CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle

April 2013 (2)

Achieving the Most Effective Outside Counsel and Client Relationship for Both Transactional Issues and Merger Reviews

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I. INTRODUCTION

Transactional work can provide outside antitrust counsel immense opportunities to create, cement, and expand relationships with in-house counsel. For IP-intensive businesses, antitrust counsel can provide a useful and often essential complement to the role that lead IP counsel often play as consigliore to a patentholder. For run-of-the-mill antitrust work associated with horizontal acquisitions, antitrust counsel can learn a significant amount about core businesses of the client in a very short period of time. For tough antitrust issues arising from high-stakes mergers and acquisitions ("M&A"), antitrust counsel can create enduring relationships with counsel with significant spillover to other types of antitrust work, particularly counseling on nonmerger issues involving related businesses, and, if necessary, related antitrust litigation.

Just as these engagements can create opportunities for antitrust counsel to expand their relationships, they can just as easily lead to the end of relationships between outside counsel and clients. Obviously, poor or subpar results should always lead counsel to reconsider their relationship with the lead outside lawyer, and, in some circumstances, with the related law firm. But results are not necessarily the only or even most significant driver of client satisfaction. The *process* of reaching a result can be often more important than the result itself in serving clients, especially when that process involves a Second Request and months of tense engagement with the government, external stakeholders, and the merging parties themselves.

This process involves a series of decisions that outside antitrust counsel and in-house counsel make during the course of an engagement about how to divide certain responsibilities in the course of the antitrust engagement. Although those decisions (and the process of reaching them) may have an important impact on client relationships, we do not discuss those implications here. Nor do we describe our thoughts on the best way to allocate those responsibilities to maintain or enhance client relationships. Instead, we simply catalogue the variety of roles that either external or in-house counsel (or other client employees) can assume over the course of a transactional antitrust engagement.

Our assumption is that an effective outcome with the agencies or opposing counsel is the primary goal shared by external and in-house counsel. And our experience is that there are no hard-and-fast rules on how these roles should be allocated. Ultimately, the best way to divide responsibilities depends on what the situation may demand, what the client prefers, and, most

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importantly, what particular strengths external and in-house counsel can bring to a particular engagement. Certain default rules can be useful, but rigid playbooks are often not.

II. RANGE OF TRANSACTIONAL SCENARIOS

Clients seek antitrust advice in a variety of transactional contexts. Formulation or enforcement of new distribution programs can lead to Robinson-Patman and vertical antitrust questions. Competitor collaborations can also require protracted antitrust engagement with outside counsel. So, too, can licensing and settlement negotiations, especially in industries where settlements are likely to attract antitrust scrutiny from the agencies and private plaintiffs bar.

These questions often go to antitrust lawyers with a preexisting relationship with the client. But even when they do not, the division of responsibilities is fairly uniform across the universe of transactional questions: the client has a specific question or situation that requires advice on structure, risk and implementation, and the external counsel provides it. Very few of these situations necessarily require outside antitrust counsel to interact with any third parties, whether the government, the collaborator, or the customer. And in those unusual situations where engagement is required, in-house and external counsel generally discuss what outside antitrust counsel is expected to do.

The most complicated and challenging division of responsibilities between in-house and outside antitrust counsel arises in the M&A context, particularly where transactions are likely to attract protracted domestic and ex-U.S. review. The length of review, the multiplicity of regulators, the necessity of constant sensitive communications with multiple stakeholders, and, most importantly, the necessity of responding effectively to the government lead to a number of important tasks that must be coordinated and implemented by in-house and outside antitrust counsel. We discuss those below.

III. PRINCIPAL ANTITRUST TASKS ARISING IN M&A

A. Initial Assessment

The three most frequent antitrust questions that arise at the outset of an M&A engagement are whether the transaction is: (1) HSR-reportable, (2) likely to raise material antitrust issues, and (3) potentially reviewable or problematic outside the United States.

On HSR reportability, the division of labor seems clear: in-house counsel provides the actual or potential transaction structure, and outside counsel provides its judgment. But the issue can often become more complicated given the increasing complexity in HSR reportability requirements, particularly for private equity and life sciences entities. In close cases, additional information about the client's historical filing preferences may be useful or necessary to determine whether to file in close cases. Filing out of an abundance of caution in one case can make previous failures to file in identical circumstances more questionable or potentially problematic.

