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Keys to Compliance—Practical Antitrust Issues Involving Trade Associations

By Matthew J. Bester and Creighton J. Macy

An executive at your company comes to you about a new trade association she would like to join on behalf of the company. The association includes many of your competitors. The executive would also like to attend the association's meeting in California next week, with several other colleagues. This will encompass three days of in-depth meetings on various aspects of the industry, including group-specific break-out sessions and several social activities. The association also meets quarterly, including in locations outside of the United States. While your response is likely that participating in these trade association meetings can be beneficial, you also know it carries risk.

To help you think through these important matters early, below is a practical guide to dealing with antitrust issues involving trade associations. This article offers best practices for you and your clients to employ when considering whether to join a trade association and how to participate in its activities. Many of these principles also apply more generally when advising executives about collaborative activities with competitors. The costs of getting it wrong are high: Competition law enforcers around the world have targeted illegal agreements among competitors formed at trade association events, resulting in violations and fines—and executives being sent to jail.

Of course, each instance must be evaluated on a case-by-case basis. We recommend you contact antitrust counsel early in the process so that he or she can provide proper case-specific guidance.

Overview

There are many good reasons for companies to participate in legitimate trade association activities. For example, collaborating with colleagues across an industry may promote more effective solutions to problems that affect the industry as a whole, allow for the gathering of important industry-wide data, or offer useful training opportunities. They also provide their members with important updates on legal and regulatory matters, provide for advocacy and lobbying on important industry issues, and help develop and implement technical standards. Trade associations, however, are also a forum for competitors to meet face-to-face or through electronic mediums, sometimes regularly; thus, these events also present the possibility of facilitating conduct that violates antitrust laws. Specifically, Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, prohibits agreements among competitors that restrict each other's freedom to make independent business decisions in matters that may affect prices, customers, output, employment, and the quality of their companies' products. Similar statutes across the globe also prohibit this conduct.

Enforcement agencies such as the Federal Trade Commission ("FTC") and U.S. Department of Justice Antitrust Division ("DOJ") recognize the benefits that trade associations can provide to consumers. But, they have also seen "the ugly," as one former FTC chairman stated, in trade associations and the potential for antitrust harm that trade association memberships can create.[1] For example, the FTC settled claims in 2017 against the National Association of Animal Breeders ("NAAB") for adopting association rules that restricted the use of technology and animal ownership rights. According to the FTC, NAAB rules reduced competition in the sale of animals and negatively impacted the market; in the settlement NAAB was required to stop limiting its members' ability to use technology or information that resulted from research involving the NAAB.[2] The DOJ has also taken action against associations for anti-competitive conduct, such as charges brought in 2013 against the Oklahoma State Chiropractic Independent Physicians Association ("OSCIPA"),[3] and even against our very own American Bar Association ("ABA").[4] Further, competitors on occasion have even

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[1] *See* Jon Leibowitz, Commissioner, Fed. Trade Comm'n., Remarks at the American Bar Association Antitrust Spring Meeting: The Good, the Bad and the Ugly: Trade Associations and Antitrust (Mar. 30, 2005). Though these remarks were delivered in 2005, the FTC's subsequent trade association enforcement actions suggest trade associations continue to raise the same concerns.

[2] *See* Press Release, In the Matter of Nat'l Ass'n of Animal Breeders, No. C-4623 (Aug. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/08/national-association-animal-breeders-inc-agreed-refrain-adopting; Order, In the Matter of Nat'l Ass'n of Animal Breeders, No. C-4623 (Aug. 18, 2017), https://www.ftc.gov/system/files/documents/cases/151_0135_naab_decision_and_order.pdf.

[3] The complaint charged that OSCIPA, a trade association that included nearly 45 percent of all then-practicing chiropractors in Oklahoma, had collectively negotiated contract rates with insurers and required members to suspend pre-existing contracts with those insurers. In the settlement agreement, OSCIPA agreed to stop jointly determining prices and negotiating these contracts, or attempting to facilitate joint negotiations or communicating with chiropractors about pricing or contracting. *See* Press Release, United States v. Okla. State Chiropractic Indep. Physicians Ass'n, No. 13-CV-21-TCK-TLW (N.D. Okla. 2013), https://www.justice.gov/opa/pr/justice-department-challenges-joint-contracting-behalf-oklahoma-chiropractors.

[4] The DOJ brought suit against the ABA in 1995 because its law school accreditation program, with a committee staffed primarily by law school faculty, "forced" law schools to increase the salary and benefits of their faculty. The matter was eventually settled, with the ABA accreditation committee agreeing not to, among other things, collect "comparative data" or impose any "comparative requirement" regarding the compensation of law school faculty. *See* Anne K. Bingaman, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Before the 32nd Annual Symposium of the Trade Association and Antitrust Law Committee of the Bar Association of the District of Columbia, (Feb. 28, 1996), https://www.justice.gov/atr/speech/recent-enforcement-actions-antitrust-division-against-trade-associations;

formed "sham" trade associations to disguise their hardcore cartel activity. These associations are merely a pretext for competitors to meet and collaborate improperly under the antitrust laws.

