US & EU Competition Law

What every counsel needs to know

27 September 2011

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Introduction – It’s All About Market Power

- In both the US and EU, the competition laws guard against improperly gaining or enhancing market power—the ability to raise price above competitive levels
  - Cartels: Price fixing is illegal because it involves otherwise competing firms joining together to raise price and exercise market power
  - Single-firm conduct: Monopolization and abuse of dominance cases involve conduct that “forecloses” competitors, thus maintaining or expanding the firm’s market power
  - Mergers: Mergers are prohibited only when they will allow the combined firm to exercise market power

The unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress…

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958)
Introduction

Who Enforces the Antitrust Laws?

- There are many antitrust enforcers:
  - US Agencies
    - The Federal Trade Commission
    - The Department of Justice Antitrust Division
  - State Attorneys General
  - Private lawsuits (including class actions)
  - European Union and its Member States
  - Competition law authorities around the world (more than 100)
    - Canada and Mexico
    - Asia
    - Latin America
Introduction

- **Antitrust enforcement in the Obama Administration**
  - More aggressive in generating antitrust theories of harm
  - More creative in exploring possible impacts of mergers and allegedly anticompetitive conduct
  - More aggressive in seeking remedies and settlements in close cases
  - More aggressive in blocking or litigating cases, civil or criminal?
    - This may be changing in light of recent mergers challenges:
      - **NASDAQ/NYSE** (U.S. stock exchanges)
      - **Verifone/Hypercom** (point-of-sale terminals/credit card payment machines)
      - **Tyson Foods/George’s** (chicken processors)
      - **H&R Block/TaxACT** (digital, do-it-yourself tax preparation products)
    - Since April 1, DOJ has blocked or sought divestitures on 10 mergers
Interactions Among Competitors

COLLABORATION, CARTELS AND MORE
Agreements in Restraint of Trade – Sherman Act Section 1

- Agreements between two or more companies
  - Agreements between a parent company and a subsidiary do not count

- That unreasonably restrain competition
  - Agreements that are obviously anticompetitive are *per se* unlawful, and some are prosecuted at criminal violations
  - Agreements of the type that can be procompetitive on balance are analyzed under the *rule of reason, and are treated as civil violations*
    - Do the procompetitive benefits outweigh the anticompetitive effects?
    - Is there a less anticompetitive way to achieve the procompetitive benefits?
Cartel Enforcement in Europe

- **EU legal system**
  - Article 101 and implementing rules
  - Enforced by the European Commission and the 27 national competition authorities at the EU Member State level
  - Supervised by Community and national courts

- **27 national legal systems**
  - Competition rules largely modeled following the EU rules and practice
  - Enforced by NCAs and national courts (civil damages and interim measures)

- **EC-NCAs Cooperation - The European Competition Network (“ECN”)**
  - Exchange of information on new cases and envisaged decisions
  - Coordination and mutual assistance (including surprise inspections), exchange of evidence
Unlawful Agreements in Europe

- **Article 101(1) TFEU**
  - Prohibits agreements and “concerted practices” that have as their “object or effect” the restriction of competition in the common market.

- **Article 101(3)**
  - The prohibition does not apply to agreements that contribute to “improving the “production or distribution of goods or to promoting technical or economic progress,” so long as consumers benefit and the restriction is necessary to achieve the benefits.

- **“Restrictions by object”** are similar to per se restrictions in the US.