On the basic merits assessment, external counsel obviously provides the judgment, but in-house counsel must take the lead in providing (and, in some cases, collecting) the essential background information and documents that any reasonable antitrust lawyer would require to provide useful counsel on what issues are likely to arise, how the parties can manage them, how long it would take to get through the agencies, and the likelihood of succeeding under multiple

scenarios. And in cases where in-house counsel itself has antitrust expertise and/or considerable experience with specific regulators in areas likely to arise during a merger investigation, then in-house counsel can and should take a more active role in reaching a consensus on the likely contours of the regulatory process and the merits of specific strategies.

The most complicated division of responsibility can involve the evaluation of ex-U.S. issues. In some cases, the outside counsel has partners who can perform a preliminary analysis and perhaps even lead engagements in all jurisdictions. In other cases, external counsel prefers to use other preferred counsel overseas. In either situation, external counsel should always ask the client from the outset if they are checking these issues with other external counsel, or whether they have any preferred partners or firms.

When U.S. antitrust counsel is the first competition counsel contact, clients will often assume that U.S. counsel can and should lead coordination among all antitrust counsel, and U.S. counsel should be prepared to do so. Anybody who has led a substantively challenging multijurisdictional merger review defense is aware of how complicated this can be (and how important seamless coordination and transparent communication are from the outset). Once U.S. counsel obtains a significant substantive download, she will often provide similar initial background to foreign counsel (to the extent the facts are similar across borders). Lead antitrust counsel will also often need to ensure that all foreign filings remain on course and consistent across borders. Finally, and most importantly for the client, lead antitrust counsel will also need to translate substantive risks, divergent rules, and diverse procedures into a global timeline.

This latter issue—who is responsible for bringing all of these pieces together in a single, communicable statement for client management and the transactional team—also underscores another important issue in dividing responsibilities between external and in-house counsel. Somebody needs to decide who will communicate the risk assessment and timetable to management, and how. Here, outside antitrust counsel can and should take their cue from in-house counsel.

In some cases, in-house counsel have legitimate internal reasons for not being the bearers of bad news. Outside counsel need to step up and deliver transparent risk assessments, regardless of how uncomfortable that is for the outside lawyer (or her partners). In other cases, there may be a structure, tradition, or very well-developed preference for in-house counsel to be the exclusive communicators of risk assessment to senior counsel. Again, external counsel need to take their lead from their clients. Pressing for direct communications with senior management can seem like grandstanding and may also suggest to in-house counsel that external counsel has concerns about the ability or willingness of in-house counsel to communicate their advice directly or accurately.

B. Managing Document Creation and Flow

A second, often essential aspect of antitrust M&A engagements is advising the client about the importance of not creating bad documents that would appear in HSR filings or Second Requests. At the very least, antitrust counsel needs to advise the client about what kinds of statements and documents are likely to raise the most significant issues. Some clients insist on a more proactive role for legal counsel, asking their businesspeople to send any potential 4(c)

documents to outside counsel for further review. And some legal counsel also insist that they assume that role themselves.

The range of possible roles for external and in-house counsel depends on a lot of factors (including the client's culture and the respect that the business affords legal counsel, whether internal or external). In some cases, screening and revising documents can be antitrust overkill and create counterproductive tension from the outset of an engagement. But in other cases, in-house counsel is correct to press for a more hands-on approach. In those situations, the only remaining question is whether antitrust lawyers need to do the review and revisions, and in tough deals, the answer is yes, whether the antitrust lawyers are external or in-house counsel.

C. Allocating Regulatory Risk

Formulating and discussing regulatory risks in M&A agreements is one of the most important antitrust functions that counsel can perform. As a general proposition, best practice for either buyers or sellers is to get their antitrust counsel well up to speed before any negotiation is likely to take place. This involves the collection and review of precisely the same information, data, and documents required for the merits assessment.

Ideally, both counsel are able to become knowledgeable and form a consensus on the issues that are likely to attract regulatory attention and the methods and timetable for resolving those issues. They can often do so under a common interest or Joint Defense Agreement. The principals and the corporate lawyers can then agree on how to deal with those regulatory issues. Although it can often be difficult for clients to understand, it is important that outside antitrust counsel at least agree on the likely degree of antitrust scrutiny and develop a transparent and positive working relationship with each other from the outset.

Unfortunately, the process rarely works that smoothly. One of the clients may not bring antitrust counsel up to speed quickly, which often reflects poorly on that client and suggests that they are not taking the regulatory process seriously (or are being coy about potential risks). Alternatively, clients and counsel may jump the gun and assume these roles for themselves, unaware that these earlier discussions can be imprudent (because they may be discoverable in documents or depositions) and/or counterproductive (because one or both sides may dig in and prevent external counsel from reaching that productive consensus on merits and strategy that can serve both clients' interests).

