The stories merger documents tell—the US, EU, Asia, Brazil, Mexico, and South Africa perspectives

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Introduction

With the global growth of merger control, many jurisdictions around the world now impose notification requirements on merging parties when certain thresholds are met. The purpose of these requirements is to ensure that competition authorities have the opportunity to review a proposed transaction to assess if it will have a detrimental impact on competition in the market.

The merger approval process for US, EU, China, and numerous other jurisdictions, including Brazil, Mexico, and South Africa, require the parties to submit extensive information about: the proposed transaction; the relevant parties involved in the transaction; the rationale for the transaction; the relevant market and how the relevant market operates; and internal documents relating to the transaction.

But what if the review reveals issues that are not specific to the transaction at hand? Providing documents to enforcers and regulators, even where no initial wrongdoing is suspected, can carry serious criminal risks, as a recent US matter in the packaged seafood industry demonstrates, and can lead to significant civil fines in the EU as shown in the *Telefónica and Portugal Telecom* case.

The US perspective—when merger review goes criminal

Of all the ways that a merger can go wrong, it is hard to think of a worse scenario than the deal falling apart and the parties being subject to a criminal investigation. Lawyers are constantly tracking and negotiating terms in an effort to close the deal. And in this push to finalise the transaction and meet the expectations of clients and various regulatory agencies, practitioners can be faced with potential ramifications far more serious to the business than what they ever would have expected (or, at least, had hoped not to expect).

At its surface, antitrust can neatly be divided into civil and criminal matters. Civil matters involve merger review, civil non-merger conduct review, and civil litigation. Criminal matters generally consist of investigating violations of price fixing, bid rigging, and market allocation.

Two US agencies—the Federal Trade Commission (FTC) and the US Department of Justice Antitrust Division (Antitrust Division)—are responsible for enforcing federal antitrust laws. While the FTC is solely civil, the Antitrust Division is separated into civil and criminal enforcement sections. The Antitrust Division's offices responsible for criminal enforcement are located in Washington DC, San Francisco, Chicago and New York. Although these criminal offices have assigned territories, they are not bound by geography, as

investigations often take place across the country and the globe. The six civil sections of the Antitrust Division are all located in DC and divided by subject-matter expertise.

But that separation of criminal and civil enforcement sections at the Antitrust Division does not create walls or silos. The different criminal offices often work together on large investigations and trials. Similarly, the size of many civil investigations requires pulling resources from the various civil sections, as well as the Antitrust Division's Appellate, International, and Competition Policy and Advocacy Sections. But the collaboration does not end there. Co-ordination between the civil and criminal sections is the norm. Management from the sections meet regularly to discuss matters and often consult on an informal basis. Cross-pollination occurs at the staff level as trial attorneys are detailed to other sections for specific matters or periods of time. And understanding this collaboration between the civil and criminal sections is vital to attorneys and their clients subject to the merger review process. A recent case shows not only how in sync the Antitrust Division's criminal and civil sections are, but also highlights the implications of that collaboration.

Recent US example

In December 2014, two packaged seafood companies announced their proposed merger.[1] As customary to the review process, the parties submitted documents to one of the Antitrust Division's civil sections. What followed was anything other than routine. But based on the level of collaboration within the Antitrust Division, the results should not have been unexpected.

The Antitrust Division's civil attorneys reviewed the documents submitted by the parties and uncovered information that raised concerns of price-fixing.[2] When the parties walked away from the deal on 3 December 2015, then Assistant Attorney General Bill Baer's statement in the Antitrust Division's press release made a veiled reference to their problematic documents. He said: "Our investigation convinced us – and the parties knew or should have known from the get go – that the market is not functioning competitively today, and further consolidation would only make things worse."[3]

The parties' abandonment of the deal did not end the Antitrust Division's investigation. Instead, the civil attorneys conducting the merger review shared their findings with their criminal counterparts. A criminal section proceeded to open a price-fixing investigation based on the shared materials. That investigation has borne fruit and is ongoing. To date, three individuals and one company have been charged for participation in a price-fixing conspiracy.[4] Criminal antitrust violations, such as price fixing, have serious implications. Not only are the criminal penalties substantial,[5] companies can be subject to civil suits with treble damages.[6]

While it is not public what specific information was contained in the documents that raised the attention of the reviewing attorneys, or exactly how the process happened, the Antitrust Division did state that the criminal investigation was triggered by "information and party materials produced in the ordinary course of business."[7] Until more information is revealed, several questions remain, including whether similar criminal investigations based on documents submitted for merger review could be waiting to surface.

The packaged seafood matter is not the first criminal case to stem from a civil investigation and likely will not be the last. The hand-in-hand co-ordination between the civil and criminal sections of the Antitrust Division will continue.

The EU perspective—when merger review results in civil fines

Historically, the European Commission (Commission) has taken a more compartmentalised approach, and has used the merger review process under the EU Merger Regulation (EUMR) only to assess the relevant proposed transaction. However, as shown below, the Commission is increasingly using its powers to conduct dawn raids at the premises of merging parties suspected of anti-competitive conduct, and also using art.101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anti-competitive conduct, against the merging parties if it becomes aware during the merger review process that they may have infringed competition law.

The most high-profile example of the Commission issuing an art.101 infringement decision following a merger review process occurred in 2013 and involved Telefónica and Portugal Telecom. The Commission imposed fines of €66,894,000 on Telefónica and

[1] See Khettiya Jittapong and Manunphattr Dhanananphorn, "Thai Union Frozen to buy U.S. tuna firm Bumble Bee for $1.5 billion", *Reuters*, 18 December 2014, *https://www.reuters.com/article/us-bumble-bee-thai-uno-frozen-acquisitio-idUSKBN0JX05G20141219* [Accessed 26 January 2018].

[2] Division Update, "Civil Investigations Uncover Evidence of Criminal Conduct" (28 March 2017), Department of Justice Antitrust Division, available at *https://www.justice.gov/atr/division-operations/division-update-spring-2017/civil-investigations-uncover-evidence-criminal-conduct* [Accessed 26 January 2018].

[3] Press Release, "Chicken of the Sea and Bumble Bee Abandon Tuna Merger After Justice Department Expresses Serious Concerns" (3 December 2015), Department of Justice Antitrust Division, available at *https://www.justice.gov/opa/pr/chicken-sea-and-bumble-bee-abandon-tuna-merger-after-justice-department-expresses-serious* [Accessed 26 January 2018].

[4] Press Release, "Bumble Bee Agrees to Plead Guilty to Price Fixing" (8 May 2017), Department of Justice, available at *https://www.justice.gov/opa/pr/bumble-bee-agrees-plead-guilty-price-