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I. INTRODUCTION

The merger approval process can be a challenging experience, especially in tough deals that prompt extended antitrust investigations. Long wait times, high costs, and the resulting uncertainty for the parties, their employees, customers, and investors about whether and when the deal will be consummated can make it difficult to hold a transaction together during a prolonged merger review. Adding further complexity is the global nature of M&A, as transactions with international implications can be particularly taxing on the parties.

It is obvious that managing a company through this process takes careful planning, hard work, and strategic thinking. What may be less obvious is the critical importance of close coordination and transparency between a company's general counsel ("GC") (or other in-house counsel responsible for the antitrust investigation) and its outside antitrust counsel. Few GCs have the time or the specialized expertise to advise merging companies on the myriad of issues encountered during a lengthy merger investigation, but they will be accountable to the Board and company for having set proper expectations and for ensuring that the merging companies interact with each other within the proper antitrust boundaries. A closely aligned outside counsel can be a valuable asset for a GC during what can be an arduous process. What is key is for outside counsel to not only be responsive to the GC's concerns, but also candid and direct about the likely outcomes and creative in developing solutions to accomplish the company's goals.

This article both describes the challenges GCs face during the merger review process, and suggests the optimal ways in which the GC and outside counsel can collaborate in order to maximize the chances of a successful result.

II. PRE-DEAL SIGNING

A. Preliminary Antitrust Analysis

Early on in deal discussions, the buyer and seller assess whether they think the transaction will raise antitrust risk. This initial antitrust analysis, even if necessarily preliminary, guides them in negotiating the merger agreement and in projecting a timetable for the transaction.

While there is no ironclad playbook regarding how and when a GC deploys his or her antitrust counsel, ideally, in our experience, parties contemplating an antitrust-sensitive merger or acquisition involve counsel at the early stages of the deal. Outside counsel can proactively work with the GC to put the company in the best position to prevail. If the deal is tougher than expected, better that the GC and senior executives know it early on. Despite the pressure a GC

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may be under to bless a deal, it is of little use to simply get a "finger in the wind" outside counsel prediction based on insufficient information.

Although the GC knows the company best, outside antitrust counsel brings a detached, independent view and expertise that comes from representing a variety of companies in many matters across multiple jurisdictions. The GC, of course, is a critical sounding board during formation of the antitrust analysis, given the GC's business acumen, company-specific knowledge, and awareness of market dynamics. The GC also helps to identify the necessary company personnel that will be important to prepare the analysis and appear before the antitrust agencies, and to arrange for outside counsel to conduct a series of interviews with those individuals in order to discuss the areas of overlap between the acquiring company and target and the competitive dynamics at issue. The GC can provide valuable insights to outside counsel regarding the various personalities within the company and how outside counsel can communicate with each individual most effectively. Through these personnel discussions and through responses to requests for information from outside counsel, the lawyers can quickly develop a greater understanding of the relevant markets and the possible antitrust issues implicated by the transaction.

With assistance from the GC, outside counsel also obtains company documents analyzing or evaluating the acquisition, and advises on the importance of drafting business documents carefully in order to avoid language that may provide a misleading, and thus unhelpful, impression. Outside counsel may also advise the parties on the proper ways in which to prepare evidence to quantify any anticipated post-merger efficiencies, and whether and when to hire economists, consultants, and other experts.

B. Avoiding Gun Jumping

Outside counsel also typically assists the GC in avoiding a pre-closing (aka "gun jumping") antitrust violation. Because the buyer and the target must continue to compete until the transaction closes, they must be careful not to coordinate their pre-closing behavior. A GC knows all too well the tensions faced by the businesspeople in trying to avoid pre-closing coordination while engaging in lawful integration planning that will enable them to hit the ground running when and if the deal closes.

