Dos and don'ts of navigating antitrust merger investigations

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For most major international transactions, the US and the EU are among the key jurisdictions for merger clearance. While counsel cannot afford to ignore the myriad of merger control regimes worldwide, US and EU reviews can be among the toughest and clearance from these authorities can frequently have a persuasive effect on others. The procedures in the US and EU are quite different but the general rules on the approach to staff remain the same on both sides of the Atlantic.

In clearing any deal through the antitrust agencies, how the parties approach the agencies' staff and what strategies they adopt in addressing the staff's concerns can be just as important as the substantive legal and economic arguments supporting the deal. When a deal is handled badly, even the 'doable deal' can suffer. Ongoing and thoughtful communication with agency staff can reduce the burden of agency review, avoid unnecessary delays, and increase the chances that a deal will ultimately be approved.

Do: establish credibility with staff early

An effective relationship with agency staff starts with honesty and candour. If staff believe they cannot trust counsel or the parties' business people to be candid and honest, any effort to establish a good working relationship will be frustrated. Counsel should respond candidly to all reasonable inquiries recognising, of course, any limitations placed on him or her by the attorney-client privilege and the work product doctrine. (In the EU, privilege protection is much narrower than in the US, and the Commission does not recognise in-house counsel advice as privileged). If facts are not known, counsel should volunteer to present those facts to staff as soon as possible. If factual representations are made to staff that are later learned to be inaccurate, correct the information immediately before staff learn of the error themselves.

In the EU, the heavy up-front burden of preparing a lengthy filing with the full competitive analysis supported by extensive data requires extensive factual development at the outset and great attention to detail to ensure there are no significant factual errors. While parties can only provide their estimates of market shares, it is important that they devote some time to this exercise so that they are indeed 'best estimates'. When the Commission subsequently obtains detailed data from all main competitors and can itself check on shares, it is important that initial estimates provided by the parties are at least close to these figures, or that there is a reasonable explanation as to why they may diverge significantly.

Do: treat staff professionally and respectfully

Agency staff perform a valuable law enforcement function and should be treated with courtesy, respect, and professionalism. Although staff demands may occasionally seem unreasonable, building strong professional relationships is critical to encouraging dialogue and avoiding unnecessary delays.

Do: prepare in advance

In both the US and the EU, counsel should fully analyse potential competitive issues raised by the proposed transaction as early as possible. This will allow counsel and clients to articulate a sound business rationale for the merger. In addition to addressing staff's threshold questions at the outset, being familiar with the issues early allows counsel to advise the client on potential concerns staff may raise later during the investigation and the realistic likelihood that the deal can be approved with or without conditions.

Prior to announcing the transaction, US counsel and the involved parties might consider a review of relevant documents, or, at a minimum, a review of potential 4(c) documents that will be filed with the initial HSR filing in the US. This will allow counsel to determine what the documents might reveal in favour of—or counter to—potential arguments supporting the transaction. During the initial interview period, agency staff will routinely ask to see recent strategic plans, marketing plans, and documents about the deal, and counsel should be well aware what those documents reveal long before they are provided to staff so any issues these documents may raise can be addressed.

In the EU, it is essential to carry out the competitive analysis before engaging in any significant contact with agency staff. Typically a draft EU merger filing form or a briefing paper with the basic details of the transaction and a preliminary competitive analysis is provided to the Commission prior to a meeting and prior to formal filing. The formal filing will contain a full competitive analysis. The documents to be provided with the filing are usually much less extensive than those provided as 4(c) documents in the US. However, reports to the board or shareholders analysing the transaction will usually be required and these should be reviewed in draft form by counsel. Similarly, press releases will typically be provided to the agency with the filing. The agency will also review other documents relevant to the transaction which may appear on the companies' websites.

Do: anticipate and address customer concerns

In the absence of customer complaints, US agencies are unlikely to challenge a deal. But customer opposition can stimulate agency staff to pursue a lengthy investigation or challenge a deal even when the legal and economic evidence runs counter to customer concerns. Therefore, addressing customer concerns in advance will increase the chances of obtaining the necessary clearances effectively and efficiently.

Parties can be well served in both the US and EU by investing time and resources into educating customers about the transaction early in the process. If customers are likely to have concerns, the parties should work with them to identify ways to address their issues. This should be done immediately following public announcement of the deal, before customer concerns can begin to fester and before agency staff begin contacting customers to solicit their views.

