ICLG

The International Comparative Legal Guide to:

Merger Control 2013

9th Edition

A practical cross-border insight into merger control

Published by Global Legal Group, with contributions from:

Accura Advokatpartnerselskab
Allende & Brea
Anastasios Antoniou LLC
Ashurst LLP
AYR – Amar Reiter Jeanne Shochatovitch & Co.
Beiten Burkhardt
Boga & Associates
Chapman Tripp
Crowell & Moring LLP
Drew & Napier LLC
ELIG, Attorneys-at-Law
Estudio Bergstein
Gianni, Origoni, Grippo, Cappelli & Partners
Gide Loyrette Nouel
Hunton & Williams LLP
Kallel & Associates
Kastell Advokatbyrå AB
Katten Muchin Rosenman LLP
King & Wood Mallesons
Koep & Partners
Lee and Li, Attorneys-at-Law
Linklaters LLP
Manyonge Wanyama & Associates Advocates
Matheson
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Nagashima Ohno & Tsunematsu
Olivares & Cía., S.C.
Oliveira Felix Advogados
PRA Law Offices, Advocates
PUNUKA Attorneys & Solicitors
Rizkiyana & Iswanto Antitrust and Corporate Lawyers
Schellenberg Wittmer
Schoenherr
SCPA DOGUE-ABBE YAO & Associés
SJ Berwin LLP
Skadden, Arps, Slate, Meagher & Flom LLP
TRINITI
Van Doorne
Vasil Kisil & Partners
Webber Wentzel
Wiersholm AS

GLG
Global Legal Group

The International Comparative Legal Guide to: Merger Control 2013

GLG
Global Legal Group

Contributing Editors
Nigel Parr and Ruth Sander, Ashurst LLP

Account Managers
Brigitte Descacq, Dror Levy, Maria Lopez, Florjan Osmani, Samuel Romp, Oliver Smith, Rory Smith, Toni Wyatt

Sub Editors
Beatriz Arroyo
Fiona Canning

Editor
Suzie Kidd

Senior Editor
Penny Smale

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
istockphoto

Printed by
Ashford Colour Press Ltd.
November 2012

Copyright © 2012
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-908070-41-8
ISSN 1745-347X

Strategic Partners

General Chapters:

1	**A Tale of Three Mergers: The Use of Quantitative Techniques in UK and EU Merger Control** – Mat Hughes & David Wirth, Ashurst LLP	1
2	**Antitrust Management of the Difficult Deal** – James J. Calder, Katten Muchin Rosenman LLP	10
3	**Identifying Filing Obligations and Beyond: Merger Control in Cross-Border Transactions** – Volker Weiss and Michael Mayer, Schoenherr	15
4	**EU Merger Control: 2012 and Beyond** – Frederic Depoortere & Giorgio Motta, Skadden, Arps, Slate, Meagher & Flom LLP	20

Country Question and Answer Chapters:

5	**Albania**	Boga & Associates: Sokol Elmazaj & Jonida Skendaj	25
6	**Argentina**	Allende & Brea: Julián Peña	32
7	**Australia**	King & Wood Mallesons: Sharon Henrick & Wayne Leach	37
8	**Austria**	Schoenherr: Stefanie Stegbauer & Franz Urlesberger	45
9	**Belgium**	Linklaters LLP: Thomas Franchoo & Niels Baeten	52
10	**Bosnia & Herzegovina**	Moravčević Vojnović Zdravković in cooperation with Schoenherr: Srđana Petronijević & Danijel Stevanović	59
11	**Brazil**	Oliveira Felix Advogados: Natália Oliveira Felix	67
12	**Bulgaria**	Advokatsko druzhestvo Andreev, Stoyanov & Tsekova in cooperation with Schoenherr: Ilko Stoyanov & Mariya Papazova	73
13	**China**	King & Wood Mallesons: Susan Ning & Huang Jing	80
14	**Croatia**	Schoenherr: Christoph Haid	86
15	**Cyprus**	Anastasios Antoniou LLC: Anastasios A. Antoniou & Rafaella Michaelidou	92
16	**Czech Republic**	Schoenherr: Martin Nedelka & Radovan Kubáč	98
17	**Denmark**	Accura Advokatpartnerselskab: Jesper Fabricius & Christina Heiberg-Grevy	105
18	**Estonia**	TRINITI: Ergo Blumfeldt & Tõnis Tamme	113
19	**European Union**	Crowell & Moring LLP: Dr. Werner Berg & Sean-Paul Brankin	121
20	**France**	Ashurst: Christophe Lemaire & Simon Naudin	131
21	**Germany**	Beiten Burkhardt: Philipp Cotta	140
22	**Greece**	Ashurst LLP: Efthymios Bourtzalas	150
23	**Hungary**	Schoenherr: Anna Turi & Christoph Haid	158
24	**India**	PRA Law Offices, Advocates: Premnath Rai & P. Srinivasan	165
25	**Indonesia**	Rizkiyana & Iswanto Antitrust and Corporate Lawyers: HMBC Rikrik Rizkiyana & Albert Boy Situmorang	175
26	**Ireland**	Matheson: Helen Kelly	183
27	**Israel**	AYR – Amar Reiter Jeanne Shochatovitch & Co.: Eyal Roy Sage & Ofry Yarom	195
28	**Italy**	Gianni, Origoni, Grippo, Cappelli & Partners: Eva Cruellas Sada	201
29	**Ivory Coast**	SCPA DOGUE-ABBE YAO & Associés: Abbé Yao & Pascal Djedje	211
30	**Japan**	Nagashima Ohno & Tsunematsu: Eriko Watanabe	216
31	**Kenya**	Manyonge Wanyama & Associates Advocates: Peter Wanyama & Mohammed Nyaoga	223
32	**Kosovo**	Moravčević Vojnović Zdravković in cooperation with Schoenherr: Srđana Petronijević & Olga Šipka	228
33	**Macedonia**	Moravčević Vojnović Zdravković in cooperation with Schoenherr: Srđana Petronijević & Olga Šipka	235
34	**Mexico**	Olivares & Cía., S.C.: Gustavo A. Alcocer & Carlos Woodworth M.	243
35	**Montenegro**	Moravčević Vojnović Zdravković in cooperation with Schoenherr: Srđana Petronijević & Danijel Stevanović	249
36	**Namibia**	Koep & Partners: Peter Frank Koep & Hugo Meyer van den Berg	256
37	**Netherlands**	Van Doorne: Sarah Beeston & Jitske Weber	263
38	**New Zealand**	Chapman Tripp: Grant David & Neil Anderson	270

Continued Overleaf

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer
This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice.
Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.
This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

GLG
Global Legal Group

Country Question and Answer Chapters:

39	**Nigeria**	PUNUKA Attorneys & Solicitors: Anthony Idigbe & Chinwe Chiwete	277
40	**Norway**	Wiersholm AS: Anders Ryssdal & Anette Halvorsen Aarset	285
41	**Poland**	Gide Loyrette Nouel: Dariusz Tokarczuk & Szymon Chwaliński	294
42	**Portugal**	Morais Leitão, Galvão Teles, Soares da Silva & Associados: Carlos Botelho Moniz & Pedro de Gouveia e Melo	300
43	**Romania**	Schoenherr si Asociatii SCA: Mihai Radulescu & Cristina Pană	312
44	**Serbia**	Moravčević Vojnović Zdravković in cooperation with Schoenherr: Srđana Petronijević & Matija Vojnović	319
45	**Singapore**	Drew & Napier LLC: Lim Chong Kin & Ng Ee-Kia	328
46	**Slovakia**	Schoenherr: Martin Nedelka & Radovan Kubáč	338
47	**Slovenia**	Odvetniška pisarna Soršak d.o.o in cooperation with Schoenherr: Jani Soršak & Eva Škufca	344
48	**South Africa**	Webber Wentzel: Nkonzo Hlatshwayo & Robert Wilson	354
49	**Spain**	SJ Berwin LLP: Ramón García-Gallardo & Manuel Bermúdez Caballero	367
50	**Sweden**	Kastell Advokatbyrå AB: Kent Karlsson & Pamela Hansson	377
51	**Switzerland**	Schellenberg Wittmer: David Mamane & Dr. Jürg Borer	385
52	**Taiwan**	Lee and Li, Attorneys-at-Law: Stephen Wu & Yvonne Hsieh	392
53	**Tunisia**	Kallel & Associates: Sami Kallel	398
54	**Turkey**	ELIG, Attorneys-at-Law: Gönenç Gürkaynak	404
55	**Ukraine**	Vasil Kisil & Partners: Denis Y. Lysenko & Mariya V. Nizhnik	411
56	**United Kingdom**	Ashurst LLP: Nigel Parr & Duncan Liddell	418
57	**USA**	Hunton & Williams LLP: Bruce Hoffman	432
58	**Uruguay**	Estudio Bergstein: Leonardo Melos & Jonás Bergstein	443

EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control in 54 jurisdictions.

All chapters are written by leading merger control lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Nigel Parr and Ruth Sander of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

Alan Falach LL.M
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Antitrust Management of the Difficult Deal

Katten Muchin Rosenman LLP

James J. Calder

For most mergers, acquisitions and joint ventures, antitrust/competition law is an important, but not deal-critical, element of the transaction. Apart from vetting the deal for antitrust issues, obtaining the necessary merger clearances, and ensuring that the parties do not "jump the gun" in the merger clearance process, the competition lawyer's role is a limited one. This all changes, however, where the transaction involves competitors – especially large competitors in a market with few rivals. In these situations, the competition lawyer's role becomes central – both in helping to negotiate the transaction and guiding the matter to consummation.

This paper offers an outline of some of the key competition law considerations for general counsel, corporate counsel and deal managers to follow in negotiating and executing the competitively sensitive transaction – sometimes known as the "difficult deal".

1. The Beginning - Early Antitrust/Competition Analysis of the Transaction Before it is Negotiated

Perhaps the most important thing to do in approaching a difficult deal is to engage competition counsel early in the process. Usually, competition law concerns can be identified and addressed early in the process before deal terms are negotiated, strategic analyses are prepared, and substantial commitments of time and money are made. The failure to engage competition experts early can result in missteps that may later complicate or derail the transaction. If possible, the following assignments should be completed by competition counsel before the deal documents are signed and the parties are committed.

A. Is the Deal Doable, or do the Competition Issues Raise Serious Execution Risks?

When direct competitors in concentrated markets merge or form joint ventures, there is a risk that antitrust/competition law authorities will seek to block the transaction. This is not a theoretical risk. In the last year US antitrust authorities have blocked or caused parties to abandon a number of prominent transactions such as ATT/T-Mobile, H&R Block/TaxACT, and NASDAQ-Intercontinental Exchange/NYSE Euronext. In Europe, deals involving Deutsche Börse/NYSE Euronext and Hutchison 3G Austria/Orange Austria have been blocked, abandoned or been the subject of extended review by competition authorities. In transactions that require clearance by competition authorities in multiple jurisdictions, the deal execution risk from competition law complications may increase materially because some, but not all, of the reviewing authorities may clear the transaction.

Given these risks, competition counsel should be asked early in the process to analyse the transaction to determine in each pertinent jurisdiction whether it can clear the merger review process. A useful test to use in this review is whether counsel can identify a path to obtaining competition authority clearance that is supportable as a legal and factual matter and easy to articulate.

In many cases, the transaction will not be easy or possible to defend and, in order to obtain competition authority clearance, it may be necessary to divest assets or agree to long-term restrictions on the activities of the merged entity. Counsel should identify these potential remedies early in the process and present them to management of the parties to determine if they are acceptable as a business matter. In this regard, it is important to note that competition law enforcers in different countries may insist on different remedies given the relevant facts and law in their jurisdictions. Accordingly, it should not be assumed that a "one size fits all" approach to remedies will work in obtaining clearance in all jurisdictions. A series of separate divestitures or other remedial measures may be required.

It is also important to note that any material divestiture or conduct restraint will likely have an economic impact on the merged entity and may affect the purchase price or other consideration being paid as part of the transaction. Accordingly, the finance professionals and deal managers responsible for the transaction may wish to consider those financial implications in running their models for the merged entity. For obvious reasons, it is important that this be done before the parties agree on the consideration to be paid in the transaction.

