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NAVIGATING ANTITRUST AND BANKRUPTCY LAWS: M&G'S SALE OF ITS CORPUS CHRISTI FACILITY

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In December 2018, after a nearly year-long investigation, the Federal Trade Commission ("FTC") accepted a settlement permitting the $1.1 billion acquisition out of bankruptcy of a partially completed purified terephthalic acid ("PTA")/ polyethylene terephthalate ("PET") resin production facility in Corpus Christi, Texas by a joint venture among three PET producers.[1] PET is a plastic polymer produced from PTA and used in many applications, such as manufacturing plastic water bottles.

The target facility had been owned by M&G Resins USA, LLC, a subsidiary of M&G USA Corporation ("M&G"), each in turn subsidiaries of Mossi & Ghisolfi S.p.A., an entity organized under the laws of Italy. Prior to declaring bankruptcy, M&G was building what was expected to be the largest and most efficient vertically integrated single line PTA/PET resin production facility in the world and the largest PTA plant in the Americas. However, in October 2017, M&G, together with 11 of its U.S. and Luxembourg affiliates, filed for Chapter 11 bankruptcy protection, prior to the completion of the project.[2] In the months following the filing, M&G conducted a comprehensive sale process for the plant under the requirements of Chapter 11, and subsequent to obtaining bankruptcy court approval of the sale, engaged in a parallel, detailed review of the transaction by the FTC.

The U.S. antitrust laws and federal antitrust enforcers—the FTC and Antitrust Division of the U.S. Department of Justice ("DOJ")—recognize that bankruptcy transactions implicate a number of unique timing and substantive issues. The agencies' merger guidelines reference the "failing firm doctrine," which under certain circumstances enables a purchaser to acquire assets out of bankruptcy even if that acquisition would otherwise violate the antitrust laws. The defense was not recognized in the M&G case—neither the FTC's press release nor accompanying public documents mention the doctrine, so we do not know how, if at all, it may have influenced the agency's analysis and decision to settle.[3] The outcome in this case, and others in recent years—for example, the litigation in 2017 involving Energy Solutions Inc.'s proposed acquisition of Waste Control Specialists LLC—serve as a reminder that companies in severe financial distress, even if in bankruptcy, are not guaranteed an easy or quick antitrust merger review.[4]

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This article will highlight the legal and policy challenges presented by the intersection of the federal antitrust and bankruptcy laws in the context of the sale of M&G's Corpus Christi plant. The article concludes with several best practices to successfully navigate these two sometimes conflicting areas of law.

M&G Case Background

By the summer of 2017, M&G faced dire financial straits.[5] Confronted with cost overruns, contractor disputes, and related construction problems, M&G was forced to scale back significantly construction at the Corpus Christi plant. With over a billion dollars owed to secured creditors and hundreds of millions of dollars of mechanic's liens filed against the plant, M&G filed for bankruptcy protection under Chapter 11 in October 2017.[6] It quickly sought bankruptcy court approval of previously-negotiated $100 million of debtor-in-possession ("DIP") financing to fund a sale process under Section 363 of the U.S. Bankruptcy Code. Absent finding a seller through bankruptcy, M&G faced the prospect of liquidation. Approximately a month and a half later, in December 2017, the bankruptcy court entered an order approving bidding procedures governing the sale of M&G's U.S. assets.

Under the court-approved bidding procedures, M&G did not start the sale process with a "stalking horse" bidder to set a pricing floor for a sale transaction and followed a two-step marketing process over four months in order to find a buyer. The procedures gave potential bidders one month to submit non-binding proposals, and another month to submit binding bids. M&G's advisors engaged in extensive efforts to find suitable purchasers, contacting potential bidders and facilitating several bidder site visits on the Corpus Christi campus. Afterwards, M&G evaluated the bids to determine which ones would be qualified under the bankruptcy procedures, and thus able to participate in an auction for M&G's assets in March 2018.

