Words Can Definitely Hurt You! (or Why an Ounce of Prevention is Worth a Pound in Cure)

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An internal email describing a gentleman's agreement with a competitor to stop recruiting each other's engineers; a presentation showing how an acquisition would eliminate the company's closest competitor; a memo describing how a pending merger would reduce the company's incentives to offer favorable terms to its customers - statements like these can doom deals and expose companies (and their employees individually) to costly investigations, huge criminal fines, large private damages, reputational harm and even jail time. Yet, internal documents[1] such as these appear in case after case as key evidence of anticompetitive conduct or effects. And both courts and enforcers usually accord significant weight to such documentary evidence.

At the 67th Spring Meeting of the ABA Section of Antitrust Law in Washington, D.C., a panel of current and former antitrust enforcers, private practitioners and in-house counsel discussed the substantive antitrust and ethical risks associated with document creation at the session "Words Can Definitely Hurt You!" presented by the Corporate Counseling Committee. Suzanne E. Wachsstock, Chief Antitrust Counsel, Walmart Incorporated, Washington, D.C., moderated the panel which consisted of Charlesa Ceres, Associate General Counsel, Antitrust & Competition Law, United Technologies Corporation, Hartford, CT; David I. Gelfand, Cleary Gottlieb Steen & Hamilton LLP, Washington, D.C.; Mark Seidman, Deputy Assistant Director, Mergers IV, U.S. Federal Trade Commission, Washington, D.C.; and John M. Snyder, Alston & Bird LLP, Washington, D.C. [2]

The speakers described how the discovery of documents showing anticompetitive motives or, worse, an actual antitrust violation, could easily become an in-house counsel's worst nightmare—or a key piece of the antitrust enforcer's case. The panel connected this discussion with counsels' ethical obligations, refreshing the audience's understanding of the ethical rules governing a lawyer's role in the creation and treatment of internal documents as well as referring back to these ethical obligations throughout the panel's discussion.

In this article, we summarize the discussion and the guidance the panelists provided on preventing and confronting such situations. First, we describe the speakers' comments on how the enforcers use poorly-worded documents to support their challenges to proposed mergers or allegedly anticompetitive conduct in court. We then list practice pointers from the panelists on how to counsel employees on sound document creation practices while complying with an attorney's ethical obligations.

Although counsel are often focused on the negative consequences of "problematic" documents, it is important to keep in mind that helpful documents can also rebut allegations of anticompetitive intent or support arguments that a merger will produce substantial efficiencies. The panelists described, in particular, how documents explaining the reasons for business decisions can show legitimate, pro-competitive justifications of certain business practices that might otherwise attract scrutiny from the

[1] "Document" is broadly defined and may refer to email and other electronic communications (including relevant social media), memoranda, studies, analytical papers, presentation decks, meeting minutes, bankers books, industry studies, consultant reports, spreadsheets, employees' handwritten notes and other records found in the files of relevant employees (hard-copy or electronically stored).

[2] The panelists' views discussed in this article were only their own and not those of their employers.

antitrust enforcers. Furthermore, these so-called "good documents" can provide the necessary context to explain away inaccurate phrasing in other documents. This is yet another compelling reason for in-house attorneys not only to educate employees about potential antitrust risks arising from improper or careless communications, but also to insist on precision and accuracy in all internal communications and other written documents.

Merger Review

Company documents play a critical role in merger review. They are one of the three main categories of evidence in merger review, the other two being customer testimony and economic analysis. The panelists explained that enforcers analyze the evidence holistically and arguments for or against a transaction must be supported by all three types of evidence, akin to balancing a three-legged stool. Documents unhelpful to the merging parties are likely not enough for a successful government challenge on their own—but they not only provide the key evidence of anticompetitive effects; they also support (or rebut) testimonial and econometric evidence.