B. What Strategic Risks are Presented by the Merger Review?

It can be the case that the intensity and excitement created during the negotiation of a large, strategic transaction make it difficult for the parties to analyse clinically and dispassionately the risks and rewards presented. This is especially the case when the negotiation is done under a tight deadline. In such an environment, where terms are being negotiated with lightning speed and due diligence is being conducted on an abbreviated and expedited basis, there may be little if any time for quiet reflection on the antitrust downside of the deal. These risks, however, can be quite real and need to be considered. They also may be very different for the acquiring and acquired parties.

First, the time between signing and closing presents a risk to both parties to the transaction. A lengthy antitrust/competition review – especially if conducted in multiple jurisdictions – may result in a delay of many months, or even a year between signing and close. For both parties, such a lengthy review means far more than the expense of counsel, economists and other outside professionals. It

© Published and reproduced with kind permission by Global Legal Group Ltd, London

means that for many members of senior and middle management, successfully navigating the merger review process and closing the transaction will become their number one priority. They are expected to rise to this challenge – which many have never faced before – while continuing to perform all of their routine duties in running the business. This is frequently impossible, and the reality for many firms is that they delay or lose their focus on strategic initiatives because their best and primary efforts are focused on transaction execution.

Second, the pendency of the deal throws the staff of both companies into disarray. Mergers and acquisitions by competitors routinely result in reductions in the work force when "redundant" managers and other workers are terminated because their talents and services are no longer needed by the combined entity. Staffers and managers are acutely aware of their vulnerability and will frequently start looking for new positions immediately after the transaction is announced. Opportunistic competitors may move in quickly to recruit insecure employees who fear they will not survive the merger. Not surprisingly, the best and most talented managers may be the first target of competitors eager to "cherry pick" the employees of the two companies. This may especially be the case with up-and-coming middle managers who represent the next generation of corporate leadership.

Third, customers are also at risk. As the parties shift their focus to deal-execution and both managers and staff are distracted by the transaction itself and the risk to their future employment, customer service and initiatives suffer. The result may be a loss of customer goodwill, and vulnerability to approaches by competitors. Sophisticated rivals will use the announcement of the transaction to take key accounts the same way they recruit key employees.

The impact of these effects may be different on the buyer and the seller. If the transaction is not a merger of equals and it is likely that the buyer will dominate the combined entity, the seller faces a greater risk that its key employees will leave before the closing and that its customers will be more vulnerable to solicitations by competitors. This is a serious risk because, if the transaction does not close, the seller is left as a weakened competitor in the market. For a transaction that presents serious execution risk, this is a factor that the seller should seriously consider - especially in discussions with antitrust/competition counsel about the length of the competition review, the likelihood of obtaining clearance, and possible remedies that may be required.

For the buyer, the risk analysis may be different. If, as is frequently the case, the buyer and its employees will dominate the merged entity, the risk of losing key managers and employees may be relatively small. The risk of losing customers, however, may be substantial, especially as senior management focuses its primary attention on closing the deal and planning post-closing integration. For middle managers who are responsible for day-to-day client relations and service, the distraction of the transaction, additional assignments they receive in connection with integration planning and preparation for post-closing activities, and concerns about their own position in the merged organisation, all detract from client development and service. Competitors, who are sensitive to this dynamic, will pounce and seek to attract the acquirer's best clients. This risk should be factored into the acquirer's analysis. Prophylactic measures should be put in place before the deal is announced to minimise the resulting customer loss.

C. Does the Transaction Expose the Firm's Other Business Activities to Competition Law Risk?

A final element of pre-transaction competition law analysis is to assess whether the review of the transaction by competition law authorities in multiple jurisdictions will expose the parties to investigation, and possible challenge, of their general business activities separate from the acquisition itself. If, as is likely, the deal is subject to a Second Request for Information in the United States, a Phase II review in the EU or extended reviews in other jurisdictions, details of the parties' business models and practices will be exposed and may become subject to separate review by the enforcement agencies.