- **“Restrictions by effect”** are similar to a rule of reason analysis in the US.
Dealings with Competitors

- Both the US and EU impose their harshest penalties for price fixing and other cartel behavior

- Criminal and fines in the US
  - **Individuals:** up to 10 years in prison and $1 million, or double the gain/loss
  - **Companies:** up to $100 million, or double the gain/loss
  - **Private lawsuits:** treble damages plus attorneys’ fees & costs

- High fines in EU and other countries
  - Criminal penalties now in the UK

- Multinational coordination among enforcement authorities
US Cartels

Criminal Antitrust Fines

- 1990s avg. : $169 million
- 2000 : $152 million
- 2001 : $280 million
- 2002 : $75 million
- 2003 : $107 million
- 2004 : $350 million
- 2005 : $338 million
- 2006 : $473 million
- 2007 : $630 million
- 2008 : $701 million
- 2009 : $1 billion
- 2010 : $555 million

Fiscal Year

Fine Totals (in millions)

$0

$500

$1,000
US Cartels

Percentage of Defendants Sentenced to Jail

Fiscal Year

1990s avg.
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010

0%
100%
50%

37%
38%
46%
53%
50%
71%
67%
68%
87%
61%
80%
78%
US Cartels

Incarceration Trend: Average Months

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Average Jail Time (in months)</th>
</tr>
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<tbody>
<tr>
<td>1990s avg.</td>
<td>8</td>
</tr>
<tr>
<td>2000</td>
<td>10</td>
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<tr>
<td>2001</td>
<td>15</td>
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<td>2002</td>
<td>18</td>
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<td>2007</td>
<td>31</td>
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<td>2008</td>
<td>25</td>
</tr>
<tr>
<td>2009</td>
<td>24</td>
</tr>
<tr>
<td>2010</td>
<td>30</td>
</tr>
</tbody>
</table>
Industries Already Affected by Cartel Enforcement US, EU and More

- Air & Water Transportation (cargo/passenger)
- Computer Components/Consumer Electronics
- Banking & Financial Industry
- Food Industry
- Oil & Gas
- Automobile Parts/Car Glass
- Chemicals
- Home Appliances
- Government Procurement
- Cement/Ice/Paper
- Vitamins
- Bathroom Fittings
## High Fines in the EU

### Per Case

<table>
<thead>
<tr>
<th>Year</th>
<th>Case Name</th>
<th>EUR*</th>
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</thead>
<tbody>
<tr>
<td>2008</td>
<td>Car glass</td>
<td>1,383,896,000</td>
</tr>
<tr>
<td>2009</td>
<td>Gas</td>
<td>1,106,000,000</td>
</tr>
<tr>
<td>2007</td>
<td>Elevators and escalators</td>
<td>992,312,200</td>
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<tr>
<td>2010</td>
<td>Airfreight</td>
<td>799,445,000</td>
</tr>
<tr>
<td>2001</td>
<td>Vitamins</td>
<td>790,515,000</td>
</tr>
<tr>
<td>2007</td>
<td>Gas insulated switchgear</td>
<td>744,210,000</td>
</tr>
<tr>
<td>2008</td>
<td>Candle waxes</td>
<td>676,011,400</td>
</tr>
<tr>
<td>2010</td>
<td>LCD</td>
<td>648,925,000</td>
</tr>
<tr>
<td>2010</td>
<td>Bathroom fittings</td>
<td>622,250,782</td>
</tr>
<tr>
<td>2006</td>
<td>Synthetic rubber (BR/ESBR)</td>
<td>519,050,000</td>
</tr>
</tbody>
</table>

### Per Company

<table>
<thead>
<tr>
<th>Year</th>
<th>Undertaking (Cartel)</th>
<th>EUR*</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>Saint Gobain</td>
<td>896,000,000</td>
</tr>
<tr>
<td>2009</td>
<td>E.ON</td>
<td>553,000,000</td>
</tr>
<tr>
<td>2009</td>
<td>GDF Suez</td>
<td>553,000,000</td>
</tr>
<tr>
<td>2007</td>
<td>ThyssenKrupp</td>
<td>479,669,850</td>
</tr>
<tr>
<td>2001</td>
<td>F. Hoffmann-La Roche AG</td>
<td>462,000,000</td>
</tr>
<tr>
<td>2007</td>
<td>Siemens AG</td>
<td>396,562,500</td>
</tr>
<tr>
<td>2008</td>
<td>Pilkington</td>
<td>370,000,000</td>
</tr>
<tr>
<td>2010</td>
<td>Ideal Standard</td>
<td>326,091,196</td>
</tr>
<tr>
<td>2008</td>
<td>Sasol Ltd</td>
<td>318,200,000</td>
</tr>
<tr>
<td>2010</td>
<td>Air France / KLM</td>
<td>310,080,000</td>
</tr>
</tbody>
</table>
Cartel Behavior

