SQUIRE
SANDERS

Google/Waze: Some Practical Antitrust Reminders

Google recently confirmed media reports that the Federal Trade Commission (FTC) has begun investigating its now-completed acquisition of the Waze mapping app, despite media reports that the parties did not submit a premerger Hart-Scott-Rodino Act (HSR Act) filing. The media coverage of the parties' decision not to file and the FTC's decision to investigate contains some useful, practical reminders for parties and their counsel when evaluating deals.

No HSR Filing Does Not Mean No Antitrust Concerns

As the FTC's investigation demonstrates, the federal antitrust enforcement agencies can and do investigate transactions outside of the HSR Act process. The HSR Act is just a technical statute that requires parties to transactions meeting certain size thresholds to notify the FTC and the Antitrust Division of the Department of Justice of their deal, and observe a waiting period, before it closes. The HSR Act does not affect the government's ability to investigate or challenge a transaction on antitrust grounds, even after, as in the case of Google/Waze, the transaction closes. Indeed, the FTC has obtained significant litigation victories in challenges to consummated deals, such as the 2012 Eleventh Circuit decision upholding its challenge to Polypore International's completed acquisition of rival Microporous Products. (On June 24 the Supreme Court denied certiorari in the *Polypore* case.) If, for example, the government learns about a transaction through press reports or is contacted by a third party (such as a customer or competitor of the parties), they can investigate the deal even though they did not receive formal notice through an HSR Act filing. The Google/Waze transaction was the subject of widespread media reports, and also reportedly the subject of a complaint to the FTC by a consumer watchdog organization. It is unclear exactly how the FTC learned of this particular transaction, but it demonstrates the point that the lack of an HSR Act filing obligation, and even closing the transaction, does not necessarily insulate parties from antitrust scrutiny.

Do Not Neglect Antitrust Due Diligence and Risk Shifting

Because the government never loses the ability to investigate a deal for antitrust concerns, even after it closes, parties to a transaction that could present antitrust issues should not shortchange their pre-transaction antitrust diligence efforts just because a deal does not require an HSR filing. A deal that merits due diligence on antitrust grounds should get a careful evaluation by the parties regardless of whether it is reportable under the HSR Act. Similarly, parties are wise to base the negotiation and drafting of antitrust risk shifting provisions in a contract on the antitrust merits of a transaction, not just on whether the transaction will be reportable under the HSR Act.

The Importance of HSR Act Analysis

Rarely does a technical HSR Act filing analysis attract attention from the mainstream press, but occasionally in a high-profile transaction the media will take note. Google's conclusion that the Waze acquisition would not require an HSR Act filing despite its US$1.1 billion price tag has been the subject of recent online pieces from the *New York Times* and *Financial Times*, in addition to several trade publications. Published reports indicate that Google may have relied on a "foreign assets" exemption to the HSR Act, which exempts from HSR consideration assets located outside the US that do not generate significant US revenues. While the specific facts relied upon by Google are unclear, in the modern global economy it is not uncommon for even substantial transactions to be exempt from HSR Act requirements because of an insufficient US nexus. Even apart from media speculation about the correctness of the parties' legal conclusions, however, the Google/Waze deal is a good example of the importance of a careful HSR Act analysis to ensure the parties meet any applicable filing obligations. The government takes HSR Act compliance very seriously, and the FTC's investigation into the antitrust merits of the Google/Waze deal will almost certainly also include an evaluation of their decision not to file. The consequences of closing a reportable transaction without filing can be serious (including civil penalties of up to US$16,000 per day), so there is a high premium on getting the analysis right.

While it is far too early to tell if anything will come of the FTC's review of the Google/Waze deal, the early press reports of the investigation provide a useful reminder of the importance of careful antitrust and HSR Act analysis and planning, even for nonreportable deals.

Contact

Mark J. Botti
T +1 202 626 6292
mark.botti@squiresanders.com

Brian N. Hartnett
+322 627 11 01
brian.hartnett@squiresanders.com

Anthony W. Swisher
T +1 202 626 6294
anthony.swisher@squiresanders.com