In general, many of the most problematic agreements in the trade association context often center on an association's restriction of its members' ability to compete for (or solicit) customers or to compete with one another on key aspects of the competitive process (*e.g.*, price or costs). Examples of restrictions that have placed trade associations squarely in the sights of antitrust enforcers include rules that prohibited members from pitching a competitor's customers, offering discounted prices to another member's customers, offering comparative advertising, offering services below a certain price threshold, and enacting rules obstructing members' ability to compete with each other. Enforcers will also pay particular attention to concerted action relating to standard setting or commercial terms, as well as rules (or conduct) that facilitate the improper sharing of competitively sensitive information (*e.g.*, individual company pricing and cost information) among members. In the EU, simply passing competitively sensitive information, even if unsolicited, can be enough to create an antitrust violation.[5]

When counseling your executives on trade association memberships and events, there are three areas of inquiry. First, before your client joins the association, review the association's bylaws and antitrust compliance policy. Second, before your client attends an association event, review the meeting agendas and the association's antitrust meeting guidance. Third, prior to a meeting or event, instruct your client on proper conduct at the meeting itself. As you will see below, much of the legal diligence and risk mitigation with respect to trade association events comes long before any of your executives set foot in an association meeting.

1. <u>Counsel, I would like the company to participate in the trade association. Can I join?</u>

The first step in assessing whether there is antitrust risk in joining a trade association is to look at its governing documents, which are commonly in the form of bylaws. A trade association's bylaws or other governance documents provide the organizational rules for the group. In their enforcement actions, antitrust agencies routinely review trade association bylaws as support for evidence of illegal conduct by an association's members. If done improperly, this may be the "agreement among competitors" that will trigger antitrust scrutiny.

Many times, even though these rules may appear on their face to benefit customers, courts have not hesitated to condemn them under the antitrust laws because, in fact, they restrict competition among members. In a notable example, the FTC found illegal an association of legal support professionals' code of ethics that not only banned comparative advertisements, but also prevented members from offering discounted rates to another member's clients or recruiting another member's employees without giving prior notice.[6] And, in 2015, the NAAB agreed to remove provisions from its code of ethics that the FTC charged limited competition among members. According to the FTC, these provisions contained prohibited advertising restrictions; the NAAB agreed to remove these restrictions from its code of ethics and references to them on its website, publish and distribute an

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Press Release, In the Matter of Am. Bar Ass'n (June 27, 1995), https://www.justice.gov/archive/atr/public/press_releases/1995/0257.htm.

[5] The EU Courts have repeatedly stated that unilateral disclosures of information can amount to an infringement of EU competition rules and the fact that a company merely receives competitively sensitive information is not a defense. *See, e.g.*, Cases C 40/73 etc., *Suiker Unie v Commission* [1975] ECR 1663, EU:C:1975:174; Cases T-25/95 etc., *Cimenteries CBR SA v Commission* EU:T:2000:77; and Case C-359/01 P *British Sugar* [2004] ECR I-4933, EU:C:2004:255.

[6] *See* Statement of the Federal Trade Commission, In the Matter of Cal. Ass'n of Legal Support Prof'ls, No. 131-0205 (Dec. 16, 2013), https://www.ftc.gov/system/files/documents/cases/140404calassocmusicteachersstatement.pdf.

announcement regarding the settlement and changes to its code, and to implement an antitrust compliance program.[7] Last, if the association your company is looking to join does not have any bylaws at all, it should be an immediate red flag in your review.

On the other hand, good bylaws set clear expectations that members will adhere to all legal requirements and not use association events as a forum to take joint actions that restrict competition. They should make clear that there are subjects that may not be discussed among competitors in a group setting like a trade association function, or at all, such as sharing competitively sensitive information, terms offered to specific customers, wage levels offered to employees, or pricing of specific products. They also need to have objective requirements for membership that cannot be used to unreasonably exclude otherwise qualified members. If membership is refused, there should be an internal procedure for appeal within the association. If the association will promulgate any technical standards or certification programs, it must be done in a way that does not unfairly disadvantage competitors outside the association. In addition, the association should create clear rules on how (and what types of) data will be shared among members if the association conducts activities such as benchmarking.

Trade associations often have codes of ethics that affect the business conduct of their members. Many of these codes, when looked at through an antitrust lens, are perfectly appropriate where they require members to improve services to their customers or engage in honest dealings. However, these codes can violate the antitrust laws when used to harm the competitive process. For example, the FTC found illegal the code of ethics of an association of music teachers that prevented members from soliciting clients from a rival, in effect preventing members from offering services to students who were already taking lessons from another member.[8] Later, in 2017, the FTC settled claims against the American Guild of Organists after the Guild agreed to eliminate rules restricting its members from competing for performance opportunities.[9] Other examples of violations include restricting competitive bidding, establishing rules on when and where members can work, and setting the prices or commissions that their members can charge.

It is not unusual for trade associations to have a separate antitrust compliance statement or addendum to the bylaws. These statements are very helpful to spell out in detail what conduct may be permitted and what may not, and should be tailored to the relevant industry. For example, in an association of pharmaceutical companies, there are antitrust risks in discussing drug development pipelines. Similarly, in an association of real estate agents, there are antitrust risks in discussing sales commission discounting. And, in an association of human resource professionals, there are antitrust risks in discussing the wages of employee classes. Good antitrust compliance statements will address risks specific to the members.