- The basics in both the US and EU
  - Price fixing
  - Bid rigging
  - Dividing geographic markets
  - Customer allocations
  - Naked agreements not to compete
“Price” Is a Broad Concept

- **Price** includes *competitive terms* such as:
  - Published/unpublished
  - Payment rates
  - Discounts
  - Rebates
  - Pricing formulas
  - Pricing levels
  - Pricing tiers
  - Marketing funds
  - Product positioning
  - Licenses
  - Conditions of competition
  - Many others

You do not have to intend to fix prices specifically to violate the law. **Any** agreements or understandings with competitors that relate to pricing can raise issues.
Hot Issues US - Signaling

- Analyst calls
  - Two recent FTC actions for statements during analyst calls
    - **Valassis**: FTC charges maker of newspaper advertising inserts with publicly inviting its only competitor to fix prices and allocate customers during an analyst call:
      - Valassis said it would be content to maintain its current share of 40%
      - Valassis said it would defend its existing customers:
        “We will defend our customers and market share and use whatever pricing is necessary to protect our share.”
      - Valassis said its prices to its competitors customers would be higher than current pricing:
        “Our net price after ancillary price discounts, rebates, et cetera, will not go below $6 for a full page and $3.90 for a half page.”
      - “If [Competitor] continues to pursue our customers and market share then we will go back to our previous strategy.”
Hot Issues US - Signaling

- Analyst calls
  - **U-Haul:** FTC charges U-Haul with similar conduct, even though the statements were in response to analyst questions:
    - U-Haul signaled that Budget should follow U-Haul’s price leadership: “Me trying to get us to expertise price leadership every time we get what we consider to be an opportunity, it’s another indicator to them as to, hey, don’t throw the money away. Price at cost at least.”
    - U-Haul complains about Budget refusing to follow: “Budget appears to be continuing as undercut as their sole pricing strategy. It’s when somebody decides they have to gain share from somebody that you get this kind of turbulence that results in no economic gain for the group, in fact probably economic loss.”
    - U-Hall would wait a little longer for Budget to respond: “For the last 90 days, I’ve encouraged everybody who has rate setting authority in the Company to give it more time and see if you can’t it to stabilize. In other words, hold the line at a little higher.”
Hot Issues US - Signaling

- Analyst calls - lessons:
  - The enforcement authorities are monitoring these calls.
  - Use extreme caution when discussing company’s pricing or output strategy. Strictly limited to what investors need to know.
  - Use equal caution when discussion activities of competitors, or industry prices.
  - Speakers should be warned not to use earnings calls to communicate even innocuous messages to competitors.
  - Reduce risk further by running prepared remarks by the legal department, along with possible responses to questions
The European Commission creates a new “restriction by object”:

“Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object”

This conduct is unlikely to benefit from Article 101(3)

If done secretly, can be regarded and fined as a cartel
Hot Issues EU – Damages Actions

- Civil damages claims are increasing across the EU (Germany, UK)
- But key issues to resolve
  - Funding – contingency claims not allowed in many countries
  - Collective actions – no real class actions in Europe
  - Multi-national effects – no “MDL” device in Europe
  - Discovery – highly limited in Europe
    - Reliance on European Commission findings
    - Access to leniency materials
- EC is drafting legislation
Hot Issues EU – Damages Actions

- Main elements of the (yet unpublished) draft Directive
  - Single, full compensation for actual loss and loss of profit
  - Collective redress (representative actions by “qualified entities” and opt-in collective actions)
  - Binding effect of NCA decisions
  - Limitation of fault requirement (liability for damages unless infringement caused by “excusable error”)
  - Protection of leniency applicants (limitation of civil liability and disclosure)

