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Pulling Back the Lens—The Long View of Antitrust Deal Work

Francis Fryscak
Cooley LLP

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"I said I must go back there, got to go back
And check to see if things still the same"[2]

I. INTRODUCTION

Nearly four decades after enactment of the Hart-Scott-Rodino Antitrust Improvements Act is a good time to get one's bearings on how antitrust deal work has changed, and how this evolving picture looks different to outside counsel and those in top-level positions in-house.[3]

II. TRENDS AFFECTING INSIDE AND OUTSIDE COUNSEL SIMILARLY

Two major shifts, occurring at roughly the same time, have affected deal work profoundly for both types of counsel. First, with respect to process, the HSR system changed the core paradigm of antitrust deal work—one that previously had the most antitrust sensitive transactions resolved in court—which had meant that, to be effective, practitioners needed to be litigators of the first order. Second, on substance, the core principles applied by the courts and the federal enforcers to evaluate deals have shifted to a single unifying principle—consumer welfare—replacing other, more varied concerns about the inherent dangers of concentrations of economic power.

A. Shifting Perspective from Litigation to a Regulatory Process

The first shift, the emergence of a "clearance" regime[4] in which significantly sized parties in large deals typically[5] had to observe a waiting period before they could close their transactions

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[1] Francis M. Fryscak is a partner in the Antitrust & Trade Regulation practice group and a member of the Cooley LLP Business department. http://www.cooley.com/ffryscak

[2] *Robert Parissi*, *Play That Funky Music* (Wild Cherry, 1976). Listening to the #1 song when President Ford signed the HSR Act into law would have served you up these lyrics.

[3] That's not to suggest that there ever is just one correct perspective on decades' worth of the evolution of legal practice—what follows is, necessarily, only one (highly subjective) view of how the practice has evolved both from the perspective of outside and inside counsel. *See* Wikipedia, Rashomon effect, http://en.wikipedia.org/wiki/Rashomon_effect (April 22, 2013, 3:41 a.m. GMT).

[4] In the U.S. system no deal is technically ever "cleared," although even many antitrust counsel now use this term as shorthand for expiration or termination of the HSR waiting period. Expiration or termination is just a highly valuable statement that "we will not interfere your deal at this time" which, in the overwhelming number of cases, means your deal can close and not be challenged by the DOJ or the FTC in the future. But it can be . . . as Chicago Bridge & Iron, Airgas, and others who saw their way through to the end of their HSR waiting periods only to face later unwinding of their deals can attest. *See*, e.g., *FTC Rules That Chicago Bridge & Iron Company Acquisition Is Anticompetitive*, FTC Press Release (January 6, 2005), *available at* http://www.ftc.gov/opa/2005/01/cbi.shtm; *FTC Settlement Would Restore Competition in U.S. Market for Nitrous Oxide*, FTC Press Release (October 26, 2001), *available at* http://www.ftc.gov/opa/2001/10/airgas.shtm.

represented a fundamental shift in the practice of antitrust transactional work. The word "tectonic" is probably not a bad one to use in this context; the world looks very different to an antitrust lawyer who is only likely to be called into a matter when litigation is inevitable, threatened, or commenced as compared to one whose role is typically more about navigating a quasi-regulatory setting in which litigation with the Department of Justice ("DOJ") or the Federal Trade Commission ("FTC") is frequently just the dark shadow cast on the wall.[6]

Little wonder that, given this history, many antitrust deal lawyers at the largest law firms are technically within their firm's litigation department even when the overwhelming majority of their work relates to helping structure and shepherd deals through what the deal documents routinely (and mostly accurately) describe as "regulatory approval" and rarely involves them in litigated merger challenges.

B. Consumer Welfare Takes Center Stage

The second trend, the shift to consumer welfare as the single unifying principle driving the evaluation of transactions, came at a very fortunate time given the emergence of a "regulatory" overlay on the evaluation of transactions. The influence of the "Chicago School" put the emphasis on a consistent approach looking for evidence of consumer harm before there could be a basis for standing in the way of a deal.

> Antitrust finally regarded enhancing consumer welfare as the *single* unifying goal of competition policy, and it used a policy framework that was based on sound economics, both theoretical and empirical.[7]

Not that the fast-moving world of evaluating deals, especially in rapidly evolving markets, is reliably scientific. But, it's enough that most parties came to agree that there was a true north and to be headed that way. And it is, in any event, a vast improvement over the way it used to be—a world memorably described as one in which antitrust enforcers were not focused on evaluating evidence or zeroing in on wrongdoers but where they acted more like a frontier town sheriff patrolling the streets and, every so often, going up to a few people and pistol-whipping them.[8]

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[5] Of course, many antitrust sensitive transactions—even very sizable ones—do not trigger an HSR filing requirement. A discussion of the numerous exemptions and other common jurisdictional "outs" is beyond the scope of this article.