2. <u>Counsel, we're preparing to attend the trade association meeting. Are there any antitrust issues to be aware of?</u>

Before any of your executives attend a trade association meeting, there are three key points to look for to ensure that it will be run in compliance with antitrust principles. First, make sure that there is an agenda and that none of the topics could lead to obvious antitrust problems. Screening the agenda

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[7] *See* Decision and Order, In the Matter of Nat'l Ass'n of Animal Breeders, No. C-4558 (Nov. 2, 2015), https://www.ftc.gov/system/files/documents/cases/151106naabdo.pdf.

[8] *See* Statement of the Federal Trade Commission, In the Matter of Music Teachers Nat'l Ass'n, Inc., No. 131-0118 (Dec. 16, 2013), https://www.ftc.gov/system/files/documents/cases/140404calassocmusicteachersstatement.pdf.

[9] *See* Decision and Order, In the Matter of Am. Guild of Organists, No. C-4617 (May 26, 2017), https://www.ftc.gov/system/files/documents/cases/american_guild_of_organists_decision_and_order_c4617.pdf.

for problematic topics (*e.g.*, a discussion of individual company pricing practices or key potential customer targets) will allow you to at least raise questions to the association in advance and make sure the discussion will steer away from topics that create antitrust risk. Remember that discussions outside the formal meetings are subject to the antitrust laws just as any other part of the association meeting—and where antitrust enforcers expect that a violation may be likely to occur—a point that should be reinforced with your executives.

Second, if the meeting agenda or your discussions with the executives who will be attending the meeting leave you concerned, call the association. Trade associations should be well versed in the risks of their activities and often have an antitrust lawyer on staff or external counsel retained who can respond to these queries. Indeed, many associations require their antitrust lawyer to attend all meetings to help mitigate the antitrust risks. It is much better to work out your concerns ahead of the meeting than have someone from your company attend the meeting where the subjects being discussed or the lack of appropriate precautions create undue risk for your company and executives.

Third, it is also useful to distribute your own set of internal guidance for any executives attending trade association meetings. Effective guidance is typically a short document (preferably 1–2 pages) that outlines problematic discussion topics and what to do if such a topic is raised. For example, we have seen some guidance presented on a notecard, with the key bullet points on both sides of the notecard. We have also observed clients messaging their employees, through an email or text, key guidelines as they are in route to a meeting.

The guidelines should make clear that the following are forbidden: (1) discussions among competitors concerning individual company pricing, strategic plans, customers, employee wages, or product pipeline information; and (2) agreements among competitors on production, sales territories, product development, employee hiring, customers, or not working with a competitor, supplier, or customer. It must also be conveyed to your executives that an "agreement" in this context can mean something far less formal than a signed agreement; rather, in the U.S. it can encompass any written, oral, or even nonverbal agreement where there was a common understanding. In the EU, the standard is even lower—as an information exchange alone can be considered a concerted practice.[10] As you know, striking the right balance is crucial between providing useful information that is at the same time understandable by busy business executives who are typically focused on issues other than antitrust compliance at trade association meetings.

3. <u>Counsel, I'm now at the meeting. What antitrust issues do I need to keep in mind?</u>

When at the meeting, your executive should be armed with four simple points: (1) stick to the agenda—and freely engage in conversations that represent the approved purpose of the meeting and association—at all times; (2) do not engage in conversations dealing with competitively sensitive information that are not previously approved; (3) do not discuss company-specific confidential information; and (4) promptly leave, and document that departure, if inappropriate conversations occur. You should also be clear to your executives that not following these simple points could expose them and the company to significant antitrust risk, including fines and jail time.

Once at the meeting, the process and structure should generally feel familiar to your company's executives if the proper groundwork was laid beforehand. To start the meeting, many associations will read or circulate an antitrust compliance statement so participants are clear as to what they can

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[10] The EU Courts have defined a "concerted practice" as "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition." *See* Case C 48/69 *ICI v Commission* EU:C:1972:70.

and cannot do. The association's attorney often attends the meeting and will let participants know that he or she is available to answer questions and will be monitoring the discussions.

As the meeting progresses, it is particularly important to adhere to the agenda and stay away from topics that require the disclosure of confidential company-specific information as described above. There should be a person designated as the leader of the meeting, and that person should also be tasked with ensuring that the discussion does not stray from the agenda. Someone at the meeting should be in charge of keeping minutes so there is a written record of what was discussed.

If it becomes apparent during the meeting that attendees are straying from the agenda and are discussing risky topics, it is crucial that your executive understands what to do next. The executive should make it clear to the other attendees that the discussion has strayed off the agenda into an area that is potentially problematic. If there is a lawyer in the room or on-site, the executive should immediately get guidance and ask that the problematic discussion be put on hold in the meantime. If she cannot obtain guidance and the discussion continues, you should instruct your executive to leave the room, announce the reason why, and ask that the minutes reflect that she has left. It will be important to document steps the executive took, and she should also be instructed to call you immediately in the event that these issues occur.