To evaluate the likely effects of a proposed transaction on competition, enforcers often rely on two categories of internal documents: deal-related documents and ordinary-course business documents. Deal-related documents such as Confidential Information Memoranda, management and board presentations as well as email communications about the transaction often describe the rationale for the transaction, the synergies resulting from the merger or the plans for the operation of the post-merger company. These documents may also contain information about the competitive dynamics or landscape of the industry in which the transaction is taking place to the extent necessary to inform key decision-makers of the position of the post-merger company in the relevant market.[3]

Ordinary-course documents such as internal market analyses, competitive intelligence reports, bidding history, customer call notes, as well as internal and external email communications, are created as part of the day-to-day operation of the company. They contain the views of business people on the strength and weaknesses of competitors, the product or service features that customers value, the alternatives customers may have to obtain similar products or services, the pipeline products the company or its competitors may have, among others. This information helps shed light on the relevant markets, the competitive interaction of market participants, entry barriers and expansion trends in the industry.[4]

The panelists described how statements in deal-related documents suggesting that a merger is intended or expected to reduce competition or that the post-merger company would have the incentive and ability to raise prices, reduce output, reduce product quality or delay the introduction of new products may provide grounds for enforcers to launch an investigation and to challenge the transaction. For example, in the U.S. Department of Justice's 2013 challenge to Bazaarvoice's

[3] For transactions that require reporting under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94-435, 90 Stat. 1390 (the "HSR Act"), enforcers receive certain deal-related documents as part of the required pre-merger notification. These are documents prepared by or for company officers and directors for purposes of evaluating the transaction with respect to competition, markets, market shares, synergies or the potential for growth and expansion. These documents are commonly referred to as "4(c) and 4(d) documents" after the sub-parts of the HSR notification form where they must be listed. *See* 16 CFR §§ 803.1-6. For transaction reporting requirements see 15 U. S. C. § 18a (stating the reportability tests) and 84 Fed. Reg. 7369-70 (stating the current thresholds to be used with the tests).

[4] Enforcers receive ordinary-course documents as part of a notification under the HSR Act, if one is required, to the extent these documents are incorporated into deal-related documents and discussions. Enforcers may obtain additional documents (both deal-related and ordinary-course) by requesting a voluntary submission by the parties or by issuing a Request for Additional Information and Documentary Material, also known as "Second Request." *See*16 CFR §§ 803.20.

acquisition of rival PowerReviews, deal-related emails were key pieces of evidence in the government's case challenging the transaction: One of the Bazaarvoice co-founders emailed his co-founding partner and company CEO a bullet list of the pros and cons of the proposed merger. In the email he explained that the transaction would result in "[e]limination of our primary competitor in both the US and Europe," which will provide "relief from the price erosion that Sales experiences in 30-40% of deals . . . ."[5] Moreover, when Bazaarvoice executives described a different motivation for the deal at trial, the court found their testimony "at best, unconvincing" in light of the numerous pre-acquisition documents showing that Bazaarvoice's primary goal in acquiring PowerReviews was to eliminate it as a competitor.[6]

In *Bazaarvoice,* the court found that certain deal-related documents provided compelling evidence of the competitive effect of the transaction, but in many other cases, such language in deal-related documents is not indicative of the future competitive dynamic as much as it is a matter of careless drafting or exaggeration meant to present the transaction in a favorable light to internal decision-makers. For example, predictions that the post-merger company would "dominate the market" may be explained away as puffery if ordinary course documents reveal a number of remaining viable competitors. Similarly, references to "markets" in presentations sometimes refer to assigned salespersons' territories rather than meaningful antitrust geographic markets. In such cases, it is important to approach the enforcers quickly with an explanation for the wording and, ideally, with ample support from ordinary-course documents showing a different reality than the one implied by the problematic deal documents.

The speakers emphasized that both enforcers and courts accord higher weight to evidence coming from ordinary-course documents when the information in them is not consistent with statements in deal-related documents. They explained that ordinary-course documents, when created to support operational decision-making, may have higher probative value than deal-related documents or analyses because the drafter may have less motivation to downplay facts unfavorable to the deal at issue.[7] Furthermore, ordinary-course documents revealing potential adverse effects on competition may undermine the analytical and advocacy documents that the parties present to the enforcers in support of the deal. In fact, the credibility and persuasiveness of the parties' advocacy depends critically on support from ordinary-course documents.

