The Civil Practice & Procedure Committee's Young Lawyers Advisory Panel:

Perspectives in Antitrust

SEPTEMBER 22, 2014 VOLUME 3, NUMBER 1

In this Issue:

The Tale of Two St. Luke's
Michelle A. Mantine

Spotlight on Rachel Brandenburger
Tracy L. Januzzi

EU Considers Expanded Review of Minority Shareholdings
Justin W. Bernick

Perspectives in Antitrust Editors:

Tiffany Rider
Vice Chair, CP&P
trider@skadden.com

Daniel Weick
Young Lawyer Representative, CP&P
dweick@wsgr.com

Dan Fundakowski
dfundakowski@ebglaw.com

The Tale of Two St. Luke's

By Michelle A. Mantine *

Introduction

Consolidation of healthcare providers has been linked to increases in the cost of services provided to patients. "Studies have shown price increases as high as 40% as a result of a system acquiring a competing hospital."[1] Given this, both the public and private sectors have become increasingly focused on affordable access to quality healthcare services. Commenting on the rapid change taking place in the healthcare industry, Deborah Feinstein, Director of the Federal Trade Commission's (FTC's) Bureau of Competition, recently explained the Bureau's belief that "[e]ffective antitrust enforcement is as important in a time of dynamic change as in periods of stability, if not more so."[2] Despite such importance, the FTC has challenged less than one in every one-hundred hospital merger/acquisition deals over the past ten years.[3]

This article provides an overview and analysis of two recent and ongoing FTC actions in the healthcare industry and attempts to draw out key lessons learned from those actions. Specifically, this article examines: the ProMedica acquisition of St. Luke's Hospital in Lucas County, Ohio, in which the Sixth Circuit Court of Appeals upheld the decision of the FTC requiring the divestiture of St. Luke's Hospital by ProMedica; and St. Luke's Health System's acquisition of Saltzer Medical Group in Nampa, Idaho, where the United States District Court in the District of Idaho ordered St. Luke's to divest Saltzer.

ProMedica Attempts to Acquire St. Luke's Hospital

The FTC has been engaged in lengthy litigation challenging ProMedica's attempt to acquire St. Luke's Hospital. St. Luke's was one of four hospital systems operating in Lucas County.[4] Several years prior to ProMedica's acquisition of St. Luke's, the latter had been experiencing significant financial troubles resulting in substantial financial losses during the late 2000s. St. Luke's was experiencing a financial turn-around when the Board of Directors voted to merge with ProMedica, the largest healthcare provider in the county.[5] Prior to the merger,

* Michelle A. Mantine is a senior associate in the Global Regulatory Enforcement group at Reed Smith LLP in Pittsburgh, PA. She would like to thank Renold M. Sossong, a 2014 summer associate at Reed Smith, for his contributions to the preparation of this article.

ProMedica held 46.8% of the market share for general acute care services, and St. Luke's held 11.5%.[6]

The FTC challenged, through an administrative complaint, the ProMedica/St. Luke's merger.[7] In response to the FTC's challenge of the August 2010 merger, an administrative law judge held, in December of 2011, that the merger violated Section 7 of the Clayton Act as it "would allow ProMedica unilaterally to increase its prices above a competitive level" and "did not create any efficiencies sufficient to offset its anticompetitive effects."[8] When ProMedica appealed the decision of the administrative law judge to the FTC, the Commission affirmed that decision. The FTC subsequently issued an order for ProMedica to strip St. Luke's out of its enterprise.[9]

In May 2012, ProMedica appealed the decision of the FTC to the Court of Appeals for the Sixth Circuit, arguing that "the Commission defined the *wrong* markets, used the *wrong* anticompetitive-effects analysis, and imposed the *wrong* relief."[10] ProMedica contended that the Commission wrongly used supply-side factors in determining the market. The anticompetitive-effects argument related to the unilateral/coordinated effects rationale, which is discussed herein.[11] Finally, ProMedica contended that a "conduct remedy," rather than divestiture would allow for a healthy merger while still protecting the interests of the patients.[12]

The Sixth Circuit first endeavored to determine the geographic and product market.[13] As Lucas County was agreed upon as the geographic area, the court focused on defining the product market. The Sixth Circuit agreed with the reasoning of the FTC:

> "The relevant markets, for purposes of analyzing the merger's competitive effects, are: 1. a cluster market of primary (but not OB) and secondary inpatient services (hereafter, the "GAC market"), and 2. a separate market for OB services."[14]

Finding that the "competitive conditions" for these sets of services were "reasonably similar," the Sixth Circuit held that it was proper to cluster these services when considering the anticompetitive effects of the deal.[15] ProMedica attempted to rely on a "package deal" theory[16] as an alternative method of developing product clusters.[17] Finding that the merger did not benefit insurance providers (and therefore did not benefit consumers of the relevant healthcare services), the Sixth Circuit held that ProMedica's "package-deal" argument was without merit. The Sixth Circuit reasoned that, "there is no evidence that [Managed Care Organizations] are willing to pay a premium to have all of those services delivered by either of those providers in a single package."[18]

