Chapter 3

Mergers Across Borders: Strategies For Navigating U.S. Antitrust Review

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The day on which executives consummate a merger or acquisition often is the culmination of a difficult and time-consuming pre-merger process. Many multinational transactions face a daunting set of merger control laws in a number of different countries, each with its own procedural requirements, legal standards, and economic theories. The United States government's pre-merger review under the Hart-Scott-Rodino ("HSR") Act of times presents the most confusing and complex of those processes. Complicating matters further, many multinational transactions raise the possibility of national security issues that require involvement of still more government agencies in the process.

Counsellors who have a detailed understanding of U.S. practices and who follow several common-sense precepts are best prepared to help their clients successfully navigate transactions through to conclusion. Even in the best of circumstances, some deals present facts that will require in-depth antitrust investigations, but experienced counsel operating with common sense principles can often make a real difference in the process.

Identify Potential Delays Early And Plan Accordingly.

Executives negotiating transactions need to hear about the scope of competition issues raised by their transactions as early in the process as possible. U.S. government antitrust investigations are known to add weeks, and even months, of delay to some transactions, and that delay alone typically means higher costs and greater uncertainty. In addition, unlike merger control provisions in the European Union ("EU"), the time period for a full U.S. merger investigation is not confined to a set period. Precisely because U.S. investigations are of indeterminate length, they are often fraught with greater, and potentially costlier, uncertainty. Elongated pre-merger investigations can and do cause serious harm to employee morale, customer relationships and stock values. However, unanticipated delay can be even more threatening than delay alone. Parties, therefore, should arm themselves with knowledge of the potential antitrust concerns and plan their deals taking into account any likely risks and delays.

This is not to say that companies should avoid transactions that raise antitrust issues. Some deals between competitors that are closely investigated by U.S. antitrust authorities survive the process unscathed. Others are consummated with very acceptable remedial requirements included to resolve the antitrust problems. On the other hand, a particular transaction may raise such significant antitrust risks that the buyer or seller will decide to turn attentions to more fruitful projects, and even minor antitrust issues may affect the value of a set of assets to a particular purchaser.

Skilled antitrust counsel with experience before the U.S. Federal Trade Commission ("FTC") or the U.S. Department of Justice ("DOJ") can identify likely areas of antitrust concern. Their analyses can include the possible length of an investigation, whether the agencies may seek to challenge the merger, and what settlement options may be available.

Armed with knowledge about the likelihood and extent of a U.S. investigation, companies can be better prepared to negotiate terms between themselves for their purchase agreement that include contingencies in the event of a lengthy or extensive U.S. review. The companies will also be prepared to give proper guidance about the likely closing dates when the deal is announced to the public, thereby better protecting their customer relationships, employee morale and stock values.

Understand The Key U.S. Merger Review Provisions And How They Differ From Other Countries' Provisions.

The Law.

The foundation of U.S. antitrust law concerning mergers is Section 7 of the Clayton Act, which makes illegal those transactions substantially likely to lessen competition. Most U.S. merger inquiries involve so-called horizontal mergers between competitors. When merging companies are competitors, *even if only slightly or potentially*, antitrust authorities may be concerned that the merger will harm consumers or customers because the merged firm will face less competition post-merger. This concern is allayed, however, if there are a number of other competitors in the market already, or if new competitors would and could enter the market easily.

Government authorities will seek industry facts and develop economic theories based upon those facts to determine the likely competitive effects of the transaction. Antitrust defence counsel work to develop facts to demonstrate that the newly merged company will continue to face vigorous competition after combining and therefore that consumers will not be harmed by the transaction.

Depending upon the seriousness of the issues involved, U.S. government antitrust investigations typically require anywhere from a few weeks to several months, although there are exceptions on both ends of this spectrum. Under the HSR Act, parties must provide pre-merger notification of certain transactions to the DOJ and FTC, both of which have jurisdiction to enforce merger control provisions of the Clayton Act. (See U.S. Chapter below for details

about specific filing requirements, which can require complex determinations and are often arcane.)

The First 30 Days After HSR Filing.