For example, in its litigation challenge to Staples' second attempt to acquire Office Depot, the FTC rebutted the parties' market definition arguments using their own ordinary-course documents.[8] The merging parties argued that the relevant market included a number of significant competitors besides the two merging superstores, such as Amazon and W.B. Mason, which would constrain the post-merger company's ability to raise prices. Yet, a presentation deck prepared for the Staples Leadership Summit included the following statement regarding Office Depot: "There are only two real choices for customers. US and Them."[9] An Office Depot email to a customer explained that "[o]n a national scale, Office Depot's competition is Staples."[10] These statements, together with similar statements in

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[5] *See* United States. v. Bazaarvoice, United States Opening Statement Presentation (Sept. 26, 2013), *available at* https://www.justice.gov/atr/case-document/united-states-opening-statement-presentation-0.

[6] *See* United States v. Bazaarvoice, No. 13-cv-00133 2014 U.S. Dist. Lexis 3284 at *65, 72 (N.D. Cal. Jan 8, 2014).

[7] See Horizontal Merger Guidelines ("HMG"), § 2.2.1 Sources of Evidence - Merging Parties (2010).

[8] *See generally, In re* Staples/Office Depot, No. 1:15-cv-02115 (D.D.C. 2016) (case documents available at https://www.ftc.gov/enforcement/cases-proceedings/1510065/ftc-v-staplesoffice-depot

[9] *See* Administrative Complaint at 2, *In re* Staples/Office Depot, Dkt. No. 9367 (Dec. 7, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/151207staplesoffdepot_pt3cmpt.pdf

[10] *Id.*

other internal documents established that Staples and Office Depot viewed each other as closest competitors and as the only viable vendors to national customers with large office supply spend.

Furthermore, the FTC pointed to an email message from a Staples sales employee urging a customer to accept proposed contract terms quickly because Staples would no longer offer such favorable terms once the then-pending merger with Office Depot was approved. The email stated that the customer "will never get a more competitive offer than right now."[11] Messages like this one, according to the FTC, signaled Staples' intent to raise prices post-merger. In light of this evidence, the district court granted the FTC's motion for preliminary injunction and the parties abandoned their plans to merge shortly thereafter.[12]

Conduct Investigations

The panelists discussed how the use of internal company documents in conduct investigations differs from that in the context of merger review. Unlike merger review, where the documents provide evidence to assess the future effects of a transaction, in a conduct review, company documents may contain the actual anticompetitive agreement or at least circumstantial evidence to establish the existence of anticompetitive conduct or motive.

For example, documents that may prompt enforcers to open a conduct investigation often include communications among high-level executives or among sales employees of rival companies, as well as communications between sales employees and customers. Indeed, when the DOJ charged several high-tech companies with a conspiracy to refrain from recruiting each other's software engineers, the DOJ described how senior executives of certain high-tech companies reached "express no cold call agreement[s] through direct and explicit communications."[13] Follow-on civil litigation revealed specific email communications describing the agreements between the companies' CEOs and the allegedly anticompetitive purpose of these agreements.[14]

The panel also identified two other categories of documents often scrutinized in conduct investigations: public announcements about price changes or pricing policies as well as statements in industry publications about industry-wide target capacity or industry-wide price movements. The speakers noted that statements of this sort may be interpreted as an invitation to collude, especially in industries with oligopolistic market structures, homogenous products, and similar cost structures across manufacturers. If such a statement is followed by parallel conduct, the enforcers may launch an investigation to ascertain whether the competitors agreed to concerted action in violation of the antitrust laws.

Finally, several panelists noted that documents submitted in the course of merger review may also prompt enforcers to open a conduct investigation if they reveal improper communications or improper sharing of competitively sensitive information. A recent example is the DOJ investigation of broadcasting companies that allegedly exchanged revenue metrics and other non-public sales information to coordinate spot advertising pricing, strategies, and negotiations.[15] The DOJ

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[11] *Id.*

[12] Press Release, Fed. Trade Comm'n, After Staples and Office Depot Abandon Proposed Merger FTC Dismisses Case from Administrative Trial Process (May 19, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/05/after-staples-office-depot-abandon-proposed-merger-ftc-dismisses.

[13] *See* Compl. at 5-8, United States v. Adobe et al., No. 10-cv-01629 (D.D.C.), *available at* https://www.justice.gov/atr/case/us-v-adobe-systems-inc-et-al

[14] *See generally, In re* High-Tech Employee Antitrust Litig, No. 11-cv-2509 (N.D. Cal.).