In determining the relevant product market, the Sixth Circuit recognized that the geographic market for certain medical services may be substantially larger than the market for other medical services. That is, people are willing to travel farther for more complex and involved medical procedures than they are for primary or secondary care services.[19] "Thus, the competitive conditions for tertiary services differ from those for primary and secondary services."[20] This

consideration caused the Sixth Circuit to exclude both tertiary and quaternary services from their analysis of the merger's competitive effects.[21]

Relying on a Herfindahl-Hirschman Index (HHI)[22] of 4391 for the GAC market and 6854 for OB services, the Sixth Circuit agreed with the FTC's finding that this metric indicated a highly concentrated post-merger market and established a presumption that the deal was anticompetitive.[23] As the FTC relied upon unilateral-effects grounds for their challenge to this merger, ProMedica contended that the use of the Index was improper in "unilateral effect"[24] cases and was intended to be used in "coordinated effect cases."[25] In other words, as this merger was not challenged as anticompetitive behavior engaged in by multiple competing firms, ProMedica contended that the FTC and Sixth Circuit should not have employed the Index. The Sixth Circuit disagreed and found that the use of the Index was proper due to the high level of "correlation between market share and price" and the fact that the deal would add to the concentration of the market to a significant extent.[26]

The Sixth Circuit also concluded that ProMedica failed to rebut the presumption of illegality established by the fact that the merger "blew through the [HHI Merger Guideline] barriers in spectacular fashion."[27] The Sixth Circuit found that "ProMedica did not even attempt to argue . . . that this merger would benefit consumers (as opposed to only the merging parties themselves) in any way."[28]

Further, the Sixth Circuit rejected ProMedica's argument that St. Luke's was a "weakened competitor"[29] at the time of the merger as support for the acquisition. Rather, the Sixth Circuit found that the "weakened competitor," St. Luke's, was relatively strong, and that a party wishing to employ this defense must satisfy "stringent requirements."[30] The Sixth Circuit found convincing evidence that St. Luke's, prior to the merger, had increasing market share, enough cash to pay any obligation as it came due and the ability to "run in the black if activity stays high."[31] Finding Promedica's reasoning to be weak on theoretical and evidentiary grounds, the court did not give merit to the argument.[32]

Based on the foregoing, the Sixth Circuit Court upheld the decision of the FTC requiring the divestiture of St. Luke's Hospital by ProMedica.[33] In early June 2014, ProMedica filed a petition requesting an *en banc* rehearing of their case.[34]

St. Luke's Attempt to Acquire Saltzer Physician Group

In December of 2012, St. Luke's Health System, Ltd. acquired Saltzer Medical Group, a physician group in Nampa, Idaho[35] and "Idaho's largest independent, multi-specialty physician practice group."[36] The new St. Luke's/Saltzer entity comprised 80% of Nampa's primary care physicians (PCPs).[37] In response to this acquisition, the FTC, Idaho Attorney General and a competitor health system, Saint Alphonsus Medical Center – Nampa, Inc., filed suit in Idaho's federal district court.[38] The district court explained that the transaction could harm competition because "[the combined entity's] size, and the sterling reputations of Saltzer and St. Luke's, make it the dominant provider in the Nampa area for primary care, and give it significant bargaining leverage

over health insurance plans."[39]

The district court determined that the applicable product market was the market for adult primary care services.[40] Due to the fact that such a large number of PCPs would have been linked within the same entity post-merger, the district court examined the HHI and found that the merger was presumptively anticompetitive[41] due to the increase in HHI of more than 1,600.[42]

The district court emphasized that this increase in power would likely result in St. Luke's being able "to (1) negotiate higher reimbursements rates from health insurance plans that will be passed on to the consumer, and (2) raise rates for ancillary services (like x-rays) to the higher hospital-billing rates."[43]

St. Luke's claimed they would be able to derive efficiencies from the new organizational structure of the "unified and committed team of physicians,"[44] as well as benefits from shared electronic information systems.[45] But the district court noted that "[w]hen high market concentration will result from the merger, the defense requires 'proof of extraordinary efficiencies.'"[46] The court further held that, in order to be relied upon to defend a deal, "[t]he efficiencies must be merger-specific – that is, 'they must be efficiencies that cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of competitions.'"[47] Finding that many of the claimed efficiencies of the acquisition could be "similarly achieved even without the Acquisition," the district court found that St. Luke's failed to present "significant and merger-specific efficiencies arising as a result of the Acquisition."[48]

Nor was the district court convinced by St. Luke's argument that new competitors would be able to enter this market with relative ease.[49] Rather, the district court found that the history in this region (Nampa, Idaho) and practice showed that there were barriers to entry, in this market segment, substantial enough to keep new PCPs from entering the market.[50]

Ultimately, the district court held that the divestiture of Saltzer was proper, finding that the case law supported divestiture over the continued operation of two separate negotiation teams.[51] On June 12, 2014, St. Luke's appealed, arguing that, "the judge made mistakes in his analysis of the anti-competitive effects of the deal and wrongly ignored its competitive benefits."[52] St. Luke's filed a motion to stay the order, which could have enabled them to "continue operating as a combined entity with Saltzer" during an appeal, but the district court denied St. Luke's motion on June 18, 2014, holding that St. Luke's failed to establish the requirements for the stay.[53] The Ninth Circuit granted a stay and expedited the appeal.[54]

Key Lessons from the Tale of Two St. Luke's

The St. Luke's actions demonstrate the persistent focus of the FTC on promoting competition in the healthcare sector. Based on these actions and the current state healthcare industry, it is likely that small, local and regional acquisitions and mergers will continue to be highly scrutinized by the FTC as they attempt to ensure patients are protected from potential anticompetitive conduct.