What often happens in these situations is that the client has assumed the role of antitrust counsel, and then wants its antitrust counsel to negotiate the regulatory risk. Adversarial negotiation between antitrust counsel may not only be inconsistent with Joint Defense Agreements, but is considerably less likely to result in the transparency required for the experts to reach an accurate assessment of the risks and the formulation of optimum antitrust strategy.

D. Filing Preparation and Coordination

Outside antitrust counsel generally takes the lead on actual preparation of regulatory filings and coordination. But in-house counsel can assume a significant amount of the responsibility for collecting the documents and information required to file. Clients with significant antitrust experience or expertise often prefer to take the lead on pulling potential 4(c)

documents from employees. Some clients with in-house antitrust experience may take this a step further and do the initial screening for whether documents are 4(c)s.

If the transaction is likely to receive a Second Request, and if in-house legal counsel does not have antitrust experience, then external counsel should strongly recommend doing the screening itself. This reduces the risk of inadvertent 4(c) omissions and enables outside counsel to collect and review relevant though non-4(c) responsive documents before filing.

E. Initial Contact with Regulators

In conjunction with an HSR filing, antitrust counsel may also consider making contact with FTC or DOJ staff likely to review the transaction. Some antitrust lawyers refuse to do this as a matter of course; others insist on doing it even when it is not clear that the deal should or would attract any attention.

Regardless of preferences, outside antitrust counsel should always ask whether either party's in-house counsel has a preexisting relationship with any of the staffers likely to review the deal. Some clients have so many interactions with FTC or DOJ staff that they may receive direct communications from regulators after filing. Conversely, some clients (particularly former FTC or DOJ employees) may also have a policy of giving relevant staff a heads-up prior to actual filing. Either way, outside antitrust counsel needs to be aware of and factor any of these relationships into the decision of whether, when, and how to talk with FTC or DOJ staff. Refusing to take advantage of these relationships is imprudent; not anticipating such outreach by the other merging party or the regulator can be counterproductive.

F. Keeping the Client Informed

As merger review progresses, outside antitrust counsel and in-house counsel will need to decide who should take principal responsibility for keeping the client's businesspeople informed about the status and likely progression of merger review. As with the initial risk assessment, either outside or in-house counsel can brief the businesspeople on these issues throughout the review.

It is optimal not only to do schedule briefings on a regular basis but also decide from the outset who should take the lead in communicating. Because protracted merger reviews often lead to the development of direct relationships between outside counsel and leading executives, both outside and in-house counsel must remain aware that individual employees will often seek personal updates on timing and risk. Obviously, such curiosity is natural, but when the nature or depth of communications from outside counsel are significantly different than regular updates, significant practical problems and conflicts can arise among employees and between outside and in-house counsel. Thus, it is useful to discuss rules of the road before such direct outreach occurs, and for outside and in-house counsel to remain coordinated on how status and timetable are communicated.

G. Important Stakeholders: Investors and Lenders

Regardless of whether companies are private or public, they will often need to communicate with important third-party stakeholders about the status and likely progression of merger reviews. Publicly-traded companies are likely to do these communications themselves, ideally with substantial guidance from outside counsel on what the issues are likely to be, what

level of detail is necessary or prudent to discuss publicly, and what statements to avoid when discussing regulators or the merits. Occasionally, it will be necessary for outside counsel to discuss antitrust issues with outside auditors, but usually those relate to lawsuits or ongoing nonmerger investigations.

Other stakeholders can require even more detailed and sophisticated communications. Lenders often have their own antitrust counsel and will press for substantial details about the timing and risk of regulatory reviews of transactions on which their repayment may depend. In these situations, clients can and should feel free to make their antitrust counsel available for detailed briefings on antitrust investigations. If clients prefer to do these briefings themselves, outside antitrust counsel needs to advise the client on how to avoid the disclosure of privileged advice in the course of discussing the investigation.

H. Integration Planning

Integration planning is an essential part of making mergers and acquisitions successful. It is also an area that can give rise to antitrust risks—not only can the discussion of integration itself raise interim antitrust risks of impermissible coordination and gun-jumping, but it can also lead to communications and documents that raise substantive risks for the transaction. These risks can multiply geometrically in a protracted review.

Thus, it is always advisable and often necessary for outside antitrust counsel to counsel the business on how to make the integration planning process as meaningful as possible without engaging in conduct that jeopardizes the transaction or the parties. At the very least, outside counsel should provide basic do's and don'ts to executives involved in the integration planning process. In addition, they should be available for a basic session of Q&A.