[15] Press Release, Dep't of Justice, Justice Department Requires Six Broadcast Television Companies to Terminate and Refrain from Unlawful Sharing of Competitively Sensitive Information (Nov. 13, 2018),

uncovered the documents giving rise to the investigation and supporting the eventual charges among the documents submitted during the review of the now-abandoned merger between Sinclair Broadcasting Group and Tribune Media Company.[16]

The Role of In-House Counsel

Throughout the discussion, the speakers underscored that developing sensitivity to antitrust risks and good document creation habits among a company's employees is worth the effort because it can help to avoid lengthy and costly antitrust investigations. In the context of merger review, the mere existence of problematic documents might trigger a more thorough investigation, including the issuance of a Second Request. Even if the investigation concludes with unconditional clearance of the deal, compliance with a Second Request is often costly, disruptive to the business and may delay closing. Similarly, defending conduct investigations usually imposes large costs in the form of attorney fees, expenses for document collection and review, and reputational losses. Furthermore, if a government investigation results in charges that a company violated the antitrust laws, then private lawsuits are sure to follow with complaints based on facts and bad documents cited in the government's complaint.

All panelists agreed that in-house counsel play a key role in educating business people on the risks of inaccurate or imprecise documents. During the discussion and in the materials provided for the session, the speakers shared advice on best practices in document creation:

- First and foremost, be truthful and accurate in any document.
    - Avoid hyperbole, puffery, and unfounded speculations that may not reflect competitive realities.
    - Avoid antitrust terms of art and wording that may carry unanticipated antitrust connotations.
- Write clearly and concisely.
    - Avoid vague and ambiguous statements.
    - Provide sufficient context to prevent statements from being misunderstood or misconstrued.
- Provide complete information.
    - List all competitors, not just the closest ones.
    - Acknowledge situations where you lost business to competitors offering better terms or better product.
    - Acknowledge limitations of information and data.
- Stick to objective facts.
    - Identify opinions or rumors.
    - Avoid conclusory characterizations.

available at https://www.justice.gov/opa/pr/justice-department-requires-six-broadcast-television-companies-terminate-and-refrain-unlawful.

[16] Assistant Attorney General Makan Delrahim, "November Rain": Antitrust Enforcement on Behalf of American Consumers and Taxpayers, Remarks at the American Bar Association Antitrust Section Fall Forum (Nov. 15, 2018) *available at* https://www.justice.gov/opa/speech/file/1111651/download.

- Follow a modified "*New York Times* rule": assume everything you write will be reviewed by enforcers or the opposing party in litigation.
- Seek legal review of documents with sensitive information.

In addition to best practices, the panelists shared their recommendations on steps that in-house counsel should take to prevent "bad" documents from being created in the first place. Specifically, in-house counsel can:

- train key executives with C-suite, corporate development, sales and marketing functions about the antitrust risks associated with competitor interactions and internal communications about these interactions;
- discuss with deal teams the substantive antitrust issues that might come up in the merger review process and best practices on how to handle information and documents related to these issues;
- institute formal processes that ensure draft documents prepared for key decision-makers go through legal review prior to being finalized;
- ask the drafters to refine the language or to elaborate on the substance of problematic statements to make the documents accurate, clear and complete; and
- educate non-legal employees proactively about the role of legal privilege claims, including how and when the attorney-client privilege applies and the differences between legal privilege issues in different jurisdictions.

Finally, if in-house counsel become aware of internal documents that suggest potential antitrust violations, the panelists noted that in-house counsel should conduct an internal investigation and assess the options for the company and its executives in light of the findings.

Conclusion

As illustrated during the panel discussion, words really can hurt, but there are concrete preventive actions that can help reduce the pain by reducing the number of potentially problematic documents that employees generate. To minimize the risk that poorly drafted documents might prompt extensive merger reviews or conduct investigations, and might serve as evidence supporting an enforcer's or private plaintiff's complaint, in-house counsel must work to instill a culture of compliance in which employees understand the pertinent antitrust risks and know how to avoid making statements or taking actions that could be misinterpreted as evidence of anticompetitive conduct or harm to competition.

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