The goal for outside counsel should be to help the GC set the antitrust boundaries that they and their merger partner cannot cross, and to help the parties navigate this area, often through the creation of due diligence "clean teams," through the use of an independent third party to collect, assess, and aggregate competitively sensitive information, and/or by having outside counsel review such information and redact the most sensitive terms (e.g., prices, future business strategies). Even if the parties are not competitors, the HSR rules require that they continue to run their businesses separately until receiving the appropriate pre-merger clearances, and outside counsel can collaborate with the GC to help the parties plan for the post-merger world without jumping the antitrust gun.

C. Negotiating the Acquisition Agreement

The level of antitrust risk presented by the transaction greatly influences negotiation of the acquisition agreement. As the top legal advisor to the corporation, the GC frequently drives the agreement negotiations, including how best to share the antitrust risk between the parties:

- The GC, for example, must ultimately agree to the time schedule under which the deal must be completed and the circumstances under which it can be terminated.
- The parties generally also must agree upon the level of effort a buyer must make (and the level of cooperation a target must provide) in order to obtain agency approval of the deal.
- Targets also quite often request that the buyer agree to make certain divestitures (or other remedies) to satisfy any competition concerns voiced by antitrust enforcers, and the GC must ensure that doing so will not frustrate the business rationale for the transaction.
- Additionally, the seller often insists on a "reverse" breakup fee under which the buyer compensates the target if the deal fails for antitrust reasons.

And while the GC is considering these antitrust-related provisions, he or she is also generally tasked with overseeing all other aspects of the merger agreement negotiation, and interacting with senior executives and the Board regarding the deal's terms and projected timing.

Through all of these considerations, outside counsel, working closely with M&A counsel, can provide important advice based on its experience negotiating antitrust risk-sharing provisions across a large number of transactions. For example, unlike most GCs, outside counsel generally has an appreciation for the way in which antitrust enforcers will view the presence (or absence) of certain provisions in a merger agreement. As a result, outside counsel may convey the pros and cons of a provision that delineates the precise time at which the parties can abandon the transaction, for fear that this will negatively affect the parties' negotiating position with antitrust enforcers down the road. In the end, however, the GC is the final decision maker and must answer to senior executives and/or the Board as to the deal terms reached and the ultimate path chosen.

D. Worldwide Filings

Another pressure point for the GC is the determination of which merger filings around the world are required and the appropriate coordination and timing of any such filings. Consequences can be severe if an antitrust authority takes the position that a filing should have been made but was not. Although most countries' filings are based at least in part on local sales in that country, some are based on market shares.

A further complication is that some merger control regimes outside the United States are "voluntary," meaning that the parties are not prevented from closing the deal in advance of review and approval by a foreign jurisdiction's competition authority. While the GC makes the ultimate determination as to whether the company should take the risk that the competition authority will not require them to undo their transaction in due course, forthright advice from outside counsel can be critical.

Moreover, timing is obviously an issue. Although the greatest timing issue is simply the desire to close as soon as possible, some countries' premerger laws require a filing within a certain number of days after a particular triggering event (typically, the signing of a definitive agreement).

Preparing the actual filings can be challenging, both because the necessary information may vary by country and because the GC may have to collect information and documents from a

large number of individuals at multiple levels and locations within the company. Moreover, the substantive antitrust analysis and local market dynamics can each differ from country to country. As a result, it is not unheard of for one country to clear a deal while another country rejects it, imposes conditions, or at least takes a lot longer to clear it. This can create some deal disruption and needs to be managed carefully.

III. POST-SIGNING/PRE-CLOSING

A. The Initial 30-Day HSR Waiting Period

The parties' filing of the HSR triggers a 30-day waiting period (15 days in the case of a cash tender or bankruptcy transaction) during which the merging parties may not close their transaction. During the initial waiting period, the reviewing agency makes a preliminary assessment as to whether the deal raises any antitrust concern that warrants closer examination. Companies and their antitrust counsel attempt to show—through the use of facts and data about the industries and the post-merger incentives of the relevant players—that the transaction raises no competitive concern.

At the end of this 30-day period, the agency may (1) terminate the waiting period and allow the parties to consummate their transaction; (2) allow the waiting period to expire, thus allowing the parties to consummate their transaction; or (3) extend the review by issuing a Second Request (an extremely broad request for additional information and documents) so that the agency can take a closer look at how the transaction will affect competition.

There is often an initial strategic call to be made—staying silent or contacting agency staff early in the waiting period, perhaps even before the HSR filing—in order to proactively explain why the transaction raises no antitrust issues. If the parties decide to contact the agencies, the GC typically attends this initial meeting. Some GCs take on a major role at such meetings, describing the company's reasons for pursuing the transaction and answering antitrust enforcers' questions about the nature of the markets at issue and the ways in which those markets will change post-merger. Other GCs prefer not to become deal spokesmen, and instead choose to leave the advocacy to outside counsel and to let the company's business people (who also frequently attend such meetings) provide facts about the nature of competition.

Regardless, it can be very important and very helpful for both outside counsel and the GC to build a relationship with agency staff. In many cases, companies will appear repeatedly before the agencies, and a GC's relationships (good or bad) with agency personnel can impact a deal, just as is true for outside counsel.

B. The Issuance of a Second Request

If a Second Request is issued, the GC is typically instrumental in helping to identify potential custodians whose documents will need to be protected with a document hold, and then ultimately searched, because the GC can speak to the company's organizational structure. The GC is also heavily involved in locating the appropriate company personnel to provide data and responses to interrogatories, managing the expectations of senior executives and businesspeople anxious to complete the transaction, holding the deal together when and if the business units and/or customers grow frustrated, managing the costs of the investigation, and working with outside counsel in planning for the possibility of litigation and/or potential divestitures.

Ultimately, in collaboration with outside counsel, the GC determines the substance and direction of the company's response to the investigation and, in the case of international transactions, helps to maintain consistency across multiple jurisdictions.

Outside counsel plays a critical and complementary role during this phase of the investigation. Most outside counsel have substantial experience negotiating with the agencies on the scope and timing of government investigations, and GCs typically rely on outside counsel to manage interaction with government enforcers and ultimately to manage the company's Second Request response. Outside counsel also reviews significant documents and communicates with the GC about documents that would be harmful or helpful to the outcome. Outside counsel frequently uses these documents—along with other materials and analyses prepared by the parties or their economists—in drafting white papers and preparing for depositions, and the GC typically reviews all major submissions for accuracy.

Again, a GC is not well-served by outside counsel who downplay the significance of bad facts, such as a particularly "hot" document. It is far more important to take a bad fact head-on than to act like it does not exist.

C. Deciding Whether to Fight, Fold, or Settle

If, despite the parties' best efforts, the agency is convinced that a competitive issue raised by the transaction cannot be resolved short of a divestiture, then the GC must make the difficult decision—in collaboration with the company's senior management and in accordance with the definitive agreement between the parties—regarding whether to litigate, abandon the transaction, or agree to a divestiture or other remedy.

If divestiture is the chosen course, then the GC—again, in close consultation with senior management—typically begins the process of engaging an investment banker, preparing an offering memorandum, and marketing the proposed divestiture package to both institutional and strategic buyers. The GC must also work to adjust management's expectation as to the time it will take to negotiate the divestiture and the terms of any consent agreement reached with the agency. Outside counsel typically assists the GC with analyzing any potential competitive issues raised by the divestiture buyer, keeps agency staff informed of progress, and negotiates the terms of the proposed settlement with the agency and the parties.

In the highly unusual event of a trial, the GC is, of course, extremely active in the litigation strategy and in holding the deal together during the months-long fight. Not an easy task, but a critical one in a long investigation.

IV. CONCLUSION

There is no one-size-fits-all for roles and responsibilities of GCs and outside counsel. Although we describe above what is optimal from our perspective, the only "must-have" is a transparent, efficient working relationship. The details beyond that can be worked out to suit the person and particular transaction.