ABA Section of Antitrust Law 64th Annual Spring Meeting
"Hot Topics" Panel
2015 – A Year of Litigated Merger Challenges
What's Blowing in the Wind?

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Merger control is once again a "hot topic."

In his recent public rejection of a merger proposal by Honeywell, United Technologies Corporation's President and CEO Gregory Hayes referred to an antitrust "regulatory environment [that] had shifted dramatically during the course of 2015."[1] In a document describing UTC's analysis of antitrust risks, Hayes stated:

> The current U.S. and global regulatory environment is the most aggressive toward mega-deals in decades. A string of successful challenges has emboldened regulators to challenge mega-deals and demand increasingly broad remedies.[2]

Hayes also noted a recent statement by U.S. Department of Defense Undersecretary Frank Kendall sounding an alarm against further defense industry consolidation. Following Lockheed Martin's acquisition of Sikorsky from UTC—which did not draw a "Second Request" by the Department of Justice (DOJ) Antitrust Division—Kendall released the following statement:

> [DOD] is concerned about the continuing march toward greater consolidation in the defense industry at the prime contractor level. While the Lockheed-Sikorsky transaction does not trigger anti-trust concerns of having a negative impact on competition and we understand and agree with the basis upon which [DOJ] decided not to issue a request for additional information about the transaction, we believe that these types of acquisitions still give rise to significant policy concerns." [3]

Kendall raised a concern about "bigness" that has not been a touchstone for antitrust enforcement since at least the 1980s.[4] "With size comes power," he said, "and the Department's

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[1] *See* www.utc.com/news/pages/CEO-Greg-Hayes-Issues-Message-on-Recent-Merger-Speculation0226-1561.aspx.

[2] *See* www.utc.com/news/documents/UTC%20 response%20regulatory%20position.pdf.

[3] www.breakingdefense.com/2015/10/whoa-lockheed-co-kendall-urges-congress-to-protect-innovation/ ("*Kendall*").

[4] "Bigness isn't badness" is associated with President Reagan's first Assistant Attorney General for Antitrust, William Baxter, who famously dismissed DOJ's case against IBM and introduced merger guidelines based on the HHI index of concentration (utilizing much lower thresholds than are used today). Even given the importance of Mr. Baxter's efforts to change the language and objectives of antitrust enforcement, however, the law had already begun evolving to the position that size does not necessarily equate to competitive harm.

experience with large defense contractors is that they are not hesitant to use this power for corporate advantage." He added that "[t]he trend toward fewer and larger prime contractors has the potential to affect innovation, limit the supply base, pose entry barriers to small, medium and large businesses, and ultimately reduce competition – resulting in higher prices to be paid by the American taxpayer. . . ."[5]

Presidential candidate Hillary Clinton has similarly weighed in with a "progressive" stance against corporate concentration that appears to go beyond anything that President Obama and his lead antitrust enforcers have expressed to date:

> American capitalism built the greatest middle class in history. . . . But sometimes the system does not work the way it should and we need to fix it. Teddy Roosevelt had to do it. Franklin Roosevelt had to do it. Barack Obama, too.
> Economists . . . have put their finger on what's going on: large corporations are concentrating control over markets. Two-thirds of public corporations operated in more concentrated markets in 2013 than in 1996. . . [T]hey are using their power to raise prices, limit choices for consumers, lower wages for workers, and hold back competition from startups and small business. . . .[6]

Clinton promises she would:

- "stop corporate concentration in any industry where it's unfairly limiting competition,"
- "prevent concentration in the first place by beefing up the antitrust enforcement arms of the [DOJ] and [FTC]," and
- "direct more resources to hire aggressive regulators who will conduct in-depth industry research to better understand the link between market consolidation ***and stagnating incomes***," which she believes will ultimately "foster a change in corporate culture that restores competition in the marketplace."[7]

Consistent with Clinton's view, in a recent antitrust oversight hearing, Sen. Blumenthal (D-CT) asserted that "consumers have been hit by a tsunami of consolidation, with the same economic effects as a natural disaster tsunami has on people who are in its way."[8] Displaying a chart of Herfindahl-Hirshman-Index (HHI) concentration calculations for the airline, media, internet software and other industries, he proclaimed that "the merger policy of our nation has

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[5] *See Kendall*.

[6] "Hillary Clinton: Being pro-business doesn't mean hanging consumers out to dry," *available at* https://www.Qz.com/529303/Hillary-Clinton-being-pro-business-doesn't-mean-hanging-consumers-out-to-dry.pdf.