- But the national courts will have a big say
Other Competitor Collaborations: OK

- **Joint bidding**
  - Can be lawful when allows companies to work better together than they could separately
  - Informed consent from the customer almost always desirable

- **Joint ventures**
  - Many are pro-competitive and often lawful
    - R&D
    - Production
    - System teaming
    - Joint purchasing
Single Firm Conduct

MONOPOLY AND DOMINANCE
Single Firm Conduct

- **Section Two of the Sherman Act:**
  “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”

- **Article 102 TFEU:**
  “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between the Member States.”

- Both prohibit conduct that maintains or expands monopoly power (dominance) through improper means
Some key differences:

- Unlike the US, attempted monopolization is not an offense in Europe. The company must already be dominant to infringe Article 102.

- Unlike the US, there is an offense for “exploiting” dominance, such as through “excessive” pricing, but it is rarely enforced.

- Both jurisdictions struggle to distinguish improper conduct from competition on the merits.
Weak Enforcement in the Bush Administration

- The Bush Administration began by settling the Microsoft case on terms favorable to Microsoft.

- It continued two pre-existing cases:
  - Prosecuted *Dentsply* to a win (exclusive dealing)
  - Appealed *American Airlines* (predatory pricing) and lost.

- DOJ brought no new Section Two cases in 8 years.
Weak Enforcement in the Bush Administration

- DOJ filed amicus briefs typically favoring defendants:
  - **Twombly**
    - creates a new heightened pleading standard
  - **Leegin**
    - removes per se treatment for minimum resale price maintenance
  - **Weyerhauser**
    - restricts predatory bidding offense to raising costs above price
  - **Trinko**
    - DOJ advocated virtual elimination of refusals to deal as an offense
Stronger Enforcement in the Obama Administration

- The Justice Department Rescinded the Section 2 Guidelines
- The Justice Department initiated seven new investigations in 2009
- FTC case against Intel
- Justice Department brought its first case since 1999:
  - United Regional Health Care System charged with maintaining a monopoly through exclusive dealing contracts.
The European Commission

- Active EC enforcement during this same period:
  - **Intel**
    - exclusive dealing
  - **Microsoft**
    - tying, refusal to deal
  - **Qualcomm**
    - standard setting, patent hold-up
  - **AstraZeneca**
    - abuse of administrative processes
  - **Deutsche Telekom**
    - margin squeeze

- Publication of “Guidance” paper outlining legal principles and enforcement priorities
Legal Framework

- Being dominant is not unlawful, only “abuse” of dominance is.

- **Unlawful monopolization** occurs only when:
  - The company has substantial market power in the market or, in the US, has a dangerous probability of getting it, and
  - Engages in conduct that “forecloses” competitors rather than competing with them “on the merits.”

- **“Dominance”** means having enough market power to set prices and other terms of sale regardless of what other competitors do.
  - A large market share can create a presumption of dominance.
  - Some authorities assume dominance for shares at 40% or 50% when the next largest competitor is less than half of that.
Legal Framework

- **Foreclosing conduct:** It is perfectly lawful for even a dominant firm to compete hard and win business from smaller rivals. “Foreclosure” happens only when rivals are not given even the **opportunity** to compete for business.

- Distinguishing between “foreclosure” and “competition on the merits” is both complicated and evolving. But here are some current examples of “foreclosing” conduct:
  - **Predatory pricing:** pricing below production costs, typically to drive rivals out of business and then to recoup the lost prices once that is accomplished
  - **Long term exclusive dealing:** requiring a large number of customers to purchase only from the manufacturer for a long period, thus locking competitors out of a substantial portion of the market
  - **Some volume discounts:** when they have the same effect as long term exclusive dealing
  - **Tying:** refusing to supply one product unless the customer buys the other
The EU grapples with volume discounts and package deals