In the meantime, there are three primary takeaways from these actions.

- HHI Is Here To Stay: HHI is here to stay, at least for a little while. One of the FTC's lawyers in ProMedica recently said that the HHI provides "a good guidepost for other hospital executives debating a merger."[55] The St. Luke's actions demonstrate the importance of HHI calculations and the FTC and Department of Justice's *Merger Guidelines* to analysis of a transaction's competitive effects and whether a presumption of illegality applies. An acquiring firm must make sure that the post-merger change in market share does not result in an increase in the HHI level in excess of 200 points or result in a total sum of the squares of the market shares in excess of 2,500. If either of these occurs, the party must attempt to present convincing evidence to overcome the presumption of illegality of the transaction.

- Consider Defenses Early On: The ProMedica/St. Luke's merger shows the importance in making an effort to overcome the presumption of illegality. The Sixth Circuit expressed a genuine willingness to consider explanation of the reasons why the merger will result in actual tangible benefits for patients and insurance providers. However, according to Sixth Circuit, ProMedica did not provide any such reasoning, leaving the Sixth Circuit with little to no ability to consider any potential benefits of the transaction versus the presumption of illegality derived from the HHI. An acquiring entity should identify and establish benefits that will result from the proposed transaction early on in the planning phase so that it can be prepared to defend itself against any potential challenge.

- Be Mindful Of What Is Said, Particularly In Writing: All parties to any potential merger or acquisition must be mindful of the things that are said and recorded with relation to a possible transaction. The FTC can more easily prove its case when it is able to employ just one or a few statements by a board member or executives of the acquirer or acquiree concerning the way in which a potential deal will increase power in the market place. The merit of ProMedica's case was substantially weakened by a comment made by St. Luke's CEO regarding the merger's potential negative impact on the community. In an August 2009 presentation to St. Luke's Board, CEO Daniel Wakeman explained the benefits of a deal with ProMedica, but also explained that it could "[h]arm the community by forcing higher hospital rates on them."[56] Similarly, in St. Luke's (Ohio), the court relied upon the fact that, "[t]he parties' own statements … tend[ed] to confirm the presumption [of illegality] rather than rebut it."[57] Comments of this nature can have significant impact on the viability of an efficiencies claim. Parties would therefore be wise to limit the information and statements that they put in writing that may be used as evidence of the anticompetitive nature and effect of a particular deal.

***

Spotlight on Rachel Brandenburger

By Tracy L. Januzzi †

Rachel Brandenburger is recognized as a leading international antitrust and competition law and policy advisor. She is a Senior Advisor to Hogan Lovells' Antitrust, Competition and Economic Regulation practice. She is also a Non-Governmental Advisor to the International Competition Network, a former non-US Representative on the Council of the ABA's Section of Antitrust, and currently a member of the Section's International Task Force. Rachel Brandenburger has over 30 years of experience as an antitrust lawyer and focuses on proceedings before the European and other international antitrust and regulatory agencies. From 2010 to 2013, Rachel Brandenburger was Special Advisor, International, to the Antitrust Division of the U.S. Department of Justice. She advised on many Antitrust Division matters that involved extensive cooperation efforts between the Antitrust Division and its international counterparts, on revised best practices regarding cooperation in merger investigations with the European Commission, and on memoranda of understanding with the Chinese and Indian antitrust agencies. Prior to 2010, Rachel Brandenburger was a partner for 21 years in Freshfields Bruckhaus Deringer LLP, based in the firm's Brussels and London offices.

Tracy L. Januzzi conducted this interview for *Perspectives in Antitrust*.

(1) How did you get into the practice of antitrust (or competition) law?

It was a happy accident that led me to practice antitrust (or to use the European term, competition) law, and it has brought me more opportunities than I ever could have imagined and absolutely no regrets. I was a junior associate in the London office of Freshfields – the firm didn't have an office in Brussels back then. It was handling a large UK and European competition law case in the sugar industry. More resources were needed, and I was asked to join the team. Fast forward three years, the case had concluded successfully, and I had learned a lot about practicing competition law in front of the UK and European agencies and courts – and also about the sugar industry!

My interest in competition law and policy, and also economics, continued to develop from there on. I think this illustrates how you should seize opportunities—even if you feel unprepared for them—because you never know what they will lead to. I took the same approach when, as a junior partner in Freshfields in London in the mid-90s, I agreed to move to the firm's new office in Brussels. That move opened up huge opportunities for the firm and for me. I was involved, together with my fellow partners, in developing the Brussels practice from a very small practice to one of the leading practices when I left the firm at the end of 2009 to accept an opportunity that I never would have dreamed would have come my way. This was when I was asked by the then newly appointed Assistant Attorney General for Antitrust at the US Department of Justice,

† Tracy L. Januzzi is an associate in the Antitrust, Competition and Economic Regulation practice at Hogan Lovells in Washington, DC.

Christine Varney, to move to Washington DC to become Special Advisor, International to the Antitrust Division.

(2) How has the legal field changed and begun offering new opportunities to attorneys since you began your career?