[6] Looking at fiscal year 2011 data, the most recent reported by the FTC and DOJ, the chances of having a filed transaction receive a Second Request were roughly 4.1 percent, and of these filed transactions—those raising the most significant antitrust issues with the regulators—over 93 percent of them were resolved by means other than contested litigation. *See* Federal Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2011, at 2, Appendix A, *available at* http://www.ftc.gov/os/2012/06/2011hsrreport.pdf. And with nearly two-thirds of those transactions which received Second Requests (37 out of 58) being "challenged" the relative lack of litigation as the end point is certainly not based on any light touch applied to heavily investigated deals. *See id.* at 2.

[7] Timothy J. Muris, *Competition and Intellectual Property Policy: The Way Ahead*, Remarks Before the American Bar Association, Antitrust Section Fall Forum (Washington, DC, November 15, 2001) *available at* http://www.ftc.gov/speeches/muris/intellectual.htm.

[8] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 6 (1978). The antitrust attorney who came up with the analogy isn't identified in Bork's book but is widely believed to Supreme Court Justice John Paul Stevens.

Attempts at clarity were furthered by the issuance of the original joint DOJ and FTC *Horizontal Merger Guidelines* in 1992,[9] identifying what the key topics for discussion would be—market definition (both product and geographic), entry, efficiencies, and the comforting mathematics of running HHIs.

Of course, antitrust lawyers soon realized that they took as literal some aspects of the Guidelines only at their peril. This is a lesson I learned the hard way when I was a newly minted associate and asked by the partner about whether the HHIs in a deal were likely to result in an enforcement challenge. "I know what the Guidelines **say** about concentration figures like ours, what do [the enforcers] **do**?" Anybody concluding, for example, that the outer boundaries of the Guidelines' safe harbors marked the spot to reliably expect enforcement action was wearing a raincoat indoors—not likely to get wet but looking awfully silly in the process.[10]

II. TRENDS AFFECTING INSIDE AND OUTSIDE COUNSEL DIFFERENTLY

Besides those two core trends, which affected the overall practice of inside and outside counsel alike, there have been major shifts that have affected the two groups quite differently.

A. Risk Assessment in a Time of Rapid Change

The first such trend is the speed at which companies can emerge as significant (if not leading) competitors to industry incumbents. How frequently such rapid competitive ascendance occurs represents a dramatic shift since the 1970s. This development has reshaped the challenges faced (especially on the target side) by inside counsel. It is far more likely in 2013 that a company's competitive significance will be substantial enough—even in as little as 3-4 years after founding[11]—to justify a Second Request if the company files to be acquired by a leading incumbent. Although this degree of market ascendancy is not an everyday occurrence it's not a rare occurrence either, particularly in Silicon Valley, San Francisco, Silicon Alley (New York), or other innovation centers.

What does this mean to inside counsel for those being acquired? Quite a lot. The emphasis of many startups and their legal staffs is—not surprisingly—on the day-to-day challenges of scaling quickly and otherwise building their business and not on the prospect of facing antitrust risk for the company's exit through acquisition. In fact, a good number of startups may only hire a General Counsel (if at all) not long before being acquired. The rapid pace to achieving market significance means that these targets are less likely to have gone through the HSR process before (other than perhaps in financing rounds in which early termination was granted quickly) so their first meaningful experience with the antitrust review process is increasingly likely to be unpleasant, expensive, and consequential.

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[9] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992), *available at* http://www.justice.gov/atr/hmerger/11250.htm.

[10] The gap between what these guidelines said and what was actually practiced at the DOJ and FTC led to revised (and more expansive) safe harbors being included in the 2010 Horizontal Merger Guidelines. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[11] Sometimes less, of course. Instagram went from founding to receiving a Second Request (for its then proposed acquisition by Facebook) in little over two years.

Inside counsel for buyers are not as likely to be affected by this trend and are far more likely to have General Counsel and sometimes even associate general counsel with greater familiarity with the HSR process (including in matters that may have drawn some level of antitrust scrutiny). For them the trend that has impacted their role in handling antitrust sensitive transactions is an ever-increasing focus on cost consciousness and predictability.