Leading up to the auction, M&G initially received three final bids for the plant and its related assets: (1) a joint bid from DAK Americas LLC ("DAK") and Indorama Ventures USA ("Indorama"), (2) a bid from Far Eastern New Century Corporation ("FENC"), and (3) a bid from a subsidiary of Grupo Financiero Inbursa, S.A.B. de C.V. ("Inbursa"), the plant's first lienholder.[7] DAK, Indorama, and FENC are each PET producers with global and North American operations. Inbursa is a bank, and its bid was primarily a "credit bid" that used its debt as currency, thus resulting in limited cash proceeds to M&G. M&G had concerns that the bids from DAK/Indorama and FENC did not comply with the bidding procedures and were not actionable as written. M&G also had concerns about the nature and amount of Inbursa's bid and

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whether it would garner the support of M&G's economic stakeholders.[8]

Given these concerns, as the auction date approached, M&G consented to DAK, Indorama, and FENC creating a trilateral bid to foster a competitive bidding environment for the plant. The three companies formed a joint venture, Corpus Christi Polymers LLC ("CCP"), and submitted a roughly $1.1 billion bid for the plant and related assets. M&G accepted, and the bankruptcy court approved, CCP as the winning bid and Inbursa as the backup bid in March 2018. If CCP failed to close the transaction, Inbursa would have acquired the assets.[9]

FTC Investigation and Settlement

While CCP's ultimate transaction structure was complex, it garnered the support of M&G and its diverse creditor body, and it was subsequently approved by the bankruptcy court. The bankruptcy court's endorsement of the sale process did not result in an easy or quick FTC review. The agency raised concerns that the North American PET market was highly concentrated, that the joint venture members were three of only four producers in that market, and that together the three firms control nearly 90% of North American capacity.[10] The FTC discounted the significance of imports, concluding that imports accounted for roughly 15% of North American sales, primarily served customers only on the coasts, and did not constrain prices throughout North America.[11] Duties on imports also rendered many sources of foreign PET uncompetitive, according to the FTC.

Ultimately, in December 2018, nine months after the bankruptcy court approved the transaction, the parties reached a settlement with the FTC. In the agency's "Analysis to Aid Public Comment," the FTC made several references to the bankruptcy process. In fact, the agency specifically noted that, of the three final bids, M&G had rejected bids by DAK/Indorama and FENC for failing to comply with the court's bidding requirements.[12] The FTC documents are silent with respect to the third bid from Inbursa. This is a key point. Although it is impossible to divine from the FTC's public statements, application of the failing firm doctrine likely turned on whether the Commission believed there were alternative purchasers to CCP that presented less antitrust risk.

Bankruptcy Versus Antitrust Laws: Compatible or Conflicting?

The bankruptcy laws and antitrust laws have different goals. The Bankruptcy Code seeks to maximize the value of the estate. The antitrust laws, by contrast, seek to prevent anticompetitive effects. In the deal context, this means prohibiting transactions which are likely substantially to reduce competition or create a monopoly. Both are federal statutes. Merging parties cannot simply rely on the Bankruptcy Code and expect a free pass from antitrust enforcers.

The Bankruptcy Code is designed to maximize the value of the debtor's assets, relieving debtors of certain obligations and fostering outcomes that are in the best interests of creditors. This goal is effectuated in part through public processes, statutory appointment of a creditors' committee, and due process for interested parties. Under Section 363(b) of the Bankruptcy Code, a debtor may sell the assets of the estate "free and clear" of any liens or interests if certain conditions are met. All other proceedings are stayed or consolidated in the bankruptcy court, and the debtor has numerous tools to pursue a value-maximizing outcome in a given case. The purpose of a 363(b) sale, by extension, reinforces bankruptcy law's core principle: to maximize the value of the estate and to return the assets of the bankrupt entity to the marketplace as quickly as possible.