Conclusion

Given the many benefits that trade associations can offer a company and its employees, participation in the right associations should not be deterred. For instance, this article appears in a publication of a terrific trade association—the ABA. As long as some basic compliance steps are taken both before and at trade association events as described above, your company's potential antitrust exposure will be significantly diminished.

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"Bankers (And Other Third Party) Privilege?"
Summary of the Corporate Counseling Committee's Spring Meeting Panel

By Sarah Melanson and Sara Salem

Although often necessary to merger analysis, communications between attorney, client, and bankers, consultants, and other essential third-party advisors are not always protected under the attorney-client privilege. Through a recap of the Corporate Counseling Committee's panel on the topic, this article seeks to address some of the important questions that are raised as to whether and when these key third-party communications can receive privilege protection.

As a refresher, the attorney-client privilege "protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance."[1] The privilege requires that the protected communications be made and held in confidence. Because of the confidentiality element, privilege is often waived when communications are voluntarily disclosed to a third party.[2]

The ABA Section of Antitrust Law's Corporate Counseling Committee held a panel at the 2019 ABA Spring Meeting to consider and discuss the extent of privilege protection that bankers and other third parties receive when counseling clients and their attorneys. The panel was moderated by Freshfields Bruckhaus Deringer partner Mary Lehner and included the following speakers (collectively, "the panelists" or "the panel"): Dorothy Fountain, Chief Legal Advisor at the U.S. Department of Justice Antitrust Division ("DOJ"); Kevin Arquit, partner at Kasowitz Benson Torres; Saralisa Brau, Chief Antitrust Counsel at McKesson Corporation; and Willard Tom, partner at Morgan, Lewis & Bockius.[3]

Through a series of hypothetical scenarios, the panelists discussed five key topics related to the scope of attorney-client privilege as applied to third parties.

<u>Privilege Issues in Deal Planning</u>

The panelists first discussed the significant impact third-party privilege protection, or lack thereof, can have on deal planning.

The panelists explained that privilege protection issues often arise throughout the deal planning process. For example, early on bankers can be involved in assessing synergies of a potential transaction. The resulting analysis can sometimes include unhelpful material from an antitrust perspective if, for example, the banker models list as a "revenue synergy" a price increase rather than an output expansion. Even if antitrust counsel asks the bankers to remove those statements, the panelists noted that the draft itself would not be covered by the attorney-client privilege if the draft was created for the purpose of advising the client rather than seeking legal advice. In practice, the panelists noted that counsel should be mindful that privilege may not apply and, therefore, discuss upfront with bankers the unintended impact their statements may have on the antitrust defense. The panelists also recommended that counsel remind bankers that draft documents should be clearly marked as drafts and that, if the bankers are communicating with the lawyers for the purpose of seeking legal advice, that they avoid ambiguity as to their purpose by, for example, sending such communications *only* to the lawyers.

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1 *In re* County of Erie, 473 F.3d 413, 418 (2d Cir. 2007).

2 *See* Denney v. Jenkens & Gilchrist, 362 F. Supp. 2d 407, 412 (S.D.N.Y. 2004).

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

Similarly, legal counsel may seek the expertise of bankers in preparing a divestiture analysis for the client. As noted in the panel, this analysis is relevant to the client both as legal advice and in reaching a business decision. The dual use of the bankers' analysis raises a question of whether the analysis can be protected under privilege if provided to legal counsel to facilitate legal advice. Given the risk that the bankers' advice might not be protected, the panelists suggested that attorneys instead discuss information necessary for their analysis with bankers on a call.

Even after a deal has signed, the panelists noted that the disclosure of bankers' materials is still relevant through merger control filings. A filing pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR" Act) must include the submission of documents "prepared by or for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets," including when prepared by third-party advisors.[4] The panelists noted that whether bankers' materials must be submitted with the initial filing will primarily depend on who has received the documents (*i.e.*, whether an officer or director is a recipient) and whether the document was a final version or a draft. Given these considerations, the panelists recommended that counsel comment on bankers' materials while the documents are still in draft form and before they are sent to any officers or directors.

Even if a privileged third-party document is not produced with the initial HSR filing, the panelists noted that production questions can still arise if the agencies initiate an in-depth investigation by issuing a Second Request. Parties have an obligation to provide certain information about privileged documents responsive to the Second Request. Both the HSR regulations and the Model Second Request require parties to provide sufficient information to allow the agencies to assess the privilege claim.[5]

According to the panel, currently the DOJ is particularly focused on the preparation of privilege logs, as evidenced by Assistant Attorney General Makan Delrahim's speech last year. In that speech, AAG Delrahim stated that the DOJ intends to "eliminate gamesmanship on privilege issues," where parties withhold many documents from production under privilege claims and then later de-privilege and produce those documents, often soon before a deposition.[6] The panel noted that the DOJ has previously bounced a party's certification of substantial compliance with a Second Request due to an inadequate privilege log.

Given the complexity of privilege logs and redactions, the panel pointed to the availability of the Model Timing Agreement, which includes provisions on the timing for privilege logs.[7]

Selective and Subject Matter Waiver

The panel next considered to what extent disclosure of otherwise privileged materials to a government agency waives privilege.