Thus, joint ventures involving competitors, and other collaborative or industry-wide activities, will likely come to the attention of the authorities reviewing the transaction. The parties may be well advised to review those activities before proceeding with the transaction. The discovery during the merger review process of a long-term joint venture or business practice that raises separate antitrust concerns may complicate or delay the merger review and result in a separate antitrust investigation and attack on the joint venture itself. (See In the Matter of Polygram Holding, Inc., 2002 WL 1422222 (F.T.C. Jun. 20, 2002) (No. 9298), affirmed, 2003 WL 21770765 (F.T.C. Jul. 24, 2003), petition for review denied by 416 F.3d 29 (D. C. Cir. 2005).

This risk may be particularly acute in those industries where there is a great deal of competitor collaboration, or where there are on-going antitrust investigations of other aspects of the parties' activities. Where, for example, the industry relies heavily on intellectual property rights and engages in extensive licensing, cross-licensing or standard setting, or where joint ventures are heavily used, there is increased risk that antitrust issues unrelated to the transaction will be discovered during the agency antitrust review. To the extent possible, these risks need to be identified before the parties go forward with the transaction and they should be factored into the deal's antitrust/competition analysis.

2. The Middle - Managing the Risk and Preparing the Antitrust/Competition Law Defence

Once the parties have a rough understanding of the competition issues and risks presented by the transaction, attention should be paid to allocating the risk and preparing the defence of the deal.

A. Allocating the Risk - Break Fees, Antitrust Obligations and Termination Rights

Where the transaction carries meaningful competition law exposure that will affect the timing of the closing, require possible divestiture of assets or businesses, or raise questions about the ability to close the deal at all, the parties are well advised to allocate those risks during the deal negotiations and memorialise that allocation clearly and explicitly in the merger or acquisition agreement.

The following items may be pertinent in allocating the antitrust execution risk:

i. What duties do the parties have to resist enforcement agency efforts to block the deal? Does the buyer have the duty to defend the transaction in court if the FTC or DOJ challenges it? Does the seller have such an obligation? Ordinarily, one would think that the seller wants the power to force the buyer to do everything necessary to close the transaction. But does the seller really want to insist that the buyer "go to the mat" and defend the deal in court knowing that it will add three months, six months or more to the uncertain period between the deal's announcement and closing? Given the cost and damage of delay to the seller, is that what he really wants?

© Published and reproduced with kind permission by Global Legal Group Ltd, London

On a more practical level, does contract language such as "reasonable best efforts" impose such an obligation on the parties?

ii. How long are the parties willing to take to close the difficult deal? While the "drop dead date" originally negotiated in the deal documents can always be extended by mutual agreement, at some point one of the parties may decide that "the game is no longer worth the candle" and seek to terminate the agreement. How long does the buyer or the seller want to be bound to pursue the transaction if it runs into difficulties at the antitrust/competition law enforcement agencies? During the deal negotiation, when the parties are filled with excitement and optimism about the transaction, this may be a difficult issue to consider in a clear-eyed, clinical fashion. It is important, however, that counsel and senior management do so. The transaction that appears to be the transformative deal of a generation may, six months later, look far less attractive – especially in the midst of an extended competition law review. Buyer's remorse, or seller's remorse, is hardly unusual in such situations and both parties should give careful consideration, before the documents are finally negotiated, as to how long they want to be bound to the agreement.

iii. Similar consideration needs to be given to whether the parties want to agree on a "walk-away right", where the divestitures required by the enforcement agencies reach a point that the cost they present renders the transaction unattractive or uneconomic. This is, potentially, a critical issue for both parties. It creates a bright line beyond which the seller (or the buyer) does not have to proceed. This may be a difficult issue to address with the seller and, for obvious reasons, the buyer may not wish to raise it. Failing to do so, however, may lock the buyer into a much more expensive antitrust resolution than he expected.

Inserting an actual antitrust trigger point at which one or both of the parties may abandon the transaction raises an additional tactical issue that should be mentioned. The antitrust/competition authorities will receive and review the merger or acquisition agreements with the parties' Hart Scott Rodino or other premerger notification filings. They will undoubtedly see and note the trigger point set by the parties for abandoning the transaction. Some parties may be uncomfortable disclosing this to the enforcement agencies.

iv. Finally, consideration needs to be given to the "break fee" – the amount of money that the buyer will pay to the seller if he decides to abandon the transaction due to antitrust or other problems. In the antitrust-sensitive deal, the break fee may rise with the degree of antitrust difficulty.