[7] *Id*.

[8] Unofficial transcript, Hearing on Oversight of the Enforcement of the Antitrust Laws, Subcommittee on Antitrust, Competition Policy and Consumer Rights, U.S. Senate Committee on the Judiciary, Mar. 9, 2016.

simply failed," suggesting that the United States should "rethink [the] approach we have taken in the past," considering "creative and innovative enforcement."[9]

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Has there in fact been a dramatic change in U.S. merger enforcement policy, such that a transaction that would have passed antitrust muster in 2013 or 2014 would not pass muster in 2016? Have the DOJ and Federal Trade Commission (FTC) changed the standards they use to evaluate competitive effects or their willingness to allow a transaction to proceed with divestitures, rather than blocking it outright? Should we expect further changes in merger enforcement policy to address the concerns voices by Senator Blumenthal and former Senator Clinton?

According to one recent analysis, 2015 was a record year for both the number and length of merger investigations. While the average length of a merger investigation was 7.1 months in each of 2011 through 2013 and 7.7 months in 2014, it was 9.6 months in 2015.[10] The number of significant investigations and challenges was also larger in 2015 than 2013 or 2014 (30% more investigations and twice as many litigated complaints). However, the number of merger notifications was also greater, and the agencies challenged the same approximately 1.1% of notified transactions in 2015 as in 2013. More importantly, statistics alone do not tell us much about actual trends in merger enforcement given the very highly fact-specific nature of merger analysis.

I believe the enforcement agencies may have become increasingly sensitive to the potential costs of under-enforcement and to the risk of failed merger remedies, given issues that arose in connection with divestiture buyers in the Humana/Arcadian (2012), Hertz/Dollar Thrifty (2012) and Albertsons/Safeway matters (2015).[11] This may have led the agencies to be more

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[9] *Id.*

[10] Paul T. Denis and Michael L. Weiner, "Merger Investigations Set Records in 2015," Competition 360, Jan. 25, 2016, available at https://www.dechert.com/files/uploads/documents/litigation/merger%20investigations%20set%20records%20in%202015.pdf.

[11] DOJ required Humana Inc. and Arcadian Management Services Inc. to divest about 13,000 Arcadian Medicare Advantage members in five states To three different buyers as a condition for approving Humana's acquisition of Arcadian. *See* https://www.justice.gov/opa/pr/justice-department-requires-divestitures-humana-incs-acquisition-arcadian-management-services.pdf. One buyer, WellCare Health Plans Inc. lost half of the acquired members and left the relevant markets at the beginning of 2015. Another, Cigna, also exited a majority of the markets in which it had acquired Arcadian members and at the beginning of 2016, CMS suspended Cigna's Medicare Advantage enrollment and marketing activities due to "widespread and systematic failures impacting Cigna enrollees' ability to access medical services." *See* https://www.thecapitolforum.com/wp-content/uploads/2013/12/Aetna-Humana-2016.02.03.pdf.

The FTC required Hertz Global Holdings Inc. to sell its Advantage Rent A Car business as a condition for approving Hertz' acquisition of Dollar Thrifty Automotive Group Inc. in order to preserve competition in airport car rental markets. The divestiture buyer, Franchise Services of North America, Inc., filed for bankruptcy within a year, ultimately selling ten locations back to Hertz. *But see* The Capitol Forum: Interview with FTC Commissioner Maureen Ohlhausen, available at

likely to challenge transactions and demand broader relief in those close cases on the margin, and Mr.Baer appears to have brought the FTC's "buyer up front" policy to DOJ. In addition, both agencies have likely benefited from recent merger litigation successes to the extent those successes have affected the perceptions of merging parties about the agencies' willingness to pursue litigation and their likelihood of succeeding.

It is dangerous to state absolute conclusions without having access to the facts that comes only with being behind the curtain on a matter. But I do not perceive that the relevant standards and methodologies for identifying a competitive problem warranting relief have changed significantly in the past two years (focus on slices of customers or product sales is not a brand new development) or that there has been a material change in how the agencies think about remedies.[12] The Antitrust Division's decision not to issue a Second Request in the Lockheed Martin/Sikorsky deal and decision not to challenge other significant transactions (such as Expedia/Orbitz) is consistent with this view, as is the high percentage of merger challenges that continue to be resolved through consent decrees.

It is important to understand with respect to remedies that the agencies have never approached the negotiation of merger relief the way that businesses might approach "making a deal"—that is, with the notion that both sides need to compromise or should end up comparably happy or equally unhappy. Instead, the government regards its law enforcement objective (ensuring that the merger will not materially harm competition) to be essentially non-negotiable. In addition, it feels institutionally compelled to resolve significant doubts about the likely effectiveness of proposed relief against the companies.[13]

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https://www.ftc.gov/system/files/documents/public_statements/590541/141001capitolforum.pdf (noting that Advantage has emerged from bankruptcy as a viable fourth competitor and that the market has become more competitive).

To preserve competition in retail grocery markets when Albertsons and Safeway Inc. merged, the FTC required Albertsons to sell 168 grocery stores in eight states. *See* https://www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-Safeway-sell-168-stores-condition-merger.pdf. Haggen Holdings, LLC, which acquired 146 of the stores, filed for bankruptcy nine months later and eventually sold 33 stores in Oregon back to Albertsons.

[12] For a contrary view, see Mark Botti and Anthony Swisher, "Antitrust Merger Enforcement in the Obama Administration: Has the Pendulum Swung Too Far?," *available at* www.lexocolgy.com/library/detail.aspx?g=ff95d401-72d9-4c4e-9977-e215bc4869f5.

[13] It has been suggested that the settlement in the USAirways/American Airlines transaction was a compromise and the best that could be gotten considering the risk of losing in court. However, the structure of the settlement is similar to settlements in other airline transactions, and DOJ regarded the divestiture of slots and gates to low cost carriers as providing for a more competitive result than would have resulted from outright blocking the merger. *See* www.Nytimes.com/2013/11/16/business/baffling-about-face-in-american-us-airways-merger.html. For the agencies' articulation of their merger remedy policy see Antitrust Division Policy Guide to Merger Remedies, U.S. Department of Justice, Antitrust Division, June 2011, *available at* https://www.justice.gov/sites/default/files/art/legacy/2011/06/17/272350.pdf; Negotiating Merger Remedies, https://www.ftc.gov/tips-advice/competition-guidance.merger -remedies; and "A Study of the Commission's Divestiture Process," Prepared by the Staff of the Bureau of Competition of the Federal Trade Commission, William J. Baer, Director, 1999, *available at* https://www.ftc.gov/sites/default/files/documents/reports/study-commissions-

Moreover, the FTC and DOJ have bargaining leverage. (Arguably, the FTC has even greater leverage than DOJ given the FTC's ability to engage in administrative proceedings even after having failed to obtain a preliminary injunction stopping a merger and the deference given to it as an expert agency.[14]) Although the government ultimately bears the burden of proving its case, the parties have only rarely put the government to its proof because most deals cannot stand the test of nine to 12 months of investigation and then another five or more months of litigation. That is why so many mergers have been resolved through consent decrees.

One could argue that what is different is the recent willingness of more merging companies to put the government to its proof. In fact, Assistant Attorney General Bill Baer has publicly asked why more companies appear to be testing the agencies with what he believes to be obviously incomplete remedies and expressed surprise that recent challenged mergers "made it out of the boardroom."[15] As he stated in a recent oversight hearing:

> When we find a merger between rivals that risks decreasing competition in one or more markets, we are invariably urged to accept some form of settlement, typically modest asset divestitures and sometimes conduct commitments or supply agreements. We thoroughly review every offer to settle, but we have learned to be skeptical of settlement offers consisting of behavioral remedies or asset divestitures that only partially remedy the likely harm. We will not settle . . . unless we have a high degree of confidence that a remedy will fully protect consumers from anticompetitive harm . . . Where complex transactions pose antitrust risk in multiple markets, our confidence that Rube Goldberg settlements will preserve competition diminishes. Consumers should not bear the risks that a complex settlement may not succeed. If a transaction simply cannot be fixed, then we will not hesitate to challenge it.[16]

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divestiture-process/divestiture_0.pdf. In August 2015, the FTC launched a review of the effectiveness of its merger remedies, updating and expanding on the report issued in 1999. The new report, which is expected to be released this year, will be based on a review of 90 orders entered between 2006 and 2012.

[14] *See* Prepared Statement of Deborah A. Garza Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Senate Committee on the Judiciary, Hearing on S.2101, The "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015," *available at* www.judiciary.senate.gov/imo/media/doc/10-07-15%20Garza%20testimony.pdf.

[15] *See, e.g.*, Statement of Bill Baer, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate, Hearing on "Oversight of the Enforcement of the Antitrust Laws," Mar. 9, 2016 ("*Baer testimony*"), *available at* https://www.justice.gov/ops/speech/antitrust-general-bill-baer-antitrust-division-testifies-senate-judiciary.

[16] *Id.* Mr. Baer could have added that the Tunney Act (15 U.S.C. § 16) requires DOJ to solicit public comment on any proposed settlement of a merger challenge and persuade a court that the settlement is in the public interest. DOJ accordingly issues a Competitive Impact Statement for every settlement explaining its theory of competitive harm and how the settlement resolves the alleged harm. *See also* Remarks by Deputy Assistant Attorney General David Gelfand:

While one can certainly take issue with government's assessment of the facts of a particular case, Mr. Baer does not appear to want to take credit for a change in enforcement approaches. This is certainly not to say that the government is always right. Rather, it is to say that the metrics for assessing competitive effects and the sufficiency of proposed settlements do not appear to have radically changed in the past two or three years.

In addition, while there have been more DOJ and FTC merger challenges in the last two years, there have also been more mergers and more really big and strategic mergers. The number of Hart-Scott-Rodino (HSR) Act merger filings was up more than 32 percent in FY 2015 as compared to 2013.[17] Sixty-seven mergers proposed in 2015 were valued at more than $10 billion and 280 deals last year were valued at more than $1 billion.[18]

Many of these transactions were strategic deals designed to wring out efficiencies and better position companies to compete in evolving markets. So, they were both extremely important to the companies and more likely to raise potential competitive concerns. It accordingly should not be too surprising that we have seen more, and more extended, investigations and that companies have been willing to put the enforcement agencies to their proof before acquiescing to remedies that would substantially diminish the strategic value of the transaction. And yet still, as in prior years, only about four percent of transactions notified under the HSR Act were investigated beyond the initial waiting period and most merger challenges were resolved by consent decree.

FTC Merger Challenges in 2015

The FTC challenged 27 mergers in FY 2015 (22 in CY 2015).[19] It entered into consent agreements requiring divestitures in with respect to 18 mergers in FY 2015, including Dollar Tree's acquisition of Family Dollar Stores, the merger of RJ Reynolds and Lorillard (the second and third largest U.S. cigarette manufacturers), several pharmaceutical mergers and a merger involving gasoline and distillate terminal storage services. Three more mergers were abandoned

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> If you are going to make us an offer to fix a merger with a remedy that's inadequate, and then tell us that you'll present that to a judge in litigation, we've got nothing to lose in challenging a transaction. [While a challenge spends resources and DOJ could lose] [i]f that's our worst case, and that's all you're offering us, I don't know why we wouldn't challenge the transaction . . . .

"Gelfand: US will go to court when merger proponents 'litigate the fix," Global Competition Review, Feb. 8, 2016, *available at* http://globalcompetitionreview.com/news/article/40471; "Gelfand: It's tough to to analyse divestment buyers' failures," Global Competition Review, Feb. 8, 2016, *available at* http://globalcompetitionreview.com/news/article/40467/Gelfand-its-tough-analyse-divestment-buyer-failures/.

[17] *See* Prepared Statement of the Federal Trade Commission, Before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, "Oversight of the Enforcement of the Antitrust Laws," Mar. 9, 2016, available at https://www.ftc.gov/public-statement/2016/03/prepared-statement-federal-trade-consumer-oversight-enforcement. ("Ramirez testimony").

[18] *Baer Testimony*.

[19] *See Ramirez Testimony* and www.FTC.gov/competition-enforcement-database.

by the parties in the face of the FTC's likely challenge. And, the FTC sued to block six transactions (four of the suits were pending as of March 10, 2016):

- The FTC lost its potential competition challenge to Steris Corporation's proposed acquisition of Synergy Health plc
- It won its challenge to the proposed merger of Sysco/US Foods
- Staples Inc.'s proposed acquisition of Office Depot, Inc. (pending)
- Proposed merger of Advocate Health Care Network and NorthShire University HealthSystem (pending)
- Proposed merger of Penn State Hershey Medical Center and PinnacleHealth System (pending)
- Cabell Hunington's proposed acquisition of St. Mary's Medical Center (pending)

Steris/Synergy. Steris/Synergy is a reminder that the government bears the burden of proof in stopping a merger and does not always win. It is also a somewhat unusual case because, instead of alleging that Steris and Synergy were currently competing head-to-head, the FTC alleged that Synergy was a potential competitor. Specifically, the FTC alleged that, but for the merger, Synergy would have entered the U.S market with a new X-ray sterilization technology. The U.S. District Court for the Northern District of Ohio assumed (without specifically deciding) that a merger could be blocked under the "actual potential competition" theory.[20] But it found that the facts failed to support a conclusion that Synergy would have entered the U.S. market but for the merger. Although Synergy had continued to consider the possibility of entry even after announcing the deal with STERIS, business and financial hurdles (and not the merger) made entry unlikely.

Sysco/US Foods. Sysco/US Foods (USF), in contrast, was a victory for the FTC. The parties abandoned their proposed merger after the U.S. District Court for the District of Columbia granted the FTC's request for a preliminary injunction.[21] Relying on HHIs, customer testimony, the parties' ordinary course documents, bidding analysis and merger simulation, the court concluded that the merger would substantially reduce competition to provide broadline food distribution services in several local markets and to large national customers.

Significantly, as part of their defense, the parties presented a proposed fix: Performance Food Group (PFG), owned by Blackstone, had agreed to buy 11 distribution centers (DCs) and related assets for $5 billion ($3 billion more in assets than provided for in the merger agreement between Sysco and USF). In addition, Blackstone had committed to invest an additional $490 million to build seven more DCs and expand capacity in 16 existing DCs.

[20] FTC v Steris Corp., No. 15-cv-1080 (N.D. Ohio Sept. 24, 2015).

[21] FTC v Sysco Corp., No. 15-CV-00256 (D.D.C. June 23, 2015).

But the Court sided with the FTC, finding that PFG would be too small to ensure the maintenance of pre-merger levels of competition. It would have one third as many DCs as Sysco-UFC and fewer DCs than used by several national customers (the parties argued that PFG would service those customers more efficiently).[22] PFG's business plan projected that it would take five years to reach a market share of 20 percent, which was smaller than USF's pre-merger share. In addition, the Court was concerned that PFG would lack the scale to be cost competitive with the merged company and would continue for several years to be dependent on the merged company for access to private label goods.[23]

Staples/Office Depot. The parties in Staples/Office Depot are also litigating the fix, in addition to the merits. This is the second time the FTC has challenged a proposed merger of Staples and Office Depot. The first time was in 1997. The FTC proved an "office superstore" market in which the retail price of office supply depended on direct competition between Staples, Office Depot and then-competitor OfficeMax, Inc. In 2013, however, the FTC let Office Depot buy OfficeMax, explaining that the market had changed substantially since 1997. Consumers looked beyond the three office supply superstores to suppliers like Walmart, Target and Amazon and large corporate contract customers were not concerned about the merger.

The FTC's current complaint against Staples/Office Depot, like its complaint in Sysco, alleges harm to competition to sell to large business customers who desire nationwide distribution and supplier IT systems that interface with their procurement systems. According to the FTC, neither local and regional suppliers nor Amazon Business compete on those terms.

Like the parties in Sysco/USF, Staples and Office Depot have presented a fix: Office supply wholesaler Essendant would buy contracts and related assets that generate about $550 million in sales. However, the FTC apparently had previously rejected the parties' offer to divest contracts valued at up to $1.25 billion (which is the largest divestiture required by the parties' merger agreement), which may itself represent much less than either parties' corporate customer business. It is also reported that Essendant might remain dependent on the merging parties for awhile given its lack an e-commerce platform or invoicing system.[24]

DOJ Merger Challenges in 2015.

DOJ filed suit to challenge seven mergers in 2015, only one of which—GE/Electrolux—was litigated (the others were settled through consent decree).[25] DOJ alleged that Electrolux's proposed acquisition of GE's appliance business would have resulted in higher prices to consumers for ranges, cook tops and wall ovens. According to DOJ, Electrolux would have

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[22] The Court did not give full credit to the parties' efficiencies defense.

[23] *See* Remarks of Deborah L. Feinstein, Director, Bureau of Competition, "FTC v Sysco: Old-school Antitrust with Modern Economic Tools," GCR Live, New York, New York, Sept. 18, 2015, *available at* https://www.ftc.gov/public-statements/2015/09/ftc-v-sysco-old-school-antitrust-modern-economic-tools.

[24] Ralph Eissler, "Tick-Tock . . . 'Faite's Vos Jeux' on the Staples/Office Depot Merger," March 9, 2016, *available at* www.seekingalpha.com/article/3956945-tick-took-faiths-Vos-Jeux-staples-office-depot-merger.

[25] On March 16, 2015, National CineMedia Inc. abandoned its proposed acquisition of Screenvision LLC, which DOJ had sued to block at the end of 2014.

produced 70 percent of ranges sold at prices below $500. In addition, DOJ alleged that Whirlpool and Electrolux would have had a duopoly in the sale of the relevant products to a customer group comprising home builders, property managers and contract-channel buyers (like the FTC in *Sysco* and *Staples*, focusing on the transaction's affect on large customers). GE exercised its contract rights to abandon the deal about four weeks into the trial, collecting a $175 million termination fee and selling the assets to China's Haier Group for $5.4 billion (substantially more than the $3.3 billion that Elecrolux had agreed to pay).

However, there is still more of a story to tell based on three transactions that were abandoned prior to DOJ having to file a complaint: Comcast Corporation/Time Warner Cable (TWC), Applied Materials Inc./Tokyo Electron Ltd. and Chicken of the Sea/Bumble Bee.

First, on April 24, 2015, following 15 months of investigation, DOJ announced that Comcast had abandoned its plan to acquire TWC after DOJ "had informed the companies that it had significant concerns that the merger would make Comcast an unavoidable gatekeeper for Internet-based services that rely on a broadband connection to reach consumers."[26] (The Federal Communications Commission, with which DOJ had closely coordinated its review, also still had to approve the merger. Hillary Burchuck, formerly a senior lawyer in the Telecommunications and Media Enforcement Section of DOJ's Antitrust Division, led the FCC's team reviewing the transaction.)

Also in April 2015, DOJ announced that Applied Materials and Tokyo Electron had abandoned their plans to merge after DOJ rejected the parties' proposal to remedy DOJ's competition concerns.[27] The two companies were the first and third-largest fabricators of non-lithography semiconductor manufacturing equipment. While it is reported that the parties offered to divest the overlapping business lines of Tokyo, DOJ apparently was concerned that such a divestiture would not sufficiently preserve competition in the development of equipment for next-generation semiconductors.[28]

Finally, in December 2015, Thai Union Group P.C.L., owner of Tri-Union Seafoods LLC, d/b/a Chicken of the Sea International and Bumble Bee Foods LLC abandoned their plans to merge in the face of DOJ opposition. According to DOJ, the two companies are the second and third largest sellers of shelf-stable tuna and first and second largest sellers of other shelf-stable seafood products in the United States "in a market long dominated by three major brands"

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[26] "Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and the Federal Communications Commission Informed Parties of Concerns," available at https://www.justice.gov/ops/pr/Comcast-abandons-proposed-acquisition-time-warner-cable-after-justice-department.

[27] "Applied Materials Inc. and Tokyo Electron LTD. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy," *available at* https://www.justice.gov/ops/or/applied-materials-INC-and-Tokyo-electron-LTD-abandon-merger-plans-after-justice-department.

[28] *Id.* Interestingly, Germany is reported to have previously concluded in a written statement that the transaction would have no adverse impact on innovation competition. See HAL/BHI and AMAT/TEL: A Close Look at Implications of Abandoned Applied Materials/Tokyo Electron Merger on Halliburton/Baker Hughes Review," The Capitol Forum, Apr. 27, 2015, available at https://thecapitolforum.com/we-content/uploads/2015/05/HAL-BHI-2015.04.27.pdf.

(the two companies and Starkist).[29] Strikingly, DOJ's press release quotes Assistant Attorney Baer as saying: "Our investigation convinced us—and the parties knew or should have known from the get go—that the market is not functioning competitively today, and further consolidation would only make matters worse."[30]

Conclusion

There are clearly lessons to be learned from recent DOJ and FTC merger enforcement. However, the themes do not seem suddenly new.

[29] *See* "Chicken of the Sea and Bumble Bee Abandon Tuna Merger After Justice Department Expresses Serious Concerns," available at https://www.justice.gov/ops/or/chicken-sea-and-bumble-bee-abandon-tuna-merger-after-justice-department-expresses-serious.

[30] *Id.* This statement echoes apparent frustration expressed by Mr. Baer on other occasions as well.