- In the recent past, dominant firms could not offer volume discounts without proving they were justified by a cost reduction
- In the recent past, dominant firms could hardly ever offer package discounts
Hot Issues EU – Conditional Discounts

- **An evolving standard in the EU:** Test is whether an equally efficient competitor can compete with the dominant firm

- **Bundled discounts:** Allocate the entire discount to the non-dominant product and see if it is above cost

- **Volume discounts:** Allocate the entire discount to the “contestable portion of demand” and see if it is above cost
Hot Issue US - Bundled Discounts

- A multiproduct seller with monopoly power in one or more of the products in the bundle engages in unlawful monopolization or monopoly maintenance when the seller uses a bundled rebate program that (a) has the effect of expanding the monopolist’s share in one or more of the competitive product markets, and (b) lacks a clearly legitimate business justification.

  *LePage’s Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (en banc), cert. denied, 542 U.S. 953 (2004)*

  OR

- To prove that a bundled discount was exclusionary for purposes of a monopolization claim plaintiff must establish that, after allocating the discount on the entire bundle of products to the competitive product, defendant sold the competitive product below its average variable cost.

  *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008)*

  OR

- Some other test – courts and commentators don’t agree.
Mergers

SUBSTANCE AND PROCESS
Legal Framework

- The substantive test in the US and Europe is the same:
  - Will the merger reduce competition to allow the combined firm to increase price or decrease innovation—on any group of products to any group of customers?
In either jurisdiction, competition concerns typically require:

- Highly concentrated markets
- High entry barriers
- Evidence that the market is conducive to the exercise of market power, either unilaterally or collectively
- Evidence that the merger’s efficiencies will not eliminate the incentive to exercise market power
The EU and US share information and cooperate extensively in merger investigations.

But outcomes can differ in the two jurisdictions, usually because of different facts:
- Different product markets
- Different competitive conditions in different geographic markets
• Unlike the US, pre-merger filings equate to **jurisdiction** in Europe
  — Countries with jurisdiction look at effects only in their country
  — Decisions whether to refer mergers to the European Commission

• Unlike in the US, the EU investigating authorities are also the initial decision-makers
  — In the US, we often persuade the agency they can’t prove their case
  — In Europe, they only have to convince themselves, so we persuade them as though they were judges
- Unlike the US, pre-filing discussions are expected
  - Allows more time to convince the authority of no problem
  - Requires more effort to manage the timeline.

- Unlike the US, the EC must write decisions approving mergers
  - Requires more information and support for innocuous deals
  - Approval decisions must withstand appeal by third parties
## Antitrust Inflection Points During the Life of a Deal

<table>
<thead>
<tr>
<th>Decision to sell and solicitation of buyers</th>
<th>Negotiate letter of intent</th>
<th>Conduct due diligence</th>
<th>Negotiate and sign agreements</th>
<th>Merger notification</th>
<th>Government investigation</th>
<th>Integration planning</th>
<th>Closing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Management</td>
<td>X</td>
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<td>Key Antitrust Concerns</td>
<td>Creation of misleading documents and assess antitrust risk</td>
<td>Conf. Agmt.</td>
<td>Info. Exchange</td>
<td>Risk allocation and document retention</td>
<td>Communication and cooperation</td>
<td>Filings, gun-jumping, and info. exchange</td>
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What Information Should Be Subject to a Confidentiality Agreement?

<table>
<thead>
<tr>
<th>Classification</th>
<th>Access/Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public/Other Non-Confidential Information</td>
<td>No restriction on use</td>
</tr>
<tr>
<td>Confidential/Non-Public Information</td>
<td>Can be shared subject to a confidentiality agreement</td>
</tr>
<tr>
<td>Competitively Sensitive Confidential Information</td>
<td>Can be shared subject to a confidentiality agreement and limitations on access and use, or “clean room” type procedures</td>
</tr>
</tbody>
</table>
Due Diligence Information Exchange