Many outside counsel advising on antitrust matters are acutely aware of these pressures acting on inside counsel, of course. But, being aware of them does not automatically put outside counsel on the same footing as inside counsel in driving to these goals. The first instinct of outside antitrust counsel is more likely to be to size up a matter and see how one can "win." And while only the most naïve outside counsel would routinely equate a win with getting a problematic deal through without concessions, the core antitrust mandate of inside counsel is to "resolve" the matter in a way that yields the largest returns for the company. The best outside counsel can and do channel this drive but, for those who don't, any lingering desire to take "winnable" facts and to convert them into a larger win can create non-trivial divergences with inside counsel's core mission.

It's dangerous to generalize, but there appears to be increasing pressure on inside counsel towards seeking what game theory calls a "maximin" outcome—defined as maximizing the minimum gain, or looking to achieve the "best worst-case."[12] That's certainly not to say that inside counsel are especially willing to offer up concessions but only that they should be expected to weigh the relative merits of a high risk/high reward outcome less favorably than outside counsel. Clearly, if a particular negotiated strategy is preferable on a particular deal it's critical for inside and outside counsel to be aligned closely and early on it.

B. Predictablity's Ascent

Which brings us to the second major force pressing on inside legal staff—providing predictable outcomes. The more that the pressure increases on inside legal counsel for predictable outcomes the less they'll be willing to put in the enormous time, effort, and risk involved in taking especially problematic transactions to the brink in order to secure a more complete win.

The ultimate brink position is, of course, resolving the dispute in court (where predictability is rarely the first word that comes to mind). And, as cost pressures increase, a resolved antitrust challenge will often be far more valuable to a company than a more speculative larger gain, particularly when the resolved deal still has substantial upside and this "bird in hand" can be obtained through manageable divestiture or other fixes.

For targets and their inside counsel, the pressures to avoid litigation are—if anything—even greater, since delay prior to closing and deal uncertainty can impose dramatic costs in terms of employee attrition, lost customers, and loss of focus and competitive momentum.[13]

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[12] For a brief description of maximin strategy *see* CASS R. SUNSTEIN, WORST-CASE SCENARIOS 152 (2009).

[13] Targets in a held up deal are in a very vulnerable position, and this makes what "deal protections" they've managed to obtain in the underlying agreement with the buyer (e.g., antitrust reverse break-up fees, ticking fees, etc.) critical. These deal protections also help bound, at least somewhat, their company's exposure to the inherent unpredictability of litigation on their deal.

C. The Global Arena Brings Unwelcome Complexity

Finally, for the inside counsel expected to provide executives a predictable roadmap on deals, the emergence of a truly international system of merger control regimes marks one of the most significant—and difficult—changes from the late 1970s to the present. Although some merger control regimes predate HSR (such as Germany's and the United Kingdom's) how recently and dramatically the field has expanded can be illustrated by the fact that even Canada did not have civil antitrust merger review until 1986, and EU filings only came on the scene in 1990.

That's a far cry from today's world, in which parties face scores of mandatory filing regimes—a world in which trivial revenues in the Ukraine can trigger filings; the Faroe Islands have their notifications; and the supranational filing system of the Common Market of Eastern and Southern Africa ("COMESA")[14] is potentially triggered based on "zero" local revenues, so long as the transaction has "an appreciable effect on trade between Member States and which restrict[s] competition."

It's one thing to be required to accurately map out not just the outcome but also the timing of meaningful antitrust review in a handful of countries, and a far different thing to do so when a transaction triggers a half-dozen or more reviews—each of which stands in the way of closing the transaction and brings with it the prospect of material operational, financial, and tax effects if delays are not clearly anticipated in advance.

The need for close coordination between inside and outside counsel on antitrust deal work is nothing new, but this need has taken on heightened significance given the sheer complexity of anticipating, coordinating, and resolving merger review on an increasingly global scale.

II. CONCLUSION

The last few decades have marked fundamental changes in antitrust deal work. Fortunately for counsel preparing for the future, the major trends appear to be durable ones—and the challenge is about adapting ever more creatively, and quickly, rather than spotting new trends. And with these changes the hallmarks of the best inside and outside counsel relationships—coordination, communication, and deep trust—are no longer just laudable goals; they are increasingly the baseline for effective antitrust deal work.

[14] Whose member states include Angola, Burundi, Comoros, DR Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.