The U.S. antitrust laws were passed to ensure free and open markets that are unfettered by conduct that is likely to increase prices, reduce output, or diminish quality or innovation. Section 7 of the Clayton Act prohibits anticompetitive mergers and acquisitions, regardless of size. The Hart-Scott-Rodino Act ("HSR Act") requires companies planning large transactions to notify the government of their plans in advance. This enables the federal antitrust agencies an opportunity to evaluate prior to closing whether a transaction is likely to reduce competition. Most transactions (approximately 95%) do not raise concerns.[13] For transactions that warrant additional scrutiny, however, investigations can last several months, and (pursuant to issuance of a "Second Request") require production of significant documents, data, and information from the merging parties and third parties, including customers and competitors. At the end of a government review, the FTC or DOJ can close its investigation with no action, reach a settlement with the parties to resolve competitive concerns (allowing beneficial aspects of the deal while eliminating problematic aspects), or go to federal court to prevent the transaction.

The U.S. antitrust laws and DOJ/FTC agency practice recognize that transactions in bankruptcy are different. Acquisitions of companies in bankruptcy (or of assets of a company in bankruptcy) remain subject to antitrust review, but are subject to a different set of procedural rules. While most transactions outside of bankruptcy are governed by an initial 30-day waiting period under the HSR Act before they can close, transactions under Section 363(b) are afforded a truncated, 15-day waiting period, which begins to run when the "acquiring person" and the trustee or DIP have filed. The FTC allows multiple bidders to make filings for the same target bankrupt assets, resulting in the possibility of parallel reviews which, depending on the buyer, may raise different competitive issues and risk profiles.

If competitive concerns cannot be resolved during the first waiting period, the agency can extend the timing and its investigation by issuing a significant discovery request to the parties (a "Second Request"). Another waiting period starts after the parties respond to the Second Request—10 days for bankruptcy cases rather than the typical 30-day period. Importantly, issuance of a Second Request to a debtor or trustee does not affect this timing; the government can be put back "on the clock" without the need for the debtor or trustee to comply with the Second Request. These HSR rules acknowledge the special circumstances presented in bankruptcy proceedings. Depending on the scope of the agency's inquiries and the buyer's strategy (for example, whether and how fully and quickly they respond to the Second Request), antitrust investigations can last anywhere from a couple of months to 12-plus months.

Apart from these important procedural differences, antitrust laws and DOJ/FTC agency practice recognize an affirmative defense for companies in dire financial distress. The so-called failing firm defense recognizes the economic principle that, in some cases, it is better for a company to continue to exist—even as a party to an otherwise anticompetitive merger—than to disappear entirely from the market. The Supreme Court first recognized the defense in 1930.[14] Drawing on this case and later precedent, the U.S. antitrust agencies' merger guidelines state that a merger is not likely to enhance market power if, absent the transaction, the assets of the failing firm would exit the relevant market. The defense applies when: (1) the firm would be unable to meet its financial obligations in the near future; (2) the firm would not be able to reorganize successfully under Chapter 11; and (3) the firm has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market, and pose a less severe danger to competition than does the proposed merger.[15]

In practice, the defense is rarely invoked and rarely accepted. Based on the authors' research, since 1930, 45 federal court cases have directly addressed the topic, and the defense was accepted in just 12. Most cases turn on being able to satisfy the last element—the "alternative purchaser" prong, and this appears to have been the decisive issue in the M&G investigation as well.[16]

Application of Failing Firm Doctrine to the M&G Case

Applying these elements to the M&G case, there was likely no serious dispute that M&G faced the grave possibility of business failure. M&G's resources were so depleted, and its business losses accumulated at such an alarming rate, that by the time it filed for bankruptcy, it was unable to pay significant amounts to suppliers and vendors, and could not raise additional liquidity outside of Chapter 11.[17] Rather, the last element of the defense—whether M&G made good faith efforts to find an alternative purchaser—appears to have been a key issue. Did M&G deploy good faith efforts to find a purchaser other than CCP? And to what extent was Inbursa, its senior secured lender and backup bidder, considered an alternative purchaser for purposes of the FTC analysis?