- Parties are free to exchange information required for evaluating the transaction and the purchase price, including:
  - Financial statements, sales and inventory data, tax returns
  - Sample periodic reports used to monitor business, provided the report is more than 12 months old
  - Key agreements, including leases, deeds, labor agreements, loan agreements and other financing documents
  - Historical cost and sales volume data

- Parties may not directly share information that would facilitate coordination of the competitive behavior before closing or on a “going forward” basis in the event the transaction is not consummated
The parties should reach an **express agreement** on the following areas of concern:

1. **Cooperation**  
   (before and during antitrust investigation)
2. **Confidentiality**
3. **Commitment**
4. **Divestitures**
5. **Break-Up Fees and Termination Conditions**
6. **Costs of investigation**
7. **Closing conditions**
Closing Conditions

All
— Hart-Scott-Rodino and other supervisory waiting periods have expired or been terminated

Low
— Any timing agreements have expired and
  ○ No oral threats of government litigation challenging deal or
  ○ No written threats of government litigation challenging deal

Medium
— No pending government litigation challenging the deal

High
— No injunction by court or agency of competent jurisdiction prohibiting deal from closing
Termination Rights: When Either Party May Walk Away

**Lowest**
- Second request issued

**Low**
- Government files action challenging transaction

**Medium**
- Court or other agency issues preliminary or permanent injunction restraining transaction

**High**
- Court or other agency issues final order restraining transaction and all appeals are exhausted
- **Consummated and Non-HSR Merger Challenges**
  - **DOJ**: Dean Foods (school milk) and George’s (chicken processors)
  - **FTC**: Lundbeck (pharmaceuticals)

- **Globalization of Merger Enforcement**
  - Over 100 jurisdictions have merger notification laws
  - Increased Cooperation with Other Jurisdictions in Merger Reviews
    - Cisco/Tandberg (close collaboration between US & EC)
    - Request for Waivers from Merging Parties

  - AT&T/T-Mobile – DOJ/FCC created first joint investigative team
NEW HSR RULES
- New Information Required for “Associates”
- New Item 4(d): Transaction Analysis Documents
- Changes to Item 5: Revenue Information
- Overview of Other Changes
The old HSR form required information only about entities controlled by the person making the acquisition. “Control” is defined in terms of some form of 50% or greater ownership.

In many cases, private equity funds and master limited partnerships are their own “ultimate parents” (not “controlled” by another person) so they did not have to provide information about other related funds or partnerships put together by the same sponsors or managed by the same advisors.

The new HSR form requires some information about the holdings of entities that are not under common control, but are under common investment management with the buyer – that is, the buyer’s “Associates.”
PE funds are associates if they are managed by the same GP, or managed under contract by the same individual(s)

A GP is always an associate of the LP of which it is the GP

The ultimate parent of a GP is always an associate of the LP of which it is the GP

An individual is only an associate if s/he manages by virtue of a contract (other than just the partnership or LLC agreement designating her/him the managing member or a general partner)

Property managers are not associates of the properties they manage – only investment managers are associates
Item 4(c) already required the parties to search directors’ and officers’ files for analyses of the transaction with respect to competition.

Item 4(d) requires three additional types of transaction analyses – but does not require the parties to search files beyond those of the 4(c) directors and officers:

- 4(d)(i) requests the Confidential Information Memorandum* (CIM) or the document serving the purpose of a CIM;
- 4(d)(ii) requests all bankers’ books* or other consultants’ 4(c)-type analyses of the transaction prepared within one year of the filing; and
- 4(d)(iii) requests all documents evaluating synergies or efficiencies.

* Note that CIMs and bankers’ books had often already been submitted as Item 4(c) documents when they included mention of competition, competitors, markets, market share, etc.
4(d)(i) requests the Confidential Information Memorandum (CIM) or the document(s) serving the purpose of a CIM

- Note that in many cases, CIMs that mention, e.g., competition, competitors, markets, and market shares had already been submitted as Item 4(c) documents. Now the CIM must be submitted regardless of whether it has 4(c) content.

- The seller need only submit the CIM that was given to the buyer in the transaction—not other versions that may have been given to other potential buyers.

- If there is no formal CIM for the transaction, the question is whether there is a single document (or at most a couple of documents) that served the same purpose – not a broader group of documents and presentations that together serve the purpose of a CIM.

- If a deal dies, is resurrected, and has a new CIM put together for the new iteration, only the second CIM should be submitted with Item 4(d).
  - However, the original CIM may also need to be submitted with Item 4(c).
Item 4(d)(ii) requests all bankers’ books or other consultants’ 4(c)-type analyses of the transaction prepared within one year of the filing.

— Note that in many cases, bankers’ books that mention, e.g., competition, competitors, markets, and market shares had already been submitted as Item 4(c) documents. This item is intended expressly to capture documents that staff believes always should have been supplied as 4(c) but were not for some reason.

— No search of lawyers’, bankers’, or other consultants’ files is required.
- Item 4(d)(iii) requests all documents evaluating synergies or efficiencies.
  - Note that synergies and efficiencies analyses were not required even by informal interpretations of Item 4(c).
  - Item 4(d)(iii) documents may include analyses of headcount reductions, financial synergies, facility consolidations and other business aspects not directly related to competitive activity.
Parties must list controlled companies’ revenues for the most recent year (all entities controlled by the ultimate parent).

- Item 5 no longer requires 2002 “base year” revenues.
- For manufactured products, the parties must report their most recent year revenues by 10-digit NAICS code (rather than 6 digits).
- Parties need to include revenues from products manufactured abroad and sold into the United States.
- When the items are not manufactured by the reporting person, wholesale and retail most recent year revenues still need to be listed, but there is no longer double-counting of manufactured products.
The new Item 3 requires less detail about the voting securities, assets, or non-corporate interests being acquired.

The new Item 4 requires only the name and CIK number for entities within the ultimate parent’s control that file with the SEC (rather than active links to filings) and no longer requires regularly prepared balance sheets for non-SEC-filing entities within the group.

The new Item 6 requires only city/state/country information for subsidiaries rather than full street addresses.

The new Item 6 requires information about minority shareholders only for the acquiring and acquired entity and their ultimate parents – not for all entities within the ultimate parent’s group.
Guidance to Minimize Risk

SOME GOOD RULES, AND THEN, A COUPLE OF MORE GOOD RULES
- **The Wall Street Journal Rule(s):** If you don’t want to see it on the front page, don't write it down. It will sound worse than you intended. It will not be reported in context.
  - e.g.: “The customers will never know what hit them” or “everyone knows everyone in this industry; we talk all the time.”

- **The Unbridled Enthusiasm Rule:** Don’t exaggerate or show off, even for effect, in writing.
  - e.g.: “The customers will have absolutely no choice but to go along with an industry price increase” or “how many millions of times have they told us they don’t want a price war?!”
- **Aging Humor Rule**: It's never as funny two years later, even if plainly untrue or sarcastic.
  — e.g.: “we can always join them rather than beat them…”

- **Accentuate the Positive Rule**: Phrase it affirmatively if you can, rather than negatively.
  — e.g.: “The competition has nothing that can touch us.”
  Alternative: “Our products out-perform the competitions' in every important category.”

What you say and write and and and will be used against you in a court of law—even if unfairly
- **Agreement**
  - See also: understanding, arrangement, commitment, boycott, cease-fire, gentlemen’s agreement, assurance, accord, promise, deal

- **Conspire**
  - See also: collaborate, coordinate, rationalize, work together, stabilize, calm, avoid a price war

- **Market**
  - See also: market share, market power

- **Dominance/dominance**
  - See also, corner the market, control, monopoly, oligopoly, only game in town

- **Leverage**
  - See also: foreclose, exclude

- **Barriers to entry**

- **Kill the competition**
  - See also, crush, eliminate, destroy, choke, annihilate, cripple
Thank you

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