According to the panel, historically, courts were quite harsh when it came to the breadth of waiver, such as waiving privilege over all documents on a subject when one document in that subject had

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[4] FED. TRADE COMM'N, ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS: INSTRUCTIONS (2018).

[5] *See* 16 CFR ¶ 803.3(d); REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL ISSUED TO [WEEBYEWE CORPORATION] (MODEL SECOND REQUEST), U.S. DEP'T OF JUST. (2016).

[6] Makan Delrahim, Assistant Attorney General, U.S. Dep't of Just. Antitrust Div., Remarks at the 2018 Global Antitrust Enforcement Symposium: It Takes Two: Modernizing the Merger Review Process (Sept. 25, 2018).

[7] *See* MODEL TIMING AGREEMENT, U.S. DEP'T OF JUST. 3 (2018).

been inadvertently disclosed. This view has been somewhat been tempered by Federal Rule of Evidence 502(a), which is applicable to federal agencies and federal proceedings.

Rule 502(a) states that when a disclosure is made in a federal proceeding or to a federal agency that waives privilege, the waiver will only apply to undisclosed communications if "(1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together."[8] This means that in federal proceedings, subject matter waiver does not apply to inadvertent disclosures. The panelists noted that it can be difficult to give advice on Rule 502(a) given the fairness requirement; however, in order to best position oneself to argue that a disclosure was inadvertent and therefore not subject to subject matter waiver, attorneys should take reasonable steps to detect privileged materials and take prompt and reasonable steps to rectify should an inadvertent disclosure occur.[9]

Another privilege issue that can arise in the context of government investigations relates to the doctrine of selective waiver. The panelists explained that when cooperating with one government agency, a client may be willing to respond to agency requests without fully considering the impact the disclosures may have on future litigation. Promises from the government that disclosure will not waive privilege are undermined by the precedent in this area. According to the panel, most courts have rejected the doctrine of selective waiver, which provides that voluntarily providing privileged information to the government does not waive privilege as to all other parties. Given the majority approach, the panelists opined that attorneys should advise their clients to carefully consider the implications any disclosure to the government may have on future litigation.

<u>Reasonable Necessity Exception</u>

When privileged material is shared with bankers, the impact of the bankers' presence will depend on the applicable case law. The panel noted that, while Delaware's Court of Chancery has been more sympathetic to upholding privilege protection for materials shared with bankers,[10] other courts have taken different views.

When it comes to third-party waiver, many courts have carved out what is generally referred to as the reasonable necessity exception. This exception states that if the presence of the third party is necessary for "effective consultation between client and attorney," there is no waiver.[11] In this context, necessary requires more than "just useful and convenient," as the third party must "clarify or facilitate" the attorney-client communications.[12]

As mentioned above, the Delaware Court of Chancery has adopted a broader view, finding that privilege is not limited to third parties necessary for the attorney-client communication. In the 2010 case *3Com Corp. v. Diamond II Holdings, Inc.*, the court found that privilege was not necessarily waived when an investment banker was present during an attorney-client communication.[13] The court explained that the investment bank's "precise role in a specific communication is not critical as long as it involved legal issues regarding the transaction and participation by [the client]'s attorneys."[14]

The panelists went on to suggest a few best practices to help navigate reasonable necessity issues. For in-house practitioners, the panel highlighted the importance of knowing who is in the loop on relevant

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[8] FED. R. EVID. 502(a).

[9] *See* FED. R. EVID. 502(b).

[10] *See* 3Com Corp. v. Diamond II Holdings, Inc., C.A. No. 3933-VCN, 2010 WL 2280734 (Del. Ch. May 31, 2010).

[11] Comm'r of Revenue v. Comcast, 901 N.E.2d 1185, 1196 (Mass. 2009).

[12] *Id.* at 1197-98.

[13] 2010 WL 2280734 (Del. Ch. 2010).

[14] *Id.* at *6.

issues. In-house counsel may provide guidance upfront about the importance of limiting disclosure of privileged materials to bankers, particularly to individuals in divisions working directly with bankers. From an agency perspective, the panel noted that the FTC and DOJ will be trying to evaluate privilege claims on the basis of a privilege log; therefore, key questions likely to arise are what was the third-party advisor's role and how does it tie into the related legal advice. If the bankers' material was not requested by counsel, the agencies are less likely to view it as privileged.

Similar issues can arise when public relations agencies are brought in as advisors. The panel noted that when applying the reasonable necessity test to PR firms, courts have decided privilege issues both ways. Two high-profile examples involve Martha Stewart and Kesha. Stewart's lawyers hired a public relations firm to address media reports about the insider trading investigation, which they were concerned would pressure prosecutors to bring criminal charges against Stewart.[15] The court held that communications involving Stewart's lawyers and the public relations firm were privileged because "the ability of lawyers to perform some of their most fundamental client functions . . . would be undermined seriously if lawyers were not able to engage in frank discussions . . . with lawyers' public relations consultants."[16]

In contrast, a New York state court held that Kesha's communications with her lawyers and public relations firm were not privileged because the public relations firm was hired "primarily for the purpose of advancing a public relations strategy . . ., not for the purpose of developing or furthering a legal strategy."[17]

<u>Clawback after an Inadvertent Disclosure</u>

The panelists next discussed situations where an attorney realizes that privileged documents were accidentally submitted to the government in a large document production.

As noted by the panelists, whether the attorney can then assert privilege and retrieve the documents will be determined under Federal Rule of Civil Procedure 26(b)(5)(B). After claiming that privileged documents were produced, the recipient

> must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim.[18]

According to the panel, after receiving a request to retrieve inadvertently produced privileged materials or a "clawback" request, the DOJ will use one of two procedures depending on whether the documents have been read. If the documents have already been read, the DOJ will assign an attorney who will never work on the investigation to review and assess the privilege claim. On the other hand, if the documents were not read, the DOJ will send the documents back to the party or sequester the documents and require a privilege log. In either case, the panel stated that the DOJ investigation team will not review the documents until the privilege claim is resolved. However, the panel cautioned, if the DOJ receives a substantial number of requests to claw back inadvertently disclosed privileged materials or if the party has a history of unsupported privilege claims, the DOJ may have a suspect view of future clawback claims.

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[15] *In re* Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 323 (S.D.N.Y. 2003).
[16] *Id.* at 330.
[17] Gottwald v. Sebert, 63 N.Y.S.3d 818, 826 (N.Y. Sup. Ct. 2017).
[18] FED. R. CIV. P. 26(b)(5)(B).

Multijurisdictional Privilege Concerns

The final topic considered during the panel was the multijurisdictional issues that can arise when a merger is reviewed in both the U.S. and other jurisdictions. The DOJ and FTC have published a Model Waiver of Confidentiality for parties to permit disclosure of confidential information between the DOJ/FTC and a non-U.S. competition authority.[19] The agencies have also provided information related to the Model Waiver of Confidentiality in Frequently Asked Questions.[20]

The panelists noted that one of the procedures outlined in the Frequently Asked Questions is the DOJ/FTC's process when privileged documents are received. If the FTC and DOJ receive documents that the parties claim are privileged under U.S. law from a non-U.S. competition authority, the agencies will treat the receipt as an inadvertent disclosure under Federal Rule of Evidence 502(b) and Federal Rule of Civil Procedure 26(b)(5)(B) and will follow the procedures in Rule 26 by returning, sequestering, or destroying the privileged documents.[21]

Conclusion

As the above key topics demonstrate, the law surrounding third-party privilege claims is far from simple. When working with bankers, consultants, and other third-party advisors, attorneys should be conscious of potential third-party waiver issues and strive to implement best practices early on with third parties.

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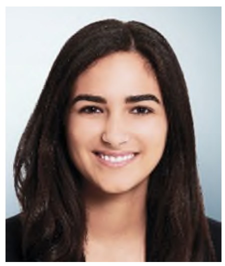

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If you are interested in writing an article for the next edition of *The Antitrust Counselor*, please email Mary.Lehner@freshfields.com or seth.wiener@arnoldporter.com for more details.

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[19] Model Waiver of Confidentiality, Fed. Trade Comm'n (2013).

[20] Model Waiver of Confidentiality for Use in Civil Matters Involving Non-U.S. Competition Authorities: Frequently Asked Questions (2015).

[21] Fed. R. Civ. P. 26(b)(5)(B); Model Waiver of Confidentiality for Use in Civil Matters Involving Non-U.S. Competition Authorities: Frequently Asked Questions 7 (2015).

Information Exchange Counseling In The Digital Age

By Kristen Harris & Kail Jethmalani

During the 2019 ABA Section of Antitrust Law Spring Meeting, the Corporate Counseling Committee presented a panel about Information Exchange Counseling in the Digital Age, moderated by Elai Katz (Cahill, Gordon & Reindel LLP) and featuring Joseph V. Farrell (University of California at Berkeley), Kyriakos Fountoukakos (Herbert Smith Freehills), Scott A. Scheele (U.S. Department of Justice Antitrust Division) and Amanda L. Wait (Norton Rose Fulbright).[1] *This article recaps that panel and expands upon some of the hot topics in information exchange counseling.*

While technology has advanced and means of communication have become more sophisticated, the antitrust laws apply with as much force today to information exchanges between rivals as they did over 40 years ago.[2] The Corporate Counseling Committee's panel on Information Exchange Counseling in the Digital Age provided a timely refresher on how information exchanges are analyzed in the United States and Europe, explaining how technologies like blockchain and the prevalence of platform markets pose challenges that are not much different than in traditional information exchange cases, and highlighting notable recent and ongoing enforcement actions.

<u>The United States and Europe: a Tale of Two Regimes</u>

U.S. antitrust law takes a relatively permissive approach to information exchanges, analyzing such arrangements under the rule of reason.[3] The facts and circumstances surrounding the information exchange are thus important. Generally, information exchanges are more likely to be condemned where they involve frequent sharing of granular, current or forward-looking competitively sensitive information (*e.g.*, price, output, cost, business strategies, etc.).[4] The degree to which an industry is consolidated can also elevate risk associated with information exchanges. Federal or state antitrust agencies are more likely than private plaintiffs to prosecute information exchanges where they may not support allegations of price fixing or output restrictions.[5] But where such claims can be made, however, the private plaintiffs' bar is active.[6]

Europe, by contrast, takes a stricter approach. As Mr. Fountoukakos explained, some information exchanges, *e.g.*, "between competitors of individualized data regarding intended future prices or quantities[,]" are treated as "restrictions by object[,]"[7] the European equivalent of the per se rule of

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

[2] *See, e.g.*, United States v. U.S. Gypsum Co., 438 U.S. 422 (1978).

[3] *Id.* at 442 n.16 ("The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a per se violation of the Sherman Act.").

[4] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors § 3.31(b) (2000).

[5] *See, e.g.*, Complaint, United States v. Sinclair, 1:18-cv-2609 (Nov. 13, 2018); Complaint, United States v. DirecTV, 2:16-cv-08150 (Nov. 2, 2016).

[6] *See, e.g.*, *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir. 2015); *In re* Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896 (N.D. Cal. 2008); *In re* Citric Acid Litig., 191 F.3d 1090, 1095 (9th Cir. 1999).

[7] European Comm'n, Dir. Gen. Competition, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 O.J. (C 11)

analysis in the U.S.[8] Even the passive receipt of competitively sensitive information from a competitor can result in liability under the Article 101 because the recipient is "presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data."[9]

The Digital Age Creates New Avenues for Information Exchange

Blockchain Repackages Common Antitrust Risks

Blockchain is a technology that allows the public validation, recording and distribution of transactions to all participants in the chain. While cryptocurrencies like bitcoin – an implementation of blockchain technology – have received much of the attention, some believe blockchain technology could revolutionize supply chains,[10] prevent insurance fraud,[11] facilitate sharing of electronic health records,[12] and much more. Blockchain could help achieve those lofty goals simply by facilitating information exchanges. But the same antitrust risks associated with traditional information exchanges apply equally to blockchain.

Mr. Farrell explained that information exchanges are a species of cooperation amongst competitors, and in industries where competitors repeatedly deal with each other, the use of a distributed ledger will raise concerns around coordination. Each competitor on a single blockchain network would have access to records of every transaction handled through the network, including any competitively sensitive information attached to the record, such as price and volume. While such transparency may have benefits, it does heighten the risk that blockchain could be used to facilitate price fixing or provide an enforcement mechanism for a conspiracy.

Counseling around the use of blockchain in some ways is no different than with other mechanisms to exchange information. As Ms. Wait and Mr. Fountoukakos both explained, where competitively sensitive information must be shared to achieve the procompetitive purposes, it will be critical to institute guard rails to prevent anticompetitive abuse. As discussed above, however, in Europe even with inadvertent disclosure of competitively sensitive information through a blockchain – which may not be immediately apparent – recipients may be presumed to have altered their market conduct. Whatever the means used to minimize the risks associated with sharing competitively sensitive

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1, ch. 2, ¶ 74, http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF ("Information exchanges between competitors of individualized data regarding intended future prices or quantities should therefore be considered a restriction of competition by object.").

[8] *Id.* ¶ 24 ("Restrictions of competition by object are those that by their very nature have the potential to restrict competition within the meaning of Article 101(1)(6). It is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established.").

[9] *Id.* ¶ 62 ("When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.").

[10] *See, e.g.*, Paul Brody, How Blockchain is Revolutionizing Supply Chain Management, EY (2017), https://www.ey.com/Publication/vwLUAssets/ey-blockchain-and-the-supply-chain-three/$FILE/ey-blockchain-and-the-supply-chain-three.pdf.

[11] *See, e.g.*, Paul Brenchley, How Blockchain is Tackling Insurance Industry Challenges, KPMG, https://home.kpmg/xx/en/home/insights/2018/09/blockchain-in-insurance-fs.html (last visited Apr. 25, 2019).

[12] *See, e.g.*, RJ Krawiec et al., Blockchain: Opportunities for Health Care, Deloitte (2016), https://www2.deloitte.com/us/en/pages/public-sector/articles/blockchain-opportunities-for-health-care.html.

information through a distributed ledger, they should be considered and implemented before commencing use of a blockchain network.

Platforms Allow Data Collection, But Also Prompt Regulatory Scrutiny

Purely vertical information exchanges between suppliers and distributors, even in dual distribution scenarios, tend not to draw much antitrust scrutiny. But Ms. Wait, Mr. Farrell and Mr. Fountoukakos all highlighted that the intersection of dual distribution and data sharing through platforms does heighten risk. Indeed, it has prompted investigations in multiple jurisdictions. The European Commission ("EC") is investigating Amazon for its business practices – specifically, its use of data – in connection with its Amazon Marketplace service, which allows merchants to sell directly to users in exchange for paying Amazon a referral fee.[13] The EC is concerned about Amazon's use of merchant data to identify successful products and then offer a competing Amazon-branded product or to offer the product through the Amazon Retail channel. That is an arguably pro-competitive use because it increases consumer choice, at least in the short term. The EC is not only concerned about the exchange of information between rivals, which could raise concerns under Article 101, but also whether Amazon can disadvantage merchants using Amazon Marketplace in favor of the Amazon Retail channel, which raises separate concerns under Article 102 and threatens to undermine the pro-competitive benefit that information the exchange could achieve. The EC's requests for information explicitly ask whether and how Amazon's product launches have affected merchants' business.[14]

Modern IT Systems Provide Tools to Safely Exchange Information

While the digital age makes it easier and faster to exchange information or collect data, it also provides more robust tools to safeguard against the improper use of shared information. For example, as Ms. Wait observed, information can be exchanged through data rooms that provide granular control over who can access information and how they can use it. Data rooms and clean teams are commonly used during pre-merger negotiations and due diligence.[15] They could also be adapted for other information exchanges as well.

Recent U.S. Enforcement Actions

Even though the U.S. has a relatively more lenient approach toward information exchanges, Mr. Scheele highlighted some of the Department of Justice's ("DOJ") recent enforcement actions where it secured consent decrees enjoining improper exchanges of competitively sensitive materials.

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[13] Natalia Drozdiak et al., *Is Amazon Unfairly Copying Products? EU Quizzes Merchants*, BLOOMBERG (Sept. 27, 2018), https://www.bloomberg.com/news/articles/2018-09-27/amazon-s-copy-cat-products-targeted-as-eu-quizzes-smaller-rivals; Aoife White, *Amazon Probed by EU on Data Collection From Rival Retailers*, BLOOMBERG (Sept. 19, 2018), https://www.bloomberg.com/news/articles/2018-09-19/amazon-probed-by-eu-on-data-collection-from-rival-retailers. Germany's Bundeskartellamt was also investigating the alleged conduct at issue. *See* Case AT.40462 – *Amazon Marketplace.* Bundeskartellamt, 27 October 2017, *Bundeskartellamt launches sector inquiry into comparison websites,* https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/24_10_2017_Vergleichsportale.html?nn=3591568. It is possible, however, that the commencement of the EC's investigation may have relieved the Bundeskartellamt of its competence to investigate the alleged conduct. *See* Council Regulation 1/2003, art. 11(6), 2003 O.J. (L 1) 1.

[14] *See* COMP/AT.40462 - Amazon Marketplace - Sache AT.40462 Amazon Marketplace - Fragebogen für Einzelhändler, *available at* https://www.wortfilter.de/wp/wp-content/uploads/2018/09/Fragebogen_Amazon_EU_Kommission.pdf.

[15] *See, e.g.*, Holly Vedova et al., *Avoiding Antitrust Pitfalls During Pre-Merger Negotiations and Due Diligence*, Fed. Trade Comm'n (Mar. 20, 2018), https://www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger.

In its 2016 complaint against DirecTV, for example, DOJ focused on three separate agreements that allowed DirecTV – the alleged ringleader – and its competitors to share competitively sensitive information about parallel ongoing negotiations to carry SportsNet LA, the Dodgers channel in the Los Angeles area, as well as future plans to carry the channel (or not).[16] The DOJ concluded, after its investigation, that the information exchange gave DirecTV's competitors greater bargaining leverage against SportsNet LA and thus chose not to carry the channel.[17] The consent decree entered prohibits DirecTV and AT&T from sharing or seeking to share competitively sensitive information with any multichannel video programming distributor, which applies much more broadly than to the conduct at issue.[18]

In Sinclair, the DOJ alleged that defendants were reciprocally exchanging revenue pacing information for the broadcast TV spot advertising market.[19] Doing so allowed defendants to understand the availability of inventory on competitors' stations, which in turn affected negotiation and pricing strategies.[20] The information exchange thus distorted the normal price-setting mechanisms in the spot advertising market.[21] The consent decree prevents defendants from sharing competitively sensitive information with rivals in the same geographic market.[22]

These examples highlight that the U.S. antitrust agencies will not hesitate to prosecute improper information exchanges. Such enforcement actions may also be followed by private treble damages litigation by the aggrieved parties, which could also be factored into the risk calculus.[23]

<u>Conclusion</u>

Even though the digital age has facilitated new means of exchanging information, the panelists agreed that the antitrust risks are not much different than in the analog age. The law does not change when applied to high or low technology. The U.S. continues to have a more laissez-faire approach to information exchanges, while Europe tends to be stricter. Fortunately, the digital age has also brought with it robust tools that empower firms to fine tune exactly how and with whom they exchange information, and how that information can be used. Vigilance is still essential to minimize the risks associated with information exchanges.

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16 Complaint, United States v. DirecTV, 2:16-cv-08150 (Nov. 2, 2016).
17 Competitive Impact Statement, United States v. DirecTV, 2:16-cv-08150 (Mar. 23, 2017).
18 *Id.*
19 Complaint, United States v. Sinclair, 1:18-cv-2609 (Nov. 13, 2018).
20 *Id.*
21 *Id.*
22 Competitive Impact Statement, United States v. Sinclair, 1:18-cv-2609 (Nov. 13, 2018).
23 As a practical matter, however, there does not (yet) appear to be private follow-on litigation in *United States v. DirecTV* or *United States v. Sinclair*.

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

By Vesselina Musick & Matthew Tabas

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

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[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

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[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

[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.

<u>Conclusion</u>

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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