In the EU, the Commission has frequently been criticised for over reliance on competitor complaints. While customer complaints will usually be given more weight, it is not unknown for competitor complaints to derail a transaction. However, unlike customer complaints, there is often little that can be done to address directly competitor concerns other than providing the Commission with effective arguments addressing or undermining those concerns or questioning their motivation.

Do: manage client expectations

Business people who are well-informed about the initial assessment of antitrust risks associated with the deal will be better prepared to consider possible remedies for resolving agency concerns quickly and effectively. If there is a high risk that the deal will be blocked or significant remedies will be required, company management and the board should evaluate the risks before proceeding.

For outside counsel, the process of managing client expectations begins before they are even retained on the deal. When pitching for the representation, it is important for counsel to avoid being unrealistically optimistic—for example, promising an 'issueless' review—so that the client is not surprised later at the level of agency vigour devoted to the investigation or lulled into inadequate preparation for agency review.

Do: focus the investigation at the outset

Clients are not the only ones eager to avoid drawn-out investigations. In the US, agency staff are not anxious to sift through hundreds of boxes of documents irrelevant to the issues. In the EU, the scope of document review is not so much of an issue, since the parties normally do not need to provide such extensive documentation as in the US. In both the US and EU, open and frank dialogue with staff will go a long way toward narrowing the issues, reducing the burden and expense on the client, and ultimately focusing the investigation so that the deal can close sooner.

Efforts to focus a potential data request before it is issued often can be more effective than later trying to convince staff to narrow a broad data request already issued. In the US, waiting until after issuance of the data request to try to negotiate something narrower could delay staff's investigation as time will be diverted away from the substantive issues. Furthermore, once issued, the data request can only be modified with agency management's concurrence, which can often delay the proceedings or make it more difficult to obtain modifications to the request.

When requesting the US agencies for a narrowed scope after the data request is issued, counsel must be prepared with specific recommendations, concrete examples, and alternative proposals. For example, be ready to produce organisation charts to explain to staff the meaning of job titles and the scope of job responsibilities. Sample documents are also effective in helping staff become comfortable with the limitations you propose.

In the EU, narrowing the scope of data requests after the formal request for information is issued is more difficult, and it is better to focus efforts on maintaining close contacts with staff and a good flow of information designed to eliminate the need for extensive requests. What is required is a well-prepared up-front competitive analysis as part of the merger filing supported insofar as possible by concrete examples (for example, of market entry or customer switching to alternative suppliers) and strong data.

US agencies have pointed to the 2002 cruise line mergers investigation, that we handled for Carnival, as an example of where the strategy of focusing early worked well. The FTC investigated competing bids by Carnival Corporation and Royal Caribbean Cruises for P&O Princess. After a 10-month, in-depth investigation, the FTC closed its investigation of both proposed acquisitions finding that neither merger would substantially reduce competition. Despite the early view by analysts and the press that neither merger would be approved, both were cleared, largely as a result of the fact that Carnival presented substantial data early in the process. Joe Simons, then-Director of the FTC's Bureau of Competition, stated "This case really demonstrates how important the economics and data can be—and particularly how important it is to get it in early and work very closely with (...) the economists in the Bureau of Economics."

Do: create greater transparency

In the US, if the parties are willing to share their competitive analysis with staff, it is more likely that agency staff will similarly 'lay their cards on the table' so that you can identify issues, analyse the strength of the staff's case, and organise subsequent presentations to address the staff's concerns most effectively. In the US, the DoJ and the FTC have issued guidelines that should enable the parties to have a more effective and open dialogue with agency staff—if the parties choose to cooperate.

The goal of the DoJ's best practice guidelines is to "more quickly identify critical legal, factual and economic issues regarding the proposed transaction, to facilitate more efficient and more focused investigative discovery and to provide for an effective process for the evaluation of evidence, in an effort to deploy the [Antitrust] Division's investigative resources more efficiently. The initiative may also have the effect of reducing the investigative burden upon all concerned." But the DoJ guidelines state that staff's willingness to utilise these procedures will depend upon the parties' reciprocal willingness to engage on a cooperative basis. Thus, the message is clear—cooperation is a 'two-way street' and parties could potentially lose some valuable opportunities to reduce their burden if they don't reciprocate.

The FTC also has issued best practice guidelines that encourage greater transparency and cooperation on both sides. In December 2002, the FTC's Bureau of Competition announced guidelines for staff to use in merger investigations that are intended to streamline the FTC's merger review process, and improve the efficiency and speed of investigations while reducing the burden on the parties. The FTC's statement, however, recognised that the parties' good-faith cooperation is still critical to making the process work. The statement encouraged parties to come in at the earliest possible stage and explain to the staff, with credible support, how the company is organised, the roles and responsibilities of particular individuals, and the pattern of information flow and data storage in the company in an effort to reduce that burden as soon as possible.

