Litigation Is Coming: The Top 5 Best Practices for In-House Counsel to Manage Merger Review Risk

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"I am concerned that merger remedies short of blocking a transaction too often miss the mark." – Jonathan Kanter, Assistant Attorney General[40]

In his first address as Assistant Attorney General (AAG) for the Antitrust Division at the Department of Justice, Jonathan Kanter invoked his "role model" and predecessor, Robert Jackson, who held the AAG position in 1937. According to AAG Kanter, Jackson "embark[ed] on an aggressive campaign of antitrust enforcement to free markets from the grip of monopoly power." Jackson's first year as AAG featured "dozens of cases, including the landmark challenges against Socony-Vacuum Oil Company and the Aluminum Company of America." With Jackson as inspiration, AAG Kanter's Antitrust Division appears poised to wield litigation as a favored tool in merger enforcement.

The Federal Trade Commission, too, has signaled equally aggressive enforcement under Chair Lina Khan, who listed as her first policy priority: "address[ing] rampant consolidation and the dominance that it has enabled across markets. This will require [] finding ways to strength our merger enforcement . . . ."[41]

Merging parties should therefore anticipate antitrust scrutiny, including by preparing for litigation. Being litigation-ready starts well before a complaint is filed, and in-house counsel play a critical role. This article highlights five best practices in-house counsel can adopt today to smooth the road for deals tomorrow.

(1) Understand the Business Objectives: Transaction Rationale Matters at Every Step

The procompetitive rationale for the transaction is a critical theme at trial. But building out the merging parties' procompetitive themes begins long before the Hart-Scott-Rodino (HSR) notification is even filed. Counsel for the merging parties will want to explain the deal rationale at every step: at first contact with the antitrust agencies (and with enforcers outside the U.S.); in the materials likely to be submitted with the HSR filing as "Item 4(c) and (d)" documents; in every letter to and discussion with the investigating agency; in response to the Second Request; and throughout every stage of the litigation (including in the answer, discovery responses, trial briefing, and presentation of the evidence at trial). The FTC or DOJ, on the other hand, will probe deal rationale at every

[40] *Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section*, U.S. Dept. of Justice (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

[41] Memorandum from Chair Lina M. Khan to Federal Trade Commission Staff and Commissioners (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

stage. Most importantly, enforcers will ask about the deal rationale during investigational hearings and/or depositions.

In-house counsel plays a critical role in developing the themes surrounding deal rationale. As a first step, when working with the business teams negotiating the deal, in-house counsel should make sure that the business teams are clear about their procompetitive objectives. Documents created during the initial stages of negotiations are critical and should accurately reflect deal rationale. In-house counsel can also play a very helpful role in making sure that the business teams understand their document preservation obligations as they begin negotiating the deal.

By understanding the deal rationale from the outset, in-house counsel will be well positioned to explain the procompetitive aspects of the deal to their outside antitrust counsel. In-house counsel should promptly connect the business leaders and key commercial decision-makers at the company to outside counsel so that the business and its advocates are aligned on objectives and messaging. In-house counsel plays a key role in ensuring that everyone involved inside and outside the company understands the deal rationale *before* the parties approach the antitrust agencies.

(2) Be Aware of What the Business Is Drafting: Documents Can Be Determinative

The HSR notification requires a company to produce several categories of transaction-related documents. Once a Second Request issues, the merging parties will be required to produce significant quantities of ordinary course business documents, emails, text messages, Slack messages, data, and more. The FTC and DOJ frequently expect to receive documents from dozens (sometimes more than 100) document custodians. Moreover, if litigation ensues, the reviewing agency may seek additional documents from the parties (including from new custodians) as well as third parties.

Documents, particularly the documents prepared in the ordinary course of business by the merging parties, are often the most critical evidence at trial. Hyperbole, false statements, and comments lacking their full context have frequently increased the degree of difficult for parties in merger reviews and litigations. To that end, at the outset of a transaction, in-house counsel should ensure that all employees understand the ways in which their documents may play a role in antitrust merger investigations litigations. Early on, in-house counsel should work with the business teams and outside counsel to identify and understand the context for any existent documents that could be of interest to the reviewing agency. In light of the potential for discovery of documents created after the deal is signed, in-house counsel should provide employees with advice regarding document preservation before the deal is even signed and continuing throughout the litigation phase.

(3) Know What Your Customer Is Thinking: The Customer Is Always Right—and a Third-Party Witness

The company will want to tell the investigating antitrust agency that its customers support the transaction because the deal will provide enormous benefits. But what will the customers tell the antitrust agency?

During the investigation phase, the investigating agency will solicit feedback from customers in the form of voluntary statements and document productions. The company could do the same. In-house counsel can help the company solicit feedback from its customers, but must do so prudently, keeping in mind that conversations with third parties may not be protected by any privilege and could also end up with the agency. It is important to weigh this risk against being surprised in the litigation phase when customers will testify under oath as third-party witnesses. In addition, counsel will likely research what customers are saying in public and what third-party analysts are telling customers and in-house counsel may want to share those statements with the business team and get the company's perspective.

(4) Hope for Early Termination, But Plan for the Long Haul

In-house counsel can hope that the antitrust agencies approve the transaction with little fanfare, but in transactions that present complex antitrust questions, it is often helpful to plan for an extended review and litigation in the merger agreement itself. In-house counsel should consider early on the company's appetite to pursue a deal through litigation, and the potential costs of doing so. For instance, if merger approval takes more than a year, will it be necessary for the seller to secure additional funding? Similarly, if litigation is a potential path for the deal, the outside date needs to be long enough to comfortably allow time to get through a trial.

It is not just the merger agreement that needs to contemplate litigation, if the agency issues a Second Request, it will likely ask for a timing agreement. In-house counsel will want to consult closely with outside counsel to understand the pros and the cons of entering any such agreement and to determine whether a timing agreement makes sense for the transaction at hand. If there is a real possibility of litigation following the Second Request, in-house counsel should pay very close attention to any litigation conditions included in the timing agreement. Often, the agencies will offer benefits for the merging parties earlier in the process in return for litigation concessions. In-house counsel and outside counsel should consult closely to make sure that the litigation terms are not so onerous as to outweigh any early advantages. Additionally, in-house counsel should ensure that any timing agreement provides room to litigate within the outside date of the transaction agreements.[42]

(5) Coordinate Global Filings with an Eye to Litigation

A cross-border transaction may involve antitrust reviews by non-U.S. agencies, and counsel will need to coordinate global filings across multiple jurisdictions. Two important issues will arise:

First, the various government agencies will want the parties to grant waivers so that the agencies can share the parties' confidential information across borders. In addition to deciding whether and when to grant such waivers, in-house counsel will need to keep in mind privilege issues. Privilege rules may vary by jurisdiction: non-U.S. countries may not recognize certain U.S. privilege rules, such as the attorney-client privilege for advice of in-house counsel. It is important to ensure that the U.S. agency does not receive privileged

[42] The transaction agreement may also need to provide an outside date far enough in the future to allow for an in-depth antitrust investigation and litigation.

materials through its global counterparts or that a party inadvertently waives privilege by disclosing materials to government entities.

Second, in-house counsel must ensure that the disparate filings tell a cohesive narrative and that outside counsel in each jurisdiction understand the deal rationale. In-house counsel may consider implementing a central team to review each filing before it is finalized.

Conclusion

Increasingly aggressive antitrust enforcement may make merger litigation more likely. In-house counsel can play an important role, and that role begins well before any merger agreement is negotiated or HSR notification is submitted. Advanced preparation will increase the odds the transaction withstands the antitrust agencies' challenge and help the parties close the deal.

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