws in fostering competition in the market.37

**FTC expands HSR reporting obligations: targeting pharmaceutical licensing deals**

In November 2013, the FTC issued HSR rules targeting the pharmaceutical industry that require filings for a broader array of licensing transactions, allowing the agency to scrutinise whether those deals may lessen competition.

As explained above, HSR filings are required for mergers and acquisitions where ‘size-of-person’ and ‘size-of-transaction’ thresholds are met, and the FTC has long required notification of exclusive licenses to patents that transfer the right to ‘make, use and sell’ a product, such as a drug, to another firm.

The new rule requires HSR notification of pharmaceutical licenses that transfer ‘all commercially significant rights’ to ‘any therapeutic area (or specific indication within a therapeutic area)’ even if the licensor retains manufacturing or other rights. These new rules are only applicable to the pharmaceutical industry (including in-vitro diagnostic and biologic as well as medical and botanical manufacturing), underscoring the Commission’s intense scrutiny of the industry.

This new notification requirement provides the Commission with the authority to review and potentially challenge additional transactions in the pharmaceutical industry and marks a significant development for pharmaceutical companies because it sets up hurdles to the use of common business arrangements that have immense importance to the industry.

Significant burdens have been added to transactions as a consequence of the new rule – even for transactions that ultimately pass scrutiny – including delay in closing and increased costs to: determine if a transaction’s value exceeds the HSR thresholds, prepare the HSR filing, and defend the substantive merits if the FTC staff decides to investigate the potential competitive effects of a transaction.

**Notes**

1 See Renata B Hesse, ‘At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement’ (22 January 2014); see also Julie Brill, ‘Merger Enforcement in High-Tech Markets’ (28 January 2013); Joshua D Wright, ‘Evidence-Based Antitrust Enforcement in the Technology Sector’ (23 February 2013).


6 Hesse Speech, supra note 1.


9 United States v Oracle Corp, 331 F. Supp. 2d 1098, 1175 (ND Cal. 2004) (‘[P]laintiffs failed to prove that outsourcing solutions, best of breed solutions and so-called mid-market vendors should be excluded from the relevant product market’).

10 United States v Sungard Data Sys, Inc, 172 F. Supp. 2d 172, 188 (DDC 2001) (‘[T]he record leaves little doubt that SunGard and Comdisco consider internal solutions, including internal hotsites, as their main competitive threat and that, in fact, there is increasing evidence that their perception is fully justified in view of the decreasing cost and changing nature of the technology’).

11 Hesse Speech, supra note 1.

12 Id.


22 Press Release, supra note 19.


FTC and DOJ, ‘Hart-Scott-Rodino Annual Report, Fiscal Year 2013’, (21 May 2014) available at www.ftc.gov/system/files/documents/reports/36th-report-fy2013/140521hsrreport.pdf. The three digit NAICS code 325, ‘Chemical Manufacturing’, encompasses both pharmaceutical and biological product manufacturing (such as cell culture plates) as well as other chemicals. The FTC conducted preliminary investigations in 32 out of 74 transactions reported in this code.

Id. The FTC issued three second request in NAICS code 325 and three of the agencies’ challenged transactions were pharmaceutical mergers and one was a merger involving cell culture vessels for use by researchers at pharmaceutical and biotechnology companies.

FTC v Lundbeck, Inc, 650 F.3d 1236 (8th Cir. 2011).


As it has done in the past, the Commission identified each of these product markets narrowly based on individual drugs, despite the fact that based on Lundbeck the agency may have faced significant hurdles persuading a judge that each was a properly defined relevant market, had the parties had gone to court.

Whether the FTC includes a branded drug and its generic equivalent in the same product market depends on several factors, including: the number of generic competitors (the fewer generic competitors, the more likely that the branded drug acts as a price constraint on the generic); and whether the branded-drug supplier chooses to reduce its price to compete against the generic equivalents.

In the fourth alleged market, Actavis and Warner Chilcott were the ‘only significant manufacturers’ of generic Femcon FE, and thus the FTC alleged the transaction would have eliminated existing competition.


Jacqueline Grise is a partner in the antitrust and competition practice group and is resident in the Washington, DC office.

Ms Grise’s practice focuses on the defense of corporate clients in connection with domestic and international mergers and acquisitions, as well as antitrust counseling and other non-merger matters. She regularly represents clients before the FTC, the DoJ and numerous foreign antitrust enforcement agencies. Ms Grise has extensive experience counseling clients through the HSR merger review process, including advocating before the agencies, responding to second requests and coordinating antitrust defense strategies in countries around the world. Her clients span a broad range of industries, including an array of high-tech industries; digital health and e-health; health care and pharmaceuticals; consumer and food products; computer and data storage; music recording and publishing; book and magazine publishing; industrial equipment; automotive parts; retail, including internet sales and distribution; and aerospace and defense.

Ms Grise was ranked as among the top 40 antitrust lawyers worldwide under the age of 40 by Global Competition Review (May 2008). She is also recognized as a leading practitioner by Euromoney’s Guide to the World’s Leading Competition & Antitrust Lawyers and Washington DC Super Lawyers.

Ms Grise currently serves as a member of the American Bar Association Antitrust Section Long Range Planning Committee.

Howard Morse, a partner in Cooley LLP’s Washington, DC office, chairs the firm’s antitrust and competition practice group.

Mr Morse represents businesses before the Federal Trade Commission, the Department of Justice, and state attorneys general, in investigations involving mergers, acquisitions and joint ventures, as well as restraint of trade cases. He also counsels clients on antitrust issues and represents companies in private antitrust litigation.

Mr Morse has been at the forefront of applying antitrust law to the high-tech sector and the intersection of antitrust and intellectual property law, including issues related to innovation markets, standard setting, patent pools and the settlement of patent litigation. His clients include companies in the pharmaceutical, biotech and medical device, as well as the computer hardware, software, social media and 3D printing industries.

Mr Morse served for 10 years at the FTC, where he was assistant director of the Bureau of Competition and received the FTC’s Award for Superior Service for ‘furthering the Commission’s Merger Enforcement Program’ and for ‘advancing the antitrust mission of the Federal Trade Commission in innovation markets and high technology industries’.

Mr Morse has been recognized as a leading antitrust lawyer by Best Lawyers in America, Chambers USA, Who’s Who Legal: Competition Lawyers & Economists, and Super Lawyers, among others.

Mr Morse is a member of the American Bar Association Antitrust Section Council; he has previously chaired the Section’s Computer Industry, Federal Civil Enforcement, and Intellectual Property Committees.

Cooley

1299 Pennsylvania Avenue, NW Suite 700
Washington, DC 20004 United States
Tel: +1 202 842 7800

Jacqueline Grise
jgrise@cooley.com

Howard Morse
hmorse@cooley.com

www.cooley.com

Cooley’s attorneys solve legal issues for entrepreneurs, investors, financial institutions and established companies. Clients partner with Cooley on transformative deals, complex IP and regulatory matters, and bet-the-company litigation, often where innovation meets the law.

Cooley has more than 750 lawyers across 11 offices in the United States and China.

Cooley’s antitrust and competition team is recognized as one of the top-tier practices in the area of antitrust by Chambers USA and Global Competition Review. Providing a full range of counseling, agency representation, litigation and arbitration services, we handle all aspects of antitrust and competition matters for companies, from emerging companies to Fortune 500 corporations, in virtually every sector of the economy including computer hardware, software, e-commerce, social media, pharmaceuticals, medical devices, biotech, clean tech, telecommunications, aerospace, defense, oilfield services, industrial manufacturing, consumer products, and financial services. We provide expert, practical and timely representation that enables our clients to manage antitrust risk while accomplishing their business objectives.

Our antitrust and competition team is comprised of 35 lawyers in major business and technology centers nationwide and includes two former assistant directors of the Federal Trade Commission Bureau of Competition and a former acting associate attorney general of the Department of Justice (DoJ) responsible for overseeing the Antitrust Division, as well as DoJ staff attorneys and assistant US attorneys.