After submitting an HSR filing, the parties must wait 30 days before consummating their agreement, unless they have requested and received "early termination" of this initial waiting period. In instances where government attorneys identify a transaction that requires investigation, the agencies will determine which agency will be investigating through a process known as "clearance." Once it has been decided whether the FTC or DOJ will be conducting the investigation, staff attorneys for the designated agency will call counsel during the initial 30-day waiting period to ask any questions regarding the proposed transaction. They are also likely to discuss those questions with competitors and customers to gather further information from other viewpoints.

This time period provides an excellent opportunity for antitrust defense counsel to provide factual bases in the form of documents and market information that shine the best, most competitive light on the proposed transaction. If counsel can satisfy agency staff members during this initial 30-day period that the agency need not be concerned -consumers will not likely be harmed by the transaction, or because the transaction is not likely to substantially lessen competition - then the inquiry will be closed. The decisions at this stage, which are made by the investigating staff attorneys and economists in consultation with their first-line managers, are rarely second-guessed by more senior members of either agency. In such a case, the U.S. HSR pre-merger review process will be complete at either the end of the 30 days or the granting of early termination and there will be no further investigation. The incentives are very high, therefore, for counsel for the parties to respond thoroughly and quickly to all staff inquiries at this stage.

Second Requests.

If, near the close of the initial 30-day waiting period, the U.S. authorities continue to have serious questions about whether the merger may substantially lessen competition in any market affecting U.S. commerce, they may recommend that the agency issue a Request For Additional Documents and Information. This request, known as a "second request," is issued either by the Chairman of the FTC or the Assistant Attorney General for Antitrust at DOJ ("AAG") upon recommendation of their staff members. Parties do not have an opportunity to address either the Chairman or the AAG about whether a second request is merited. Thus, it is critical for parties to respond appropriately to questions of staff attorneys and economists.

Upon receiving a second request, parties may not close their transaction until 30 days after they have "substantially complied" with the request. Second requests are unique to the U.S. federal government pre-merger process. Taken literally, a second request requires that the company turn over every document and electronic file in the company's possession or under its control that concerns the products at issue in the investigation. In addition, it demands that the company compile and create certain data files in a specified format for the investigators to use. Second requests take a standard format, a model of which appears on each of the agency's websites.

Experienced antitrust counsel will be able to negotiate to lessen the terms of the second request to reduce the burden of the response that their clients will be required to provide. The agency staff will agree to limit the request, but only if they can be convinced that a requested modification will not hinder their ability to obtain facts necessary to decide whether to challenge the merger and the evidence with which to prove the facts in court if need be. Even where counsel are very successful at negotiating significant reductions in their second requests, companies routinely must provide hundreds of boxes of materials and many gigabytes of electronic files as well as lengthy answers to interrogatories.

Compiling a response to a second request, therefore, requires significant effort and time for the companies. The second request does not specify a return date, but leaves the timing entirely open to the parties. This means that the parties control the time clock in the U.S. This is a far different circumstance from that employed by the EU, for example, where matters that move into the full investigatory stage have a specified end date.

Court Challenges.

Ultimately, even if the U.S. antitrust authorities believe that a transaction will substantially lessen competition, neither agency may disapprove the transaction. If they are unable to persuade the parties to resolve the competitive issues or to abandon the transaction, the agencies must convince a U.S. District Court judge to issue an injunction blocking the acquisition. This is a significant difference from practice outside the U.S., where some governmental bodies have actual approval authority. Because the HSR statute only holds the parties back from consummation until the end of the 30th day after substantial compliance with a second request, the government must file for a temporary restraining order pending the District Court's proceeding no later than that 30th day.

The FTC and DOJ statutes provide for different procedures at this stage of the process. DOJ goes to the court seeking an injunction from the District Court to block the transaction. The FTC asks a court to enjoin the transaction pending its own administrative court processes - issuance of an administrative complaint by the Commission; a hearing held by an administrative law judge ("ALJ"); an initial decision by the ALJ; and finally, a decision by the Commission whether to accept the ALJ's decision or issue its own. In real terms, few deals can survive the possibility of a lengthy administrative process, which will likely span a year or more. Accordingly, as a practical matter, the FTC's District Court motion to enjoin the transaction becomes the trial on the merits in almost all instances.

Before a final agency decision is made to initiate a court challenge to the deal, parties will be given opportunities to meet and discuss with senior managers the issues as framed by the staff's investigation. Meetings first take place between the parties, staff and managers. The decision-makers, which in the case of the FTC will be the five Commissioners and in the case of DOJ will be the AAG, will also meet with the parties thereafter to discuss the issues. No formal hearing is held at either agency. At the FTC, the Commissioners meet in closed session with staff a day or so after meetings with the parties to make their final decision. The parties are not allowed to attend this meeting.

Settlement Options.

In many situations, rather than undergoing the costs and risks of litigation, parties will agree to settlement terms with the investigating agency. In most but not all matters, settlement terms require the divestiture of assets to another company. Staff will be seeking a settlement that will maintain the status quo before the merger, e.g., a divestiture of business assets that will maintain the competition that would be lost through the proposed merger or acquisition. On the other hand, the merging parties will most likely

want a settlement that preserves the economic benefits of the deal.

Parties desiring to settle most often offer their proposed settlement terms to staff attorneys and economists and then negotiate mutually agreeable terms. These negotiations can be lengthy in and of themselves. Staff will want to verify, independent of the parties' assertions, that the settlement terms being offered are sufficient to maintain the current competitive vigor of the industry. Based upon a study the FTC conducted a few years ago of its prior settlements, which showed that many of the agencies' settlements had not fully accomplished the competition goals, staff are wary of divesting partial sets of assets and greatly prefer divesting ongoing business units.

When the investigation is conducted by the FTC, the settlement terms must be first provisionally accepted by the Commission itself, then placed on the public record for comment and finalised thereafter by a Commission vote taking into consideration any comments received. For matters settled by DOJ, the settlement terms are filed with the U.S. District Court under the provisions of the Tunney Act and, after consideration of public comments, will be made final by the court.

Be Actively Engaged And Effective With U.S. Government Authorities.

U.S. attorneys and economists are generally much more informal and available to discuss both the legal and economic theories of their investigations than is the norm in many other countries. Most practitioners in the U.S. agree that throughout the investigation, parties' counsel should engage in discussions with U.S. authorities as much and as often as the staff will allow (i.e., without becoming a pest).

Responding to questions rapidly and backing up answers with market facts and documents to the greatest extent they are available may allay concerns before any concerns become entrenched. U.S. antitrust investigators work collaboratively on their investigations, and they periodically report to their superiors about the issues faced in their investigations. If a particular issue goes unanswered, even where it may later be adequately or partially addressed, the parties will find that they must then convince not only a single attorney with a nagging concern but also other officials with whom the hypothetical problem was discussed. The longer an issue remains unaddressed, the more difficult and time-consuming it is to dislodge.

Discussions with staff members, if they are backed up by solid evidence, allow counsel to put forth arguments to eliminate possible issues from the investigation. Staff members have wide latitude to narrow their investigations without management input, and even relatively junior-level U.S. government staff members may have an important say in internal decisions about the issues that should remain in the investigation. Discussions with staff also have the benefit of informing counsel about the theories being pursued and possibly give insights about the types of information being collected by the government from other sources.

Parties should prepare as far in advance as possible to answer potential antitrust concerns. Mere rhetoric is rarely sufficient. Where the reasons that the agency might not wish to challenge the transaction are not readily apparent, the parties should anticipate that they will need to educate the investigators sufficiently to understand the competitive conditions of their industries. If parties are able to convince agency attorneys and economists not to recommend that there be a second request (which must happen during the initial 30-day waiting period), parties may proceed to closing without additional delay.

A number of strategies may be employed by counsel who understand the FTC and DOJ investigatory procedures and are relatively certain that the transaction will receive a second request. Counsel may get ahead of the process by collecting certain materials and beginning their document review ahead of time. Some law firms hire temporary personnel to supplement their document review team and to speed up the process. Many will decide to enlist an economist to analyse the market and develop arguments to support their transaction.

It is important to remember that the investigation is not litigation. Most counsel make it a practice to cooperate with the staff members of the FTC and DOJ to the greatest extent practicable. Unless, and until, there is litigation filed in a District Court, the procedural posture of the investigation usually does not require hard-nosed litigation practices.

This is not to say that it is an easygoing exercise. Quite the contrary. But, throughout the agency investigative procedural time period the U.S. antitrust staff members have some significant points of procedural leverage that can make matters very difficult for parties who behave obstreperously. Moreover, it behooves parties to make every attempt to convince staff members that they need not be concerned that the deal is potentially anticompetitive. Even where senior-level approval is required to close an investigation without challenging the transaction, staff attorneys leading investigations at either the FTC or DOJ have little trouble convincing their superiors to close investigations once they themselves are convinced that is the right course.

Recognise Issues That Arise Outside HSR Area And Prepare To Coordinate The Timing And Content.

Multinational mergers and acquisitions are particularly likely to raise important issues outside the confines of competition law. Most prominent among these areas are national security concerns. The Exon-Florio Amendment to the Defense Production Act of 1950, as amended, empowers the President to suspend, prohibit or dissolve foreign acquisitions, mergers and takeovers of any U.S. businesses that, in the President's judgment, would threaten to impair national security. The twelve-member Committee on Foreign Investment in the United States (known as "CFIUS"), which is chaired by the Treasury Department, is responsible for conducting Exon-Florio reviews and investigations.

If a transaction will result in foreign control of assets that may affect U.S. national security, antitrust counsellors should recognise that possibility and seek advice about the effect that the CFIUS review may have on the transaction. The antitrust investigation strategy should be adjusted accordingly.

In a similar vein, many transactions involve products purchased by the Department of Defense ("DOD"). In those instances, DOD officials are likely to be invited by the reviewing antitrust agency to participate actively in the investigation, as the primary customer (and sometimes the sole customer). The antitrust officials rely heavily upon DOD officials to provide important information about possible competitive effects of the transaction. In many instances, therefore, it is useful for companies to discuss the pending transaction with officials in DOD who are most knowledgeable about their products as early in the process as feasible to gauge any possible concerns that may exist from that customer.

Establish and Maintain Credibility.

Throughout the process, it is paramount that the parties and their

counsel maintain their credibility with U.S. authorities. There is no substitute for developing a trustworthy relationship with investigators. If the agency officials get any indication that they have been provided untruthful information or half-truths, the success of the parties' arguments are likely to suffer significantly. Throughout the process with U.S. government officials, there will be instances of procedural "give and take" based upon trust that the parties are presenting accurate responses to questions and issues raised. HSR procedures, particularly the requirement that companies "substantially comply" with a second request, give agency staff sometimes formidable leverage. Where counsel or companies no longer have credibility with the government officials, the procedural hurdles they will be required to clear will no doubt be higher. The agency will believe that it must ensure at each juncture that it is not being misled and that its processes and inquiries must be protected from the untrustworthy counsel or company. In addition, individuals untruthful in their representations to the U.S. government may suffer personal legal sanctions.

Know The Facts - It's All About The Facts.

Antitrust inquiries are notoriously fact-based. Customers' comments and company documents form the core of any antitrust matter. Economic theories are only as good as the facts on which they are based.

Customers.

Customers provide key input for antitrust agency decisions. U.S. antitrust authorities discuss prospective mergers with customers in great detail. Unlike in the EU, where customer contacts with investigators are largely done via exchanges of written questionnaires and written submissions, the U.S. process involves more interviews. Customers being interviewed are often able to express concerns that they may be reticent to address in more formal forms. The information gained in discussions between customers and U.S. investigators can and does play a central role in whether a particular transaction will be challenged.

Unfortunately for the parties involved in the acquisition, the customer interviews are conducted with a guarantee of confidentiality. The confidential assurances in the U.S. are unlike the procedures employed by the EU, where at a certain stage in the process, the parties have the right to know both the identity of parties who have come forward against their transaction as well as the content of their statements and information. That is most certainly not the case in the U.S. Investigators at both the FTC and DOJ promise confidentiality to third parties and can deliver on those promises based upon statutes and regulations that have been passed specifically for HSR merger investigations.

Because customer testimony is so vital to the antitrust authorities' inquiries and their views are so important in the analysis, parties to a transaction need to find a way to understand just what their customers are likely to be saying. In many instances, therefore, companies planning an acquisition or merger should consider discussing the transaction with their customers as soon as the deal is announced.

If the parties can convince customers that they have nothing to fear from the transaction, they have gained a significant element on their side.

Customers, however, are often wary of disclosing to an important supplier that they may be worried about competition after a merger. They may fear retaliation from a powerful supplier. Sometimes they do not wish to say negative things to their supplier who has cultivated a friendly relationship with his customer. Parties need to think through the possibilities that their customers are merely telling them what they wish to hear and adjust their expectations accordingly.

Documents.

The parties' own documents can be either their best sources of evidence or the transaction's worst enemy. Antitrust counsel should be given access to company documents as well as to company officials to explain the background of documents as early as possible. Most often in U.S. merger proceedings, the most damning information comes from the documents of the merging parties.

For an antitrust proceeding, the parties' documents are the company speaking, and rarely can the parties get out from under statements in documents that support the antitrust arguments against their transaction. The claims that the worst documents were penned by middle managers acting without authority or the "summer intern" will often fall on deaf ears, unless those documents are clearly out of keeping with other evidence adduced in the investigation. Those arguments have been repeatedly offered, and are not likely to be accepted as sufficient.

Electronic communications can be particularly difficult for companies with antitrust issues raised by their transaction. Managers are sometimes comfortable flipping short statements back and forth via email in such a way that important qualifiers are often omitted. Counsel need to prepare for such difficulties.

For a second request production, documents will be collected from throughout the company wherever there may be information that is related to the products at issue. For purposes of preparation, however, most antitrust practitioners can relatively quickly understand much of the business from access to top-level managers' documents and the major marketing and planning documents. Also, counsel should give careful consideration to the documents required to be filed with the HSR filing, which includes documents that discuss the markets affected by the transaction that the Board of Directors and key executives reviewed in evaluating the deal (see USA Chapter below). Because these so-called 4(c) documents were the first documents examined by the agency, and likely formed the basis for initial inquiries, counsel should give particular attention to understanding anything therein that relates to the antitrust theories being proposed.

Develop A Strategy Between Merger Partners And Coordinate.

Antitrust counsel for the two merging parties should speak at length early in the process to assess their respective views of the markets involved and the competition issues raised by the transaction. Often antitrust counsel exchange documents for their companies under the auspices of a joint defence agreement that provides they will not disclose the other company's documents to their own clients. These exchanges between outside counsel keep them from being blindsided by statements their merging partner may have made that differ from those of their own clients. In many circumstances, FTC and DOJ staff meet separately with each party to the merger, and counsel should routinely keep each other apprised of what they learn during their respective meetings. Pursuant to the joint defence agreements, counsel seek to protect the attorney-client privilege from being waived.

In addition, the companies need to develop a strategy for the end of the process. Will their merger only make economic sense if it can

be closed without divestitures? Or, are there settlement terms that are at least palatable? If the agency says that it believes it will sue to enjoin the acquisition, will the parties fight the injunction in court? Or, will they decide to fold the deal entirely? These are, of course, decisions for the business people and not for the lawyers, but the lawyers will proceed with their investigation strategy based upon knowledge of their ending strategy.

Only in a rare circumstance would it be appropriate for counsel to allow the FTC or DOJ staff to discern the final strategic goal. The procedures and the manner of working through the various stages of the investigation, however, will certainly differ based upon that goal. If, for example, settlement would at least be considered, the parties might wish to identify a bundle of assets that could be offered if and when the agency identified and fixed on a particular product and appeared to have developed evidence sufficient to make out a case in that industry. At the FTC, settlements that include less than the divestiture of an ongoing business unit often require the merging parties to offer a buyer for those assets along with a negotiated contract to sell them. Such an agreement can be very time-consuming and will need to be factored in to the transaction's time line.