B. Preparing to Defend the Transaction

Counsel and the parties to the transaction should begin to prepare the antitrust defence of the deal as early as possible – ideally before the relevant agreements are signed. There are a number of disparate aspects to the preparation effort.

i. Control of the document creation process – Items 4c and 4d of the Hart Scott Rodino Notification and Report form require, in broad strokes, that the parties submit documents prepared in connection with the transaction that relate to its strategic, competitive or market implications. These documents are often the most insightful materials provided to the competition law enforcement agencies because they may contain the firms' internal, candid assessments of the competitive implications of the transaction. In cases where the agencies go to court to block the transaction, 4c and 4d documents may be key evidence offered by the government.

Due to the sensitivity of these documents, they should not be created casually. E-mails or other communications between officers or directors musing about the enhanced market position or pricing power of the post-merger firm will likely be 4c or 4d materials and may make the antitrust review more difficult. Accordingly, as early as possible, the parties need to be instructed that documents containing market or competitive analyses of the transaction should be created with care, thought and absolute accuracy. "Puffing documents" created to "sell the deal" internally or to potential acquirers will likely need to be submitted with the HSR filing and may complicate the antitrust review if they overstate the competitive implications of the transaction. Accordingly they should be prepared with care and, if necessary, consultation with counsel.

ii. Retention of an economist – Virtually every transaction that presents significant competition law concerns requires advanced economic analysis. The enforcement agencies have sections for economic analysis that are staffed by talented and sophisticated economists. They have vast experience in antitrust matters, frequently specialise in particular economic sectors and often have detailed expertise about specific industries based on past transactions. The economic teams have heavy influence in whatever final enforcement decisions are made. They are separate and important constituents in the enforcement agencies and their questions and concerns must be separately addressed.

Given the important influence that economists have at the agencies, the parties should hire a sophisticated antitrust economist early in the process. The economist will likely serve several functions. First, the economist will analyse the competitive implications of the deal in the same way that the economic teams at the enforcement agencies do. By anticipating the enforcers' economic analysis, likely areas of agency inquiry can be identified in advance and incorporated into the overall antitrust defence of the transaction.

Second, the economist will be able to identify data such as pricing and other transactional information that will be useful in evaluating the deal's competitive effects. The enforcement agencies will likely request this data and the parties may be aided by having the economist analyse that information in advance of the antitrust review to determine what influence it will have on the enforcers' analyses.

Third, just as counsel will initiate and maintain a dialogue with counsel at the enforcement agencies to address the competition and antitrust law issues presented, the economist will need to have a parallel dialogue with the agencies' economic teams. These two conversations will frequently occur simultaneously, often in the same meetings. Obviously, they must be carefully coordinated to ensure that counsel and the economists are on the same page.

Finally, if the matter is ultimately presented to the senior managers of the enforcement agencies or goes to court, the economist will be an important player in presenting the parties' analysis of the economic implications of the deal.

iii. Identifying complainants – A key element of any deal analysis is the presence (or absence) of third parties who lodge competition-based complaints about the transaction. Independent parties, especially customers or vendors of the parties, who complain about the transaction, are frequently given great credence in the agencies' deliberations. Complaints by competitors who fear exclusion from the market by the merged firm will also be considered. Third-party complainants frequently provide evidence and analysis to the agencies in their efforts to block the transaction and will often testify if the matter is taken to court. To the extent the parties can identify likely objections in advance and craft responses to their likely complaints in advance of the deal's announcement, they will be well served.

iv. Identifying remedies – In many cases, the competition law concerns about the transaction can (or in some cases must) be

© Published and reproduced with kind permission by Global Legal Group Ltd, London

resolved by divesting certain assets or agreeing to certain limitations on the merged firm's post-closing conduct. Indeed, this is how the vast majority of competition law concerns are resolved in transactions reviewed by the enforcement agencies. [E.g., during fiscal years 2007 through 2011, the FTC reported that 91 transactions resulted in enforcement actions. Fifty-seven were resolved by negotiated consent decrees, 15 were litigated and 19 were abandoned.] To the extent the parties can identify these remedies early, they may offer a path to a shorter and easier antitrust review and clearance of the transaction.