The Search for a Suitable Buyer

Bankruptcy courts require parties to follow strict procedures to govern the search for a suitable purchaser. These procedures necessarily require a timeline that takes into account the potential deterioration of the subject assets. Here, the speed of M&G's proceeding was important to preserve its assets: the longer the Corpus Christi plant remained incomplete and idled, the higher risk an eventual bidder faced in completing construction.[18] In addition, M&G had limited funding to maintain the plant and field a prolonged sale process. M&G's search efforts and subsequent auction were completed within a normal window relative to other 363(b) sale processes—four months—and in accordance with court-approved bidding procedures. At the end of the bid procedures hearing, the bankruptcy court approved M&G's process, concluding there were no complaints about the bidding procedures or timing for the sale process.[19]

The antitrust agencies are not required to defer to the judgment of a bankruptcy judge with respect to the sufficiency of a sale process. As explained above, the bankruptcy process seeks to maximize the value of the estate while the antitrust agencies seek to avoid anticompetitive transactions, regardless of how much a buyer is willing to pay for the target assets. For this reason, the FTC and DOJ will conduct its own analysis about whether the procedures were sufficient for a debtor to find an alternative buyer with less antitrust risk. To determine whether parties made a good-faith effort in finding that alternative purchaser under the failing firm doctrine, courts have analyzed various factors, including evidence that the failing company hired investment bankers or search consultants, publicized the sale, formulated a detailed and thorough proposal process, or rejected other suitors for good reasons, or in good faith.[20]

The evidence suggests that M&G met this standard and that its outreach efforts were distinguishable from cases in which courts have found deficiencies. M&G made "earnest, wide-ranging" attempts to find other potential sources of capital and prospective purchasers.[21] Its outreach efforts were "numerous and varied" during a time when M&G "faced a grave probability of business failure."[22] M&G reached out to many potential bidders, and arranged for site visits with interested parties.[23] M&G's efforts in running its sale process contrast with cases in which the failing firm defense was rejected—there, sellers either discouraged potential purchasers, or engaged only one targeted buyer while leaving others out of the process.[24]

The FTC did not comment on the sufficiency of M&G's search for alternative purchasers in its public documents (which is not surprising, given the settlement). Still, this leaves open the question whether the agency was satisfied with M&G's search efforts.

Who Counts as a Suitable Buyer?

At the end of this process, the CCP bid was the only viable strategic bidder. The FTC had significant concerns with this transaction, which gave rise to the settlement.[25] The only other bidder was Inbursa, a bank, with a backup bid. As noted, the FTC's Analysis to Aid Public Comment recognized M&G's concerns with the only other two strategic bids (from DAK/Indorama and FENC).[26] Assuming the FTC credited M&G's concerns, and did not have broader qualms about the sufficiency of the sale process, this leaves Inbursa as the only other alternative purchaser. But can Inbursa, a bank, be a viable buyer under the failing firm doctrine?

FTC officials have taken the position that "merging parties must show that the acquiring company is the *only* available purchaser."[27] But the Merger Guidelines state that any offer above the liquidation value of the assets will be deemed a reasonable alternative, preventing parties from discouraging bids (that may otherwise have fewer—or no—competitive problems) that fall below a certain value.[28] And both the Merger Guidelines and case law favor the principle that assets should stay in the market, which of course requires a buyer that is willing and able to operate them.[29]