On the other hand, if antitrust counsel anticipate that the only way to achieve an acceptable result is to fight the agency in court, the best strategy may be for the parties quietly to prepare their injunction defence papers and put together their evidence while working through the lengthy agency investigation. They might also choose to be preparing an economist for possible testimony, and in some instances would use an economist whose identity had not been revealed to the agency.

Avoid Illegal Pre-merger Coordination.

U.S. antitrust authorities have made clear in recent years that they will zealously protect the waiting periods established under HSR. Significant penalties have been levied on parties to a prospective deal that failed to observe the HSR waiting periods - known as "jumping the gun" - by exchanging competitively sensitive information with one another while the government's investigation was pending or by ceding some forms of control to the merger partner.

The basic principle of gun-jumping is that non-public, competitively sensitive information should remain confidential within the company, except in limited circumstances when necessary for due diligence or integration planning. Improper disclosures of competitively sensitive information may subject parties to charges that they have engaged in gun-jumping by failing to adhere to the HSR waiting periods. Also, when the parties to a negotiation are competitors, improper exchange of information may subject them to charges that they have colluded in violation of Section 1 of the Sherman Act.

Competitively sensitive information differs according to the industry and the company. Competitively sensitive information is that which the company would normally not disclose publicly because to do so would hinder its ability to compete. This would include anything that, in a competitor's hands, would enhance the competitor's ability to predict the company's future price and output strategies, including its likely responses to price and output initiatives of the competitor. So long as negotiating companies keep in mind that a transaction may not be consummated, they will have little problem identifying which information they should keep confidential.

If there is some competitively sensitive information that is reasonably necessary for the parties to exchange in order to evaluate the very merits of exploring the potential transaction, some of that information may be disclosed. This should be done, however, only if the disclosure is accompanied by procedural protections that prevent the information from being used for commercial purposes. The procedural protections might be that only three or four named individuals would have access to the information, each of whom would be obligated to sign a stringent confidentiality statement and none of whom were responsible for making decisions about marketing and sales. Even so, some information is so competitively sensitive that it just should not be exchanged pre-merger because to do so would be essentially to give away the crown jewels of the company.

Of necessity, these gun-jumping principles are very broad. Information that is competitively sensitive will vary so widely from firm to firm and industry to industry that it is difficult to define it across the board. Most often, the best way to determine whether a piece of information would fall into the competitively sensitive category is to ask a key executive whether he would feel comfortable giving it to his most difficult competitor. If not, then the information is most likely competitively sensitive, and antitrust counsel should be sought before exchanging it.

U.S. counsel should exercise serious caution with regard to potential gun-jumping issues. The enforcement agencies have made known that they continue to watch for gun-jumping violators, because charges filed against one transaction serve as examples to educate many other parties about permissible and impermissible exchanges.

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By understanding the key features of U.S. pre-merger review, and by following certain ground rules, companies will be able to navigate the complexities of such reviews effectively and be better prepared to deal with the issues as efficiently as possible. Although no ground rules can absolutely protect a transaction from government investigatory delays, the above principles may significantly lower the antitrust risks and costs associated with your merger. Each investigation is very fact-based, and skilled counsel can assess the possible delay, costs and risks attendant to your transaction.

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KAYE SCHOLER

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Kaye Scholer's Antitrust Practice Group litigates antitrust cases in civil and criminal actions, represents clients before federal and state enforcement authorities in pre-merger and other investigations, and counsels clients with respect to the development and execution of business strategies. Our practice comprises antitrust lawyers fluent in multiple languages, and who are familiar with European and Asian business and legal environments. With more than 40 antitrust lawyers in the U.S. and Europe, including a number of former U.S. Department of Justice and Federal Trade Commission officials, we have successfully represented multi-billion dollar acquisitions before both U.S. enforcement agencies and have litigated many major antitrust cases in federal, state, and appellate courts.

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