It is often the case that the parties will resist making divestitures because they are difficult, costly, or undermine their competitive position. These are legitimate concerns. The decision to make divestitures is often financially and economically complex, and, at times, emotional. It often involves asking executives who have spent years building a business to give up the fruits of their labours in order to consummate a larger transaction. While these decisions are almost inevitably difficult, they must be considered as part of the solution to obtaining antitrust clearance quickly and, in some cases, at all.

v. Are the parties prepared to fight? – A key consideration, especially in the US, is whether the parties are prepared to go to court to defend the transaction. In the US, the enforcement agencies must sue the parties to block the deal if there is no agreed resolution by the end of the HSR process and the parties are insistent on consummating the transaction.

This is a key factor that will heavily influence the parties' strategy for defending the deal. If the parties are prepared to incur the expense and delay of a court fight, they will be able to take a harder position in their discussions with the enforcement agencies. If they are not prepared to fight and must reach an agreement in order to obtain clearance, a more accommodating posture will, in all likelihood, have to be assumed.

3. The End - Defending and Consummating the Deal

The final step in the process is obviously filing the necessary premerger notification materials with the relevant agencies and obtaining the relevant clearances. Unlike routine transactions where there will rarely be significant, or any, substantive engagement with the enforcement agencies' staffs, the difficult deal will involve intense engagement with staff – often in multiple jurisdictions. Engaging the enforcement agencies and reaching agreement that will permit the deal to clear and close is the final step in the process.

A. Preparation of the Substantive Competition Law Defence Case

The most important task of counsel and the economic team is the preparation of the substantive competition law defence of the deal. The outlines of the defence will take shape early in the process when counsel and the economists examine the parties' businesses and the markets in which they compete. The process, however, is an iterative one. The defence will be further developed and modified as the defence team learns more about the industry and the relevant markets. In addition, the defence may have to be modified based on the defence team's analysis of the pertinent quantitative data.

The substantive defence will address the essential elements of the competition law analysis – definition of the relevant market(s); identification of competitors; approximation of their market shares; HHI estimates; calculation of diversion ratios; an analysis of the ease of market entry; likely market restraints on the merged firm's pricing power; and other factors pertinent to analysing the likely competitive effects of the deal.

For cross-border deals and domestic transactions that require clearance in multiple jurisdictions, the substantive defence analysis must be tested against the merger law sensitivities of each jurisdiction in which clearance is required. This is not a simple exercise. While the merger laws of most jurisdictions are based on the same economic principles, there are significant differences – notably the desire to protect competitors of the merging parties by maintaining a "level playing field" – that must be taken into account in developing and presenting the antitrust case. Since the enforcement agencies in the different jurisdictions can be expected to communicate with each other concerning the merger review, consistency of message across the different jurisdictions may be particularly important.

Ideally, this work will all be done before the merger notification filings are made and the parties have engaged the agencies substantively. The reality is that this will rarely be possible. The pressure to move the deal forward quickly often forces the antitrust team to proceed with the merger notification process before the competition analysis is done.

Not having a fully developed competition defence before engaging with the enforcement agencies is unfortunate, but it does carry a silver lining. It will often be the case that the parties' and the agencies' substantive analysis of the transaction will change as the merger review proceeds. It is, accordingly, important that the deal defence team preserve its ability to modify its defence as the enforcement agencies examine the evidence and identify the issues that concern them. Not having the time to develop a full and complete defence of the transaction forces the defence team to take that flexible approach. Even where the defence team has the luxury and the time to prepare a complete defence, it should be careful not to over-commit to the elements of its substantive defence. Maintaining the flexibility to respond to unanticipated government arguments or the inevitable "bad document" or unhelpful transactional data, may be essential to the successful defence of the deal.

B. Timing Engagement with the Agencies

Another key consideration is when to contact the agencies to advise them of the transaction and open the dialogue about the competition and antitrust issues raised by the deal. In jurisdictions where the parties are not required to make their filings within a specified time period after the deal documents are executed, the parties may wish to start that conversation before they make their merger notification filings.