There is no precedent for rejecting the failing firm defense based on an alternative offer from a non-strategic bidder. A non-strategic bidder that has no intent or demonstrated ability to operate a failing firm, and that would prefer not to acquire it, likely does not satisfy the objective of the failing firm doctrine—to keep the failing firm's assets in the relevant market. The M&G case raises questions about whether a secured lender should qualify as an alternative purchaser under the failing firm doctrine. Does the FTC require an alternative purchaser to have operational expertise and an intent to operate the assets? Should similar elements of proof apply in this context as to would-be divestiture buyers, and if not, why not? Or does the FTC take the position that a secured lender bidder that presents lower antitrust risk than other bidders, including a primary bidder, could sell the assets to a strategic party in the future (who would then keep the assets in the relevant market)? The case law is clear that general expressions of interest without the extension of an actual offer do not constitute reasonable alternative offers.[30] Courts require something more concrete than possibilities—a mere "will-o'-the-wisp" is not enough.[31]

Key Takeaways

The M&G transaction is a reminder that the bankruptcy and antitrust laws intersect in the context of a sale in bankruptcy. Parties must navigate both sets of rules to maximize value in the estate and meet the tight timelines present in bankruptcy. Where the sale presents antitrust risk, a bankruptcy proceeding does not guarantee quick merger review. Parties should expect a comprehensive investigation into the merits of transactions that raise potential competitive issues, including any defenses the parties wish to present. Parties also need to ensure the debtor has sufficient liquidity to fund itself through the duration of antitrust review. The burden of proof for establishing defenses lies with the parties, and both the case law and the Horizontal Merger Guidelines have set a high bar to be deemed a "failing firm."

Below are some best practices for navigating the antitrust considerations in the context of a bankruptcy sale.

1. **Involve antitrust counsel early.** Antitrust counsel should evaluate the antitrust risk of potential bidders and advise on the likelihood of obtaining clearance under different sale scenarios. A sale to a bidder that presents significant antitrust risk may jeopardize the likelihood of obtaining clearance and closing the transaction. Conducting this analysis earlier in the process can assist M&A counsel in negotiating risk shifting provisions in purchase agreements to the extent there are multiple buyers.

2. **Prepare different strategies to obtain a timely resolution.** Parties should develop timing strategies around the possibility that the agency will not be swayed by a potential accelerated bankruptcy sale timeline, and will instead conduct a detailed investigation. Although parties may not know the identity of the successful bidder until entry of the sale order, antitrust counsel can begin preparing arguments in support of different deal scenarios early in the process, working closely with counsel for potential bidders. Parties should consider entering into multiple joint defense agreements, and ought to be aware of the confidentiality and strategic implications of working with multiple potential buyers.

3. **Respond to agency requests.** Counsel for the debtor and potential bidders should anticipate the likelihood of an investigation by the FTC or DOJ. Depending on the facts, parties should expect to receive formal and informal document, data, and information requests from staff on the merits of possible transactions by different bidders. It is important to address these requests promptly—including, in many cases, by certifying compliance with Second Requests—as failure to do so can prolong the investigation and undermine parties' arguments that time is of the essence and that further delays could threaten closing and ultimately threaten the future viability of the at-issue assets.

4. **Develop a robust bidding process.** The FTC and DOJ may be skeptical of the bidding process, even if it was approved by a bankruptcy judge. If the parties plan to rely on the failing firm defense, debtors should be prepared to explain why their process for shopping the assets was comprehensive. Debtors and their advisors should

develop a robust sale process that mirrors the factors courts have relied on in the past, including by hiring reputable third-party consultants to conduct an expansive search, communicating frequently with potential bidders (even those whom the debtors believe may submit lower-value bids if they present fewer competitive issues), and providing potential bidders with access to information upon request. A process that starts and stops simply with a single or high-valued bidder likely will not satisfy the antitrust agencies.

5. **Expect greater agency scrutiny in the case of multiple bidders**. During an agency investigation, be prepared to address the who, what, when, and why of other possible bidders, including bidders who never formally entered the process and bidders who lost at auction. Debtor's counsel should be prepared to explain why these companies were not selected. Counsel also should be mindful of creditors who may enter the sale process, and understand the significance of their involvement to the antitrust investigation and to the parties' advocacy efforts and potential defenses.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they associated.

ENDNOTES:

[1]Far Eastern New Century Corporation ("FENC"), one of the parties to CCP, the joint venture, and a global supplier of PET, entered North America through its acquisition of M&G's Apple Grove, West Virginia PET plant in early 2018.

[2]*In re M&G USA Corporation*, No. 17-12307 (Bankr. D. Del. Oct. 30, 2017).

[3]Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of Corpus Christi Polymers LLC*, *et al*., FTC File No. 181-0030 (Dec. 21, 2018) ("Analysis of Consent Order").

[4]*United States v. Energy Solutions, Inc.*, 265 F. Supp. 3d 415 (D. Del. 2017); Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of CentraCare Health System*, FTC File No. 161-0096 (Oct. 5, 2016).

[5]*Declaration of Dennis Stogsdill in Support of First Day Pleadings*, *In re M&G USA Corporation*, No. 17-12307 (Bankr. D. Del. Oct. 31, 2017) at ¶ 11.

[6]M&G's financial state was similar to firms that successfully invoked the failing firm defense. *See, e.g.*, *U.S. v. M. P. M., Inc.*, 397 F. Supp. 78, 98 (D. Colo. 1975) (applying the defense where the acquired firm was deeply in debt and in "very serious and dire financial straits").

[7]Analysis of Consent Order, at 2.

[8]Hearing Transcript, *In re M&G USA Corporation*, No. 17-12307, at 35 (Bankr. D. Del. Mar. 27, 2018) (counsel for creditors pointing out Inbursa's backup bid is a foreclosure bid, meaning some creditors do not get paid).

[9]*Id.* at 20. Inbursa's ability to acquire the assets was subject to certain conditions, such as its ability to fund various reserves—an event that could have delayed further finishing the Corpus Christi plant.

[10]Analysis of Consent Order, at 3.

[11]*Id.*

[12]*Id.* at 2.

[13]Federal Trade Commission, *Mergers*, *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers.

[14]*International Shoe Co. v. Federal Trade Commission*, 280 U.S. 291, 50 S. Ct. 89, 74 L. Ed. 431 (1930); *Citizen Pub. Co. v. U.S.*, 394 U.S. 131, 137 (1969).

[15]Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission (2010), at § 11 ("Horizontal Merger Guidelines").

[16]Twenty-three cases analyze this last element. Courts have required that sellers make good-faith efforts—*i.e.*, conduct a "well-conceived and thorough canvass of the industry" to ferret out an alternative purchaser. *See, e.g.*, *United States v. Pabst Brewing Co.*, 296 F. Supp. 993 (E.D. Wisc. 1969).

[17]*Int'l Shoe Co.,* 280 U.S. at 302 ("a corporation with resources so depleted and the prospect of rehabilitation so remote that it face(s) the grave probability of business failure with resulting loss to its stockholders and injury to the communities where [the] plants were operated" is a company in "failing" circumstances); *U.S. v. International Harvester Co.*, 564 F.2d 769, 776 (7th Cir. 1977) ("[E]ven if [Seller] remained in the market, it did not have sufficient resources to compete effectively, and this supports the district court's conclusion that the acquisition . . . would not substantially lessen competition").

[18]*In re M&G USA Corporation*, No. 17-12307 (Bankr.

D. Del. Oct. 30, 2017).

[19]Hearing Transcript, *In re M&G USA Corporation*, No. 17-12307, at 65 (Bankr. D. Del. Mar. 28, 2018).

[20]*Dr. Pepper/Seven-Up Companies, Inc. v. F.T.C.*, 991 F.2d 859, 885 (D.C. Cir. 1993) (an unsuccessful search canvassed several potential buyers but "further efforts would be unlikely to bear fruit"); *cf. United States v. Energy Solutions, Inc.*, 265 F. Supp. 3d 415, 445 (D. Del. 2017) (seller failed to make affirmative search for ultimate buyers and only engaged with one other potential bidder); *Citizen Publishing Co*., 394 U.S. at 138 (1969) (noting failure of seller in hiring a broker); *Golden Grain Macaroni Co. v. F. T. C.*, 472 F.2d 882 (9th Cir. 1972) (merely showing that other companies looked at—but didn't buy—the seller is not enough to prove the challenged purchaser was the only prospective purchaser). *Cf. California v. Sutter Health System*, 130 F. Supp. 2d 1109, 1136 (N.D. Cal. 2001) (acquired company conducted a four-year search with an investment banker to elicit bona fide offers, even repeatedly contacting the second potential bidder to elicit another offer).

[21]*M.P.M.*, 397 F. Supp. at 102-03 (noting seller's "earnest, wide-ranging" but "uniformly fruitless" efforts to elicit bids).

[22]*Id.*

[23]*Declaration of Jonathan Brownstein in Support of Debtors' Motion for Entry of Orders Approving (I) Sale of Certain Assets of the Debtors and (II) The New DIP Facility*, *In re M&G USA Corp.*, No. 17-12307, at 5 (Bankr. D. Del. Mar. 22, 2018).

[24]*U.S. v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 781-82 (D. Md. 1976) (seller did not attempt to secure a purchaser alternative to the eventual buyer, and actively discouraged other prospects from bidding); *United States v. Energy Solutions, Inc.*, 265 F. Supp. 3d 415, 445 (D. Del. 2017) (seller engaged with only one other bidder who was left in the dark and basically ran a single bidder process; it was well-known in the industry that buyer made frequent overtures to purchase seller).

[25]Analysis of Consent Order, at 3 ("Without the proposed Consent Agreement, the Transaction would substantially lessen competition in the North American PET market by facilitating or increasing the likelihood of coordination between and among the joint venture members and by increasing the likelihood that the joint venture members, acting alone or in concert, would exercise market power.").

[26]*Id.*

[27]Federal Trade Commission, *Power shopping for an alternative buyer*, Competition Matters Blog (Mar. 31, 2015) (emphasis in original), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/power-shopping-alternative-buyer.

[28]*See* U.S. Contribution on Roundtable on Failing Firm Defence, Directorate for Financial Enterprise Affairs Competition Committee (Oct. 6, 2009), *available at* https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/failingfirm.pdf.

[29]Horizontal Merger Guidelines, at 32 ("If the relevant assets would otherwise exit the market, customers are not worse off after the merger than they would have been had the merger been enjoined"); *United States v. General Dynamics Corp.*, 415 U.S. 48, 507 (1974) (the failing firm doctrine applies a "choice of evils" approach where "the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition and other losses if the company goes out of business").

[30]*U.S. v. Culbro Corp.*, 504 F. Supp. 661, 669 (S.D. N.Y. 1981) (rejecting the DOJ's attempt to contact a potential purchaser on the "very eve of trial" because no proposal was ever made); *Sutter Health*, 84 F. Supp. 2d at 1136 (rejecting party as a viable alternative purchaser after it failed to respond to inquiries over several months and eventually said, "[W]e are no in a position to make an offer").

[31]*Culbro*, 504 F. Supp. at 669.

NEW EU FRAMEWORK TO COORDINATE EU MEMBERS' FOREIGN INVESTMENT SCREENING

By James Modrall

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On February 14, 2019, the European Parliament adopted a regulation ("the FDI Regulation") creating a new framework for screening foreign direct investments ("FDI") into the European Union ("EU").[1] In spite of its sensitive subject matter and EU Member States' reluctance to grant the EU Commission new powers, especially in areas touching on national security, the FDI Regulation was approved very quickly by EU standards. The regulation must be applied by all Member States and the EU Commission ("the Commission") starting 18 months from publication, *i.e.,* in the second half of 2020. The new