But in many antitrust investigations, in-house counsel can and should take the lead in attending meetings between the parties and ensuring that planning remains within permissible or prudent boundaries. Ironically, it is often the outside antitrust counsel who often greenlights activity that the client or in-house counsel may think is inappropriate.

I. Dealing with Second Requests

Second Requests obviously require close, effective coordination between the client and outside counsel. For the most part, outside counsel will take the lead at almost every stage of the Second Request process. In most cases, there is little that in-house counsel can or should do. In some cases, however, in-house counsel can take a more active role in driving and managing the process with the client. We discuss some of these circumstances below.

1. Third-party Vendors

Although outside counsel usually takes the lead in obtaining third-party vendors for document pulls, production, and hosting, the client may have strong preferences or even preexisting vendor agreements. Outside antitrust counsel should therefore ask about these issues before contacting potential third-party vendors for bids.

2. Document and Data Pulls

Document pulls usually require employee interviews. Personnel from the client (though generally not higher-level counsel) will need to coordinate the scheduling of interviews and pulls and usually provide the employees a brief overview of what is likely to be expected.

3. Negotiating with the Government

In-house lawyers working with boots-on-the-ground employees are often essential in identifying elements of a Second Request that are unreasonably burdensome or otherwise impossible to satisfy. In addition, they are also necessary for guiding counsel through the organizational charts that are the starting point in any negotiation of Second Requests with government staff. Although some outside counsel are reluctant to expose their clients directly to the government staff in the merger review process, it is often far more efficient and credible for in-house counsel to take the lead in walking through organizational charts with government staff.

4. Interrogatories

In-house lawyers generally do not become involved in responding to Second Request interrogatories, but can play an important role by identifying the personnel in IT, manufacturing, finance, and marketing who may be the right personnel for answering particular interrogatories or providing and explaining data.

J. White Papers/Advocacy

As a general proposition, outside counsel takes the lead in outlining and drafting White Papers. But client input is essential to ensuring that advocacy is accurate, consistent with other client statements and objectives, and as effective as it can be. Building in time for review and comment is an important part of obtaining and discussing input with the client. And in-house counsel often play an important role in ensuring that businesspeople understand the objectives, and that they provide the review and comment on a timely basis.

Occasionally, perhaps even frequently, the drafting and review process will lead to some tension between outside counsel and businesspeople. Outside antitrust counsel would be seriously wrong in assuming that it is in-house counsel's responsibility to push outside counsel's points, or to manage the tensions that can arise. Instead, outside antitrust counsel should welcome the opportunity and embrace the responsibility of defending positions that businesspeople may not like or support.

In some cases, however, in-house counsel may make a reasonable judgment that it should act as a buffer between outside counsel and businesspeople, in which case outside counsel should take its cue from in-house lawyers on how to solicit and process comments from businesspeople.

K. Depositions

One of the most important roles that in-house counsel can play is during preparation for depositions (or investigational hearings). Preparation usually consumes one day of extended discussion between counsel and the deponent, revolving around areas of potential government interest, affirmative themes that the parties want to emphasize, and review of documents relating to central issues in the case (frequently from the files of the deponent).

The presence and active participation of in-house counsel can substantially increase the effectiveness of preparation: outside counsel can ask better questions, deponents can answer (or not answer) more effectively, and the deponent is more comfortable engaging in frank discussion and preparation knowing that a company lawyer is in the same room.

L. Final Stretch: Meetings

Another role that in-house counsel can play is with final meetings with the government enforcers and leadership in those rare cases that go the distance. These meetings frequently involve a senior business leader (the CEO or the head of the relevant business). Although the lead antitrust lawyer may know the senior business leader, in-house counsel can play the same kind of role in preparing for final rounds of meetings that they can play in depositions—bridging potential factual disconnects, translating some of the more idiosyncratic antitrust recommendations into more familiar or comfortable language, and providing psychological support to businesspeople who can find even a friendly agency meeting to be disorienting.

IV. CONCLUSION

As we emphasized at the outset, there are no hard-and-fast rules for allocating the myriad responsibilities that can arise during antitrust work on transactions. Division of labor depends principally on the preferences of the client and the nature of the relationship between the client and outside counsel.

In the course of this article, we have also attempted to highlight how in-house counsel can assume a more expansive role with respect to certain aspects of the merger review process. Although antitrust experience and expertise can often lead to a more expansive role for particular in-house lawyers, so, too, can the institutional knowledge and industry-specific expertise of particular in-house lawyers. And although antitrust counsel may sometimes think their client is trying to do too much on their own, outside counsel ought to consider whether the same might be true of them when the client offers talent willing and able to perform certain tasks more effectively.