The legal field has changed greatly since I began my career over thirty years ago. I spent thirty-two years in one firm. I joined Freshfields as a trainee and, when I left to move to Washington, DC, I was one of the most senior partners in the antitrust practice. That is an incredibly long time! And I rather doubt that such a single firm focus will be the pattern for lawyers' careers in the future. These days, there are very many different opportunities for lawyers, including antitrust lawyers, within the field of law and beyond the field of law. And, as in the rest of the business world, we are increasingly seeing lawyers having a number of different jobs during their careers. An attorney may begin his or her career in private practice and then move in-house to work for a particular company or into government or the public sector. They may also return to the private sector later in their careers - or vice-versa. Attorneys also have opportunities for secondments from private practice to a corporate position or, in some jurisdictions, to a government agency for a temporary period of time. And there are also many opportunities to work abroad outside one's home jurisdiction these days. These different opportunities provide an all-around perspective, making us better able to advise our clients – whether our client is in the public or the private sector, a corporation or an individual.

Lawyers can also step outside the law and decide to do something entirely different. I believe legal training gives you an excellent way of thinking about, analyzing, and discussing issues in whatever field you end up in. In the antitrust field in particular, lawyers need to understand clients' businesses and industries. This provides antitrust lawyers with an added perspective and additional opportunities outside the field of law if they so choose.

(3) Mentorship continues to be a hot topic in the legal field. Tell us about some of your mentors.

I have been very fortunate over my career to have had a number of wonderful mentors both male and female and from within the legal profession and outside it. They have each in their own, and different, ways been great supports to me, been very generous with their time, and have offered me invaluable insights. And some of them continue to do so still – as we all benefit from good mentors throughout our lives. I would prefer not to name them individually except to pay special tribute to one – my godmother – who passed away recently. She had an extraordinary life and career. She graduated from Cambridge University, England shortly after the end of World War II. She came to the US to do a Masters at Smith College and then returned to the UK where she joined the UK Civil Service. She served under five Prime Ministers from Harold Macmillan to Margaret Thatcher and rose to be the first female head of the Government's Press Office. She was the most amazing source of wise and warm counsel to me until almost the very end of her life – including over my decision to

move to Washington, DC in 2010.

These days, I try to be as good a mentor for others as I have been so fortunate to have myself. I believe there is nothing more important than helping and supporting others, whether they are starting out in their careers or at key stages in their careers. Seeing my mentees develop, flourish, gain in confidence, and establish their own successful and satisfying careers and fulfillment is one of the very best parts of what I can do.

(4) You were Special Advisor, International, to the Department of Justice's Antitrust Division for over 3 years. Can you tell us about your role?

Being Special Advisor, International, was a true highlight of my career. I advised on many Antitrust Division investigations that involved extensive cooperation between the Antitrust Division and other antitrust agencies around the world that were investigating the same matters. Among the investigations where the international cooperation has been publicly recognized are the Deutsche Boerse/NYSE transaction, the merger between United Technologies Corporation and Goodrich Corporation, and the *e-books* case. The latter was particularly interesting as it was a civil conduct case and demonstrated that international cooperation can be effective in that enforcement area as well as in the cartels and mergers areas. I also advised the Division on a number of other aspects of its work. Revised best practices regarding cooperation in merger investigations between the Department of Justice (DOJ), the Federal Trade Commission (FTC), and the European Commission were issued in 2011 on the 20th anniversary of the Cooperation Agreement between the US antitrust agencies and the European Commission. Also in 2011, the DOJ and FTC signed a Memorandum of Understanding (MOU) with the three Chinese antimonopoly agencies. And in 2012, the DOJ and FTC signed an MoU with the Indian Ministry of Corporate Affairs and the Competition Commission of India. The Antitrust Division is also involved in multinational organizations like the Organization for Economic Co-operation and Development (OECD) and the International Competition Network (ICN), including, during the period I was Special Advisor, International, an OECD project on procedural fairness and a joint OECD/ICN project on international enforcement cooperation. In sum, it was a great honor to advise the leadership and men and women of the Antitrust Division in furthering the Division's cooperation with its counterparts around the world.

(5) What have you been doing since you ceased to be Special Advisor, International?

Initially, I took some time off to relax after a very wonderful, and also very busy, three years in Washington DC. I enjoyed spending time with my New York-based family (my sister and brother and their spouses and my nieces and nephew) who had complained – with justification - that they had not seen me often enough while I had been based in Washington, DC. I also used the time to consider what I wanted to do next and where. Now I'm setting out on what I call the third chapter of my professional life. These chapters have been of very

different lengths. The first chapter—private practice—was 32 years long, while the next chapter— DOJ—was just over three years long. Although I feel as though I learned as much in the three years as I did in the 32!

Now, I am developing a portfolio of different activities. Earlier this year, I became Senior Advisor to Hogan Lovells US LLP based in their New York office. The combination of a New York base with a great international antitrust practice is yet another wonderful opportunity for me. I am also remaining active in the area of international antitrust policy. I am a Non-Governmental Advisor to the International Competition Network, a member of the ABA's Section of Antitrust Law's International Task Force, and I am also writing and speaking on international antitrust policy issues. In addition, I am developing interests entirely outside the antitrust field and, indeed, outside the law, with positions on boards of non-profit organizations. And I am making sure I have time for my family now we are all in the same city!

(6) Do you think increasing globalization is impacting the antitrust laws and the way businesses will need to respond to those laws and policies?

Yes, definitely. Increasing globalization of businesses and antitrust and competition laws and the proliferation of antitrust and competition agencies around the world (over 120 at this point) certainly have been impacting the way companies do business and interact with the agencies and the ways the agencies around the world cooperate with each . These are the ways of the world these days, and, having seen this from both the agency side and the business side, I believe it is going to become increasingly so in the future. Businesses are well advised to take account of this not only in their commercial strategic planning but also in their strategies regarding individual antitrust cases. Antitrust is an ever-developing and ever-fascinating area of law, policy, enforcement, and practice. That is not only its allure, but also a cautionary note to businesses to consider globalization not only from the perspective of the growth and expansion of business opportunities but also with respect to navigating the antitrust laws and practices around the world both now and in the future.

***

EU Considers Expanded Review of Minority Shareholdings

By Justin W. Bernick ‡

The European Commission ("Commission") is currently considering reforms that could significantly impact transactions involving the acquisition of minority shareholdings. On July 9, 2014, the Commission published a White Paper outlining a proposed approach for reforming the EU Merger Regulation,

‡ Justin W. Bernick is an associate in the Antitrust, Competition and Economic Regulation practice at Hogan Lovells in Washington, DC.

which provides the framework for the Commission's review of transactions that are subject to pre-merger notification.[58] The White Paper follows a June 25, 2013, Consultation Paper inviting comments on several proposals for reform.[59] The White Paper proposes to expand the scope of the Commission's authority to review the acquisition of non-controlling minority shareholdings ("structural links") and to modify the system for referring cases between the Commission and various EU Member States. The proposed reforms to the EU Merger Regulation are significant, and could have a substantial impact on transactions subject to review in the EU.

I. Review of Minority Shareholdings Under the Current Regime

Under the EU Merger Regulation,[60] mergers, acquisitions, and certain joint ventures ("concentrations") must be reported to the Commission and may not be consummated prior to Commission approval. The Commission currently only has the authority to review transactions that directly or indirectly result in a change in control.[61] Control is defined as either "ownership or the right to use all or part of the assets of an undertaking" or "rights or contracts which confer decisive influence on the composition, voting, or decisions of the organs of an undertaking."[62] Partial acquisitions of a minority shareholding in a company therefore must be reported to (and approved by) the Commission if they confer "decisive influence" over the company.

The approach in the EU differs somewhat from certain other jurisdictions, including the United States and various EU Member States.[63] In the U.S., acquisitions of minority shareholdings must be reported to the Federal Trade Commission ("FTC") and Department of Justice ("DOJ") if the transaction meets thresholds set forth in the Hart-Scott-Rodino Act,[64] regardless of whether the acquisition results in a change in control. However, there is an exception in the U.S. for partial acquisitions of less than 10 percent of a company made "solely for the purpose of investment."[65] Regulations construe "solely for the purpose of investment" based on whether the acquirer "has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer"[66] – a framework that suggests "control" may factor into U.S. agencies' analysis of this exception to the rule that minority shareholdings are generally reportable.

Certain EU Member States also permit review of minority shareholdings that may not be subject to review by the Commission. For example, in the United Kingdom, a voluntary notification regime, "control" is defined as the ability to directly or indirectly "materially [] influence the policy" of the target firm, even "without having a controlling interest."[67] Similarly, in Germany, transactions are subject to review if they enable a firm to "directly or indirectly exercise a competitively significant influence" on another firm.[68]

II. Reform Options

The White Paper states that the Commission does not have the ability to regulate minority shareholdings that do not result in a change in control, despite the fact that "[t]he experience of the Commission, Member States' and third countries' authorities, as well as economic research, show that the acquisition of

a non-controlling minority shareholding may harm competition, and thus consumers, in some instances."[69] The Commission stated that Articles 101 and 102 TFEU,[70] which prohibit anticompetitive agreements and abuse of dominance, also "may not be suitable for dealing with anti-competitive minority shareholdings."[71] Thus, the White Paper concludes that the "Commission does not currently have adequate tools for dealing with anti-competitive acquisitions of minority shareholdings."[72]

The White Paper addresses a significant recent case that highlights the potential inability of the Commission to review certain problematic structural links.[73] Ryanair notified the Commission of a proposed acquisition of control of Aer Lingus in 2006, after acquiring a significant non-controlling minority interest in the company. The Commission prohibited the acquisition of control in June 2007.[74] However, despite concerns regarding the possible anticompetitive effects of Ryanair's minority stake in Aer Lingus, the Commission's decision did not prevent Ryanair from maintaining 29 percent of the company because the EU Merger Regulation only provides for ex ante review of transactions resulting in the acquisition of control.[75] In contrast, in 2012, the United Kingdom's Office of Fair Trading ("OFT") found that Ryanair had "material influence" over Aer Lingus as a result of its 29 percent stake, in part because of Ryanair's ability to block special resolutions.[76] The case reveals potential limitations in the ability of the Commission to review structural links reviewable in other jurisdictions that may raise anticompetitive concerns.

On May 15, 2014, European Commissioner for Competition, Joaquin Almunia, stated that the Commission intends to "close this gap" related to minority shareholdings, but not by "wholesale" transfer of the current merger notification system to minority shareholdings.[77] The Commission recognized that it may be inappropriate to "apply all of the procedural rules of the current merger regulation to structural links" because of the reduced likelihood that structural links may cause anticompetitive effects.[78] Instead, the Commission proposed expanding the Commission's ability to review problematic structural links by narrower modifications to the Merger Regulation. The Commission initially set forth three possible options for reform in the Consultation Paper. Under the first option, structural links would have to be reported to the Commission in advance and cleared by the Commission before being implemented (the "notification system").[79] This option would essentially "extend the current system of ex-ante merger control to structural links."[80] Alternatively, the Commission would "have the discretion to select cases of structural links to investigate,"[81] which could be implemented in either of two ways. First, the Commission could require no notification whatsoever by the parties and rely solely on the Commission's "own market intelligence or complaints" in determining what structural links to investigate (the "self-assessment system").[82] Second, the Commission could require parties contemplating a "prima facie problematic structural link … to file a short information notice" with the Commission, containing "for example information on the parties, the type of transaction and possibly limited information on the economic sectors or markets concerned (the "transparency system")."[83]

III. Proposed Reform

After numerous submissions were made expressing a range of different views in response to the Consultation Paper,[84] the Commission announced its proposed approach in the White Paper – a "targeted transparency system."[85] Under this system, "parties would be required to self-assess whether a transaction creates a 'competitively significant link,' and, if so, submit an information notice."[86] The Commission set forth two criteria for determining whether a structural link is "competitively sensitive." *First*, the minority acquisition must be of a competitor or vertically-related company (i.e., a supplier or customer).[87] *Second*, the minority acquisition must be (1) "around" 20 percent or (2) between 5 and around 20 percent and "accompanied by additional factors such as rights which give the acquirer a 'de-facto' blocking minority, a seat on the board of directors, or access to commercially sensitive information of the target."[88]

The required information notice would contain "information relating to the parties, their turnover, a description of the transaction, the level of shareholding before and after the transaction, any rights attached to the minority shareholding, and some limited market share information."[89] A full notification would only be required if the Commission decides to initiate an investigation based on the information notice.[90] Parties would be prohibited from consummating a minority shareholding until the expiration of a waiting period (such as 15 business days) from the submission of the information notice.[91] The Commission would be free to investigate the transaction "whether or not it has already been implemented" within a period of time (such as 4 to 6 months) following the information notice.[92] The Commission believes this system would capture potentially harmful transactions, limit the administrative burden on businesses, and fit the merger control regimes currently in place at the EU and national level.

IV. Significance of the Proposed Reform

The White Paper has initiated a new round of public consultation, which ends on October 3, 2014. Once the consultation period is complete, the Commission may put forward a legislative proposal to revise the EU Merger Regulation consistent with the White Paper. Such legislation would have far-reaching implications for companies acquiring shareholdings that do not result in a change in control. Such transactions are an essential part of the European – and global – economy. They provide an important source of capital in an era of scarce liquidity, as well as meaningful opportunities for firms to invest and mitigate risk. The proposed system set forth in the White Paper may have a significant impact on these businesses by increasing the cost and uncertainty associated with minority shareholdings. Although the "targeted transparency system" may reduce costs to some extent, it may create additional uncertainty regarding the definition of "competitively sensitive links," when an information notice may be required, and when such a structural link may be subject to investigation. The Commission's proposed reforms are particularly significant in light of the influence they may have on other countries around the world that model their national merger control regimes on the EU Merger Regulation. As Commissioner

	Almunia noted, the end goal of the Commission's consultation process should be finding "the best way to tackle problematic cases without imposing an unnecessary administrative burden on companies."[93] The coming months may reveal whether the Commission is striking such a balance with respect to minority shareholdings.

ABA ANTITRUST
CIVIL PRACTICE & PROCEDURE COMMITTEE

Amy Manning
Chair
McGuire Woods LLP

Ian Conner
Vice Chair
Kirkland & Ellis LLP

Tiffany Rider
Vice Chair
Skadden, Arps, Slate, Meagher & Flom LLP

Danielle Haugland
Vice Chair
Thomson Reuters / Pangea3

Elizabeth Haas
Vice Chair
Foley & Lardner LLP

Russell Wofford
Vice Chair
King & Spalding

Jonathan Gleklen
Council Representative
Arnold & Porter LLP

Daniel Weick
Young Lawyer Representative
Ropes & Gray LLP

DISCLAIMER
Perspectives in Antitrust is published eight times a year by the American Bar Association Section of Antitrust Law Civil Practice and Procedure Committee. The views expressed in *Perspectives in Antitrust* are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law or the Civil Practice and Procedure Committee or its subcommittees. If you wish to comment on the contents of *Perspectives in Antitrust*, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, IL 60654.

COPYRIGHT NOTICE
© Copyright 2014 American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. To request permission, contact the ABA's Department of Copyrights and Contracts via www.americanbar.org/utility/reprint.

Endnotes to "The Tale of Two St. Luke's"

[1] *Id.* at 6.
[2] Deborah L. Feinstein, Director, Bureau of Competition, Fed. Trade Comm'n, Address at the Fifth National Accountable Care Organization Summit – Washington, D.C.: Antitrust Enforcement in Health Care: Proscription, not Prescription, 1 (June 19, 2014).
[3] *Id.* at 9.

[4] *ProMedica Health Sys., Inc. v. Fed. Trade Comm'n*, 749 F.3d 559, 562 (6th Cir. 2014).
[5] *Id*. at 563.
[6] *Id*. at 562.
[7] *Id*. at 564.
[8] *Id*.
[9] *Id*.
[10] Public Brief for Petitioner at 8, No. 12-3583, 2012 WL 4321890 (6th Cir. 2012), filed in *ProMedica Health Sys. v. Fed. Trade Comm'n*, 749 F.3d 559 (6th Cir. 2014).
[11] *Id.*
[12] *Id*. "As the ALJ agreed, a conduct remedy would eliminate any potential competitive effects, while preserving the benefits that a healthier St. Luke's provides Toledo. Divestiture, by contrast, is tantamount to a slow-motion death sentence, which may make sense to the Commission sitting in Washington, D.C., but does not serve those who live and work in Lucas County." *Id*.
[13] *ProMedica*, 749 F.3d at 565. "Often, the first steps in analyzing a merger's competitive effects are to define the geographic and product markets affected by it." *Id*. (citation omitted)
[14] *Id*. at 568.
[15] *Id*. at 565.
[16] "The package-deal theory holds that, if 'most customers would be willing to pay monopoly prices for the convenience of receiving certain products as a package, then the relevant market for those products is the market for the package as a whole." *Id*. at 567.
[17] *Id*. at 567.
[18] *Id*.
[19] *Id*. at 566.
[20] *Id*.
[21] *Id*.
[22] "The HHI is calculated by summing the squares of the individual firms' market shares, and thus gives potentially greater weight to the larger market shares. When using the HHI, the Agencies consider both the poster-merger level of the HHI and the increase in the HHI resulting from the merger. The increase in the HHI is equal to twice the product of the market share of the merging firms." *Horizontal Merger Guidelines*, Fed. Trade Comm'n and Dep't of Justice, 17-18 (Aug. 19, 2010).
[23] *ProMedica*, 749 F.3d at 568. "Based on their experience, the Agencies generally classify markets into three types: Unconcentrated Markets: HHI below 1500; Moderately Concentrated Markets: HHI between 1500 and 2500; [and] Highly Concentrated Markets: HHI above 2500." *Horizontal Merger Guidelines*, Fed. Trade Comm'n and Dep't of Justice, 18 (Aug. 19, 2010).
[24] "Unilateral-effects theory . . . holds that '[t]he elimination of competition between two firms that results from their merger along constitutes a substantial lessening of competition.'" *ProMedica*, 749 F.3d at 569, citing the *Horizontal Merger Guidelines* § 6 at 20.
[25] *ProMedica*, 749 F.3d at 568. "[T]he idea behind coordinated effects is that, 'where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels.'" *Id*. at 568-69 (citation omitted).
[26] *Id*. at 570.
[27] *Id*. at 568.
[28] *Id*. at 571.
[29] "Courts 'credit such a defense only in rare cases, when the [acquiring firm] makes a substantial showing that the acquired firm's weakness, which cannot be resolved by any competitive means, would cause the firm's market share to reduce to a level that would undermine the government's *prima facie* case.'" *ProMedica*, 749 F.3d at 572, citing *F.T.C. v. Univ. Health*, 938 F.2d, 1206 1221 (11th Cir. 1991). "Under the *Merger Guidelines*, a company can assert what is known as a 'failing firm' defense only if (i) the company is unable to meet its obligations as they come due; (ii) would not be able to organize successfully in bankruptcy; and (iii) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its assets in the relevant market and pose less severe danger to competition than does the proposed merger." Feinstein, *supra* note 1, at 12, citing the *Horizontal Merger Guidelines* § 11.
[30] *Id*.
[31] *ProMedica*, 749 F.3d at 572.
[32] *Id*.
[33] *Id*. at 573
[34] *ProMedica Health Sys., Inc. v. Fed. Trade Comm'n*, No. 12-03583, at 5 (6th Cir. June 3, 2014).

[35] *Fed. Trade Comm'n v. St. Luke's Health Sys. Ltd.*, No. 1:12-CV-00560-BLW, Findings of Fact and Conclusions of Law at 9 (D. Ohio. filed Jan. 24, 2014).
[36] Hart-Scott-Rodino Annual Report, Fed. Trade Comm'n, and Dep't of Justice, 2 (Fiscal Year 2013).
[37] St. Luke's Health System, Ltd., No. 1:12-CV-00560-BLW at 3.
[38] *Id*. at 1.
[39] *Id*.
[40] *Id*. at 12.
[41] *Id*. at 17.
[42] *Id*. at 44. The deal resulted cause the HHI to increase by 1,607, from the pre-merger level of 4,612 to the post-merger level of 6,219.
[43] *Id*. at 3.
[44] Deborah Feinstein explained: "Merging hospitals often claim their combination will produce significant efficiencies, such as improved quality of care, avoidance of capital expenditures, consolidation of management and operational support jobs, consolidation of specific services to one location (*e.g.*, all cardiac care at Hospital A and all cancer treatment at Hospital B), and reduction of operational costs, such as purchasing and accounting costs." Feinstein, *supra* note 1, at 11.
[45] St. Luke's Health System, Ltd., No. 1:12-CV-00560-BLW at 47.
[46] *Id*. at 46, citing *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 720 (C.A. D.C. 2001).
[47] *Id*. Efficiencies must be: (1) merger-specific and would be unlikely to occur without the existence of the merger, (2) "must not be vague or speculative" and (3) are required to be cognizable. Feinstein at 11.
[48] St. Luke's Health System, Ltd., No. 1:12-CV-00560-BLW at 47.
[49] *Id*. at 45.
[50] *Id*. at 44. "To constitute a defense, St. Luke's must show that entry by competitors will be 'timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects' of a proposed transactions." *Id*., citing the *Horizontal Merger Guidelines* § 9 and *FTC v. Procter & Gamble, Co.*, 386 U.S. 568, 579 (1967).
[51] St. Luke's Health System, Ltd., No. 1:12-CV-00560-BLW at 47-49.
[52] Andrew Westney, *St. Luke's Appeals Antitrust order Killing Saltzer Deal*, LAW360, June 13, 2014 at 1.
[53] *Fed. Trade Comm'n v. St. Luke's Health Sys.*, Ltd., No. 1:12-CV-00560-BLW, Memorandum Decision and Order at 2 (D. Idaho filed June 18, 2014). "To obtain a stay, St. Luke's and Saltzer bear the burden of demonstrating that (1) they are likely to succeed on the merits of their appeal; (2) they will be irreparably injured absent a stay; (3) issuance of a stay will not substantially injure other parties interested in the proceeding; and (4) the public interest favors the stay." *Id*., citing *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012).
[54] *St. Alphonsus Med. Center-Nampa Inc. et al. v. St. Luke's Health Sys. Ltd., et al.*, No. 14-35173, Dkt. 70 (9th Cir. filed July 25, 2014).
[55] Jeff Bliss, Comment: *ProMedica decision adds to guidance for hospitals considering mergers*. MLEX: MARKET INTELLIGENCE, Apr. 22, 2014 at 3.
[56] *ProMedica*, 749 F.3d at 563.
[57] *Id.* at 571.

Endnotes to "EU Considers Expanded Review of Minority Shareholdings"

[58] White Paper, Towards More Effective EU Merger Control, COM(2014) 449 final, July 9, 2014, *available at* http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf
[59]Commission Staff Working Document, Towards More Effective EU Merger Control, SWD(2013) 239 final, June 25, 2013, *available at* http://ec.europa.eu/competition/consultations/2013_merger_control/merger_control_en.pdf.
[60]Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation), *available at* http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004R0139.
[61] *Id*. at Art 3.
[62]*Id*.
[63] An Annex to the Consultation contains a summary of the analysis of minority shareholdings in other jurisdictions. Annex II to the Commission Staff Working Document, Towards More Effective EU Merger Control, SWD(2013) 239 final, *available at* http://ec.europa.eu/competition/consultations/2013_merger_control/consultation_annex2_en.pdf.
[64] 15 U.S.C. § 18a.
[65] *Id*. at § 18a(c)(9). Section 7 of the Clayton Act, the statute that prohibits acquisitions where "the effect of such acquisition may be substantially to lessen competition," also contains an exception for acquisitions made "solely for investment." *Id*. at § 18.
[66]16 C.F.R. § 801.1(i).

[67]Enterprise Act 2002 at § 26, *available at* http://www.legislation.gov.uk/ukpga/2002/40/contents.
[68] Act Against Restraints of Competition at Art. 37(1)(4), *available at* http://www.gesetze-im-internet.de/englisch_gwb/index.html.
[69] White Paper at ¶ 26.
[70] Treaty on the Functioning of the European Union ("TFEU"), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT.
[71] White Paper at ¶¶ 38-39.
[72] *Id*. at ¶ 55.
[73] *Id*. at ¶ 33.
[74] Case No COMP/M.4439 *Ryanair / Aer Lingus* 27/06/2007.
[75] Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691.
[76]Completed acquisition by Ryanair Holdings plc of a minority interest in Aer Lingus Group plc, ME/4694/10, 15 June 2012, ¶¶ 35-37, *available at* http://www.oft.gov.uk/shared_oft/mergers_ea02/2012/Ryanair.pdf.
[77]*Joaquin Almunia, "Honing the instruments of EU competition control," International Competition Law Forum, SPEECH/14/378, May 15, 2014, available at* http://europa.eu/rapid/search-result.htm?query=4&language=EN&format=HTML_EXPORT.
[78] Consultation Paper at 6.
[79]*Id*. at 7.
[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84]*See* http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html.
[85] White Paper at ¶ 45.
[86] *Id*. at ¶ 48.
[87] *Id*. at ¶ 47
[88] *Id*.
[89] *Id*. at ¶ 49.
[90] *Id*.
[91] *Id*. at ¶ 50.
[92] *Id*. at ¶ 51.
[93] *Joaquin Almunia, "Honing the instruments of EU competition control," International Competition Law Forum, SPEECH/14/378, May 15, 2014, available at* http://europa.eu/rapid/search-result.htm?query=4&language=EN&format=HTML_EXPORT.