Such a dialogue with DoJ or FTC staff could be particularly helpful in identifying and assessing the strength of the government's legal and economic concerns about the merger and addressing them. But such a dialogue only works if it is a two-way street—parties have to be willing to share their own analyses with the agency to facilitate an open and effective dialogue with staff. An additional benefit of sharing your analyses with staff is that, if they are 'leaning your way' toward clearing the deal, an understanding of your arguments will make it easier for staff to reach a favourable conclusion faster. Frequently, sharing your analyses with staff can provide a greater opportunity for them to understand the factual and economic underpinnings of your arguments and potentially adopt your analyses as their own.

In the EU, such an open dialogue routinely occurs. Since the parties' competitive analysis is provided with the formal merger filing, laying the cards on the table is a critical and inevitable part of the procedure. The European Commission has issued Best Practice Guidelines which encourage parties to engage in pre-notification contacts with the Commission so that prior to formal filing, the parties will normally provide a draft filing or briefing paper. The Commission may meet with the parties to discuss the transaction and address

such issues as the likely approach to market definition and the Commission will want to review at least one draft of the filing prior to formal filing. The reason behind this is that formal filing triggers a strict legal time-limit on the review period. The only real time flexibility in this system is pre-filing and in complicated transactions it is certainly in the parties' interests to engage in pretty extensive pre-filing contacts with the Commission.

Do: use well-regarded economists

To establish an effective dialogue with economic staff at the agencies, the parties should use economic consultants who are well regarded within the agency. This has long been true in the US. The EU has recently been affording greater attention to economic analyses and in complex deals, it is generally advisable to engage an economist.

Like the lawyers, economic consultants should be candid and honest with staff on their analysis and findings. It is particularly important when a merger is subject to multi-jurisdictional review to hire economists who are well known and well regarded by each reviewing agency. This may require the added costs of hiring multiple economists, but antitrust enforcers in any particular jurisdiction will be better persuaded by economic analysis performed by consultants who regularly appear before them.

Don't: use litigation tactics

In the US, during a merger investigation's early stages, it is important to remember that staff are investigating, not litigating. Counsel who adopt an adversarial posture from the outset often turn staff off and shut down effective dialogue. Staff will be less willing to share vital information and their views on the deal if they think parties are only trying to get a better position against them in some future litigation.

A litigation stance should only be adopted when it is plainly apparent that the deal is headed for litigation. But even then, actual litigation is extremely rare. Therefore, it is beneficial to keep some lines of dialogue open with agency staff. In some circumstances, a separate litigation team should be organised so that the team that has been communicating with agency staff can maintain those lines of communication without having preparations for litigation interfere.

In the EU, this is less of an issue since the Commission does not have to go to Court to block a deal and even now merger decisions do not frequently result in litigation. While there have been a few examples of litigation recently, the vast majority of mergers will be cleared (with or without remedies), without any appeal from the Commission's decision to the European courts. Nonetheless, the recent appeals of the Commission's merger decisions have resulted in a more cautious approach by the Commission in dealing with the parties and their lawyers and more extensive requests for data to support their decisions.

Don't: dump documents

In the US, once a data request is received, parties often embark on collecting and assembling the requested information as soon as possible so that all the information can be provided quickly. This often results in a 'document dump', where the entire production—often hundreds, or even thousands, of boxes of documents—is delivered to the agency staff on the same day. As a result, the waiting period clock is started on staff, who must then review the materials produced, complete their investigation, and prepare their recommendation memos—all within in a matter of 30 days in most cases. As a consequence, staff often have little time to meet with the parties to discuss the merits of the parties' position, or their own factual and economic evidence.

A better alternative—one that is more conducive to a continuing dialogue and a more effective relationship with staff—is to provide data and documents on a rolling basis as they become available. This approach gives staff more time to review documents while continuing a constructive dialogue with the parties on the merits. It has the added benefit of allowing the parties several opportunities to lay out the facts and theories of their arguments to staff. Counsel should take every opportunity to present their arguments to staff—even on a piecemeal basis—to allow staff time to fully digest and understand the arguments' factual and economic underpinnings.

Some counsel argue that staff will have less time to review your data, and, therefore, less time to find problems, if documents are dumped at the last minute. But it is a mistake to think that this will benefit the parties by leaving staff no time to look at the data – the agency will simply add more staff for the analysis or seek procedural ways to gain more time for its review. Also, such an approach puts staff in a confrontational mood, and they will be less willing to have a dialogue on the merits and discuss remedies until the parties give them more time. Invariably, staff will seek more time, either through a straightforward request or by stating that a recommendation to challenge the deal will go forward unless some additional time is provided. In most cases, parties will end up giving staff more time in order to avoid a lawsuit, so the only thing a document dump achieves is raising the tension and establishing an unnecessarily adversarial relationship with staff.

This issue does not typically arise in the EU. The filing is generally accompanied by transaction documents, structure charts and any third party sources of data or surveys which support the parties' competitive analysis. Subsequent requests for information can be extensive in terms of requiring further data from the parties or description of activities but replies have to be focused, responsive and rarely involve production of boxes of documents.

Don't: assume staff will conform to your timeline

Parties (and staff) are keenly aware of strategic dates for closing a transaction (ie, drop dead dates, or key dates for closing at either the end of the quarter or end of a fiscal year). In the US, the parties should also be aware that staff needs time at the end of the process to complete review of data and documents, prepare formal recommendation memoranda to agency management, and engage in remedy negotiations. In the absence of an agreement establishing a timetable for review, staff must finish their investigation under the assumption that the deal may be challenged and will shift to preparing for litigation.

Recognising these competing time constraints early in the process allows for a constructive approach that can accommodate everyone's schedule and avoid any further delay. Counsel should work out a timing agreement with staff in advance so the parties know the key action dates. Include in the schedule targeted dates for when staff's recommendation will go to management at the agency, and include, to the extent possible, targeted dates for meetings with agency management. Also allow for adequate turnaround times in any negotiations with staff.

In the EU, the review period is fixed by law with some possibilities for fixed extensions. The timing issues still arise and can even be more acute than in the US since, faced with a legal deadline, if the Commission has had insufficient time to conclude its analysis or test remedies, it may have no choice but to block the transaction. The parties therefore need to consider how much time they should give the Commission to consider the transaction and discuss the case prior to formal filing. In complex transactions, pre-filing contacts (exchanging drafts and meetings with staff) can take several months.

Don't: be surprised

In order to avoid surprises during later phases of the investigation, make sure in the US that staff involve management in the investiga-

tion as early as possible. (In the EU established teams will handle the review with regular reporting to senior management and the Commissioner.) Management involvement will usually ensure that all issues are presented and analysed in a timely fashion. Often management has greater sensitivity to what may be acceptable (or not) to the final decision-makers at the agency. It is important to understand these issues so that remedies the parties thought were acceptable to the agency are not later rejected when the ultimate decision-makers are brought into the process.

If there are particularly sensitive issues, such as potentially outcome-determinative issues, get management involved in those issues at an early stage. If economic analysis on crucial issues is to be presented to staff, make sure that management from the economic staff are also invited to the presentations so all issues can be vetted and discussed.

It is not always possible to predict all issues that may arise as a merger investigation proceeds, but careful advance work can often minimise the number of issues that may arise late in the process to a manageable set that can be addressed quickly and effectively.

Don't: wait until the last minute to consider acceptable remedies

Part of counsel's early preparation should include identifying the issues that might raise concerns before the antitrust agencies and to begin analysing what, if any, remedies the parties might be willing to consider in order to resolve those concerns. Identifying issues early will allow counsel to advise the client and provide input from the business people as to what remedies would not significantly undermine the value of the deal. Counsel should discuss with management at the outset of the process what conditions would be acceptable to the company: what they really need for the deal to make sense and what can they live without. Getting the business people to focus early on these issues will save time later if remedies are necessary to resolve concerns. In the EU, this is critical since there are strict time limits for submission of remedies within the review period.

A final word of advice

When developing a strategy for dealing with a merger review investigation, think of that strategy as a three-legged stool. The supporting 'legs' are legal arguments, economic analysis, and effective communication. Only when these three elements are combined will the strategy be strong enough to support the parties through the intricate process of getting the deal done.

In international transactions, this will also require that the parties consider the varying procedures, timetables, and substantive standards in all the jurisdictions in which the transaction may be subject to review and that they coordinate and schedule their communications and activities in each of these countries to avoid unnecessary complications, expense, or delay. As a practical matter, this requires that the parties retain experienced counsel who can handle this coordinating role unless they have an internal representative who has the time and experience to do so.

* The authors would like to thank Elise Kirban at Symbol Technologies for sharing her in-house counsel perspective.

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