Engaging the agencies before filings are made can take a number of forms. The parties may wish simply to advise the enforcement authorities that they are preparing their filings and provide the approximate date when the submissions will be made. Alternatively, the parties may decide to "go in early" and begin the actual merger investigation and negotiations in advance of the filings. In these cases, the parties will present the transaction, explain why they believe it does not raise competition concerns and respond to questions raised by the enforcement agencies. Frequently, the parties will provide information on a voluntary basis to permit the agencies to analyse the deal's competitive effects. In the ideal case, the parties will be able to convince the agencies that the transaction does not raise serious concerns. Alternatively, they

© Published and reproduced with kind permission by Global Legal Group Ltd, London

will be able to resolve agency concerns with a remedy that permits the transaction to proceed through the merger review process without the need for a Second Request or similar extended review. The goal, which may be difficult to achieve, is to get through the investigation, and if necessary negotiate a remedy, before the merger notification filings are made. When that is done, the notification filings are submitted and clearance becomes a formality.

For certain types of transactions, going in early may offer some significant advantages in both time and expense. For transactions where a simple remedy will eliminate competitive objections to the deal, this approach may be quite effective. In transactions where a remedy may be more complex, the investigation will inevitably take a long time or where there is a high likelihood that the deal will be challenged, this approach may be less attractive or efficient.

C. Gun Jumping and Integration Planning

A final word should be added about "gun jumping". In the US and many other jurisdictions, the parties cannot consummate the transaction until the merger review process is completed and the deal has "cleared" competition agency review. The bar on closing extends to coordination by the parties in the conduct of their on-going businesses pre-close. In the US, such coordination, referred to as "gun jumping", is separately prosecuted by the government as a violation of the Hart Scott Rodino Act.

For most transactions, gun jumping is not a serious problem. The competition review does not take an extended period of time and the parties are generally able to close relatively quickly. For the difficult deal that involves an extended competition review, the problem becomes far more real. The parties need to integrate their operations and are under intense business pressure to coordinate in order to address the client- and employee-uncertainty created by the deal announcement. While the parties are free to plan for the integration of their businesses during the investigation, they cannot actually start the integration process. Nor can they coordinate their commercial activities because they are barred during the review process from acting as if they have merged. This presents a thorny and on-going management issue for antitrust counsel, the deal managers and management of the parties. It needs to be treated with care and should be part of the parties' game-planning process before the deal moves forward.

4. Conclusion

In executing transactions that raise difficult antitrust/competition law issues, the parties and their counsel need to appreciate the fact that, at best, these concerns will complicate and, at worst, derail the transaction. The parties will improve their chances of closing the deal successfully and quickly if they factor the competition issues into the deal execution strategy early and make merger clearance a top priority.

James J. Calder

Katten Muchin Rosenman LLP
575 Madison Avenue
New York, NY 10022-2585
USA

Tel: +1 212 940 6460
Fax: +1 212 940 8776
Email: james.calder@kattenlaw.com
URL: www.kattenlaw.com

Mr. Calder is Co-Chair of the Firm's Antitrust and Competition Practice. He represents parties in U.S. and cross-border mergers, acquisitions and joint ventures. His antitrust practice also includes litigation, counseling and responding to government antitrust investigations. He has represented antitrust clients in more than 30 industries. Mr. Calder won the 2012 International Law Office Client Choice Award for Competition Law in the United States and has been named a New York Super Lawyer from 2007-2012.
Mr. Calder received his undergraduate degree, with high distinction, from the University of Virginia (B.A., 1974), where he was a member of Phi Beta Kappa. He received his law degree from the University of Virginia Law School (J.D., 1977), where he was a Hardy Dillard fellow. He is admitted to practice in New York.

Katten
Katten Muchin Rosenman LLP

Katten Muchin Rosenman LLP is a full-service law firm with more than 600 attorneys in locations across the United States and in London and Shanghai. Clients seeking sophisticated, high-value legal services turn to us for counsel locally, nationally and internationally. Our core areas of practice are corporate, financial services, insolvency and restructuring, litigation, real estate, environmental, commercial finance, intellectual property and trusts and estates. Among our clients are a wide range of public and private companies, including a third of the Fortune 100, as well as a number of government and nonprofit organisations and individuals.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Gas Regulation
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Mining
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Telecoms, Media & Internet
- Trade Marks

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk