

CLOSED BUT NOT SAFE?



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Competitor Challenges of Approved Deals Gets Traction in EU

- Sony/BMG CFI Judgment (July 13, 2006)--annulled
 - Parties closed transaction on August 5, 2004
- Challenge of 2004 EU clearance decision by trade association of competitors (Impala)
- Not first time a EU clearance decision has been annulled
 - EU had issued S0; After hearing, EU had cleared unconditionally
 - Court not persuaded that EU had developed evidence rebutting its initial conclusions
 - Transaction re-notified and re-examined.
 - Commission could clear; prohibit; obtain undertakings
- NB: Third Parties can challenge undertakings as well as clearances
- QUESTION: Source of divergence between US and EU?



U.S. Government Challenges of Consummated Deals Continues

- 10 consummated transactions challenged by the Bush Administration
 - 2 FTC challenges this year – both simultaneously settled [*e.g.*, *Hologic*; *Duncan*]
 - Most (but not all) were not HSR reportable [*e.g.* *Hologic*]
 - Most challenges within a year of consummation [But see *Aspen Tech* (1 yr); *Hearst* (~2 yrs)]
 - Post-closing conduct can be key source of investigation/challenge
- No recent successful competitor Section 7 challenge of consummated mergers (rare even in pending mergers)
 - Lack of standing absent anticompetitive practices, [*e.g.*, predatory pricing], that may injure competitors [*Cargill*]



Tunney Act Possibly Opens Door for Competitor Challenges of DOJ Merger Settlements



- Judge Sullivan considering whether to approve DOJ proposed consents in the now consummated SBC/AT&T and VZ/MCI transactions
 - Trade association of competitors filed comments under Tunney Act (and others)
- AT ISSUE = change in the law from “may” to “shall” consider – what is in the Court’s required mandate to reach “public interest” finding
- Mandatory Broad Role could have broad implications for DOJ process;
 - Discourage settlements (perhaps fix-it-firsts are the answer)
 - Discourage DOJ from permitting closing pending approval (great cost in lost synergies)
 - Huge procedural gap btw FTC and DOJ in merger consent process
 - Gives third parties more opportunity to challenge deals in which relief imposed than those simply cleared.
 - Lack of standing in cleared transactions



Deal Implications



- Heightened risk for parties of consummated deals where third-party complainants can be addressed through risk allocation and cooperation provisions surviving closing
- In transactions not subject to HSR/certain industries (e.g., hospitals), post-consummation risk/cooperation could also be allocated
- Given the rarity of these situations, however, this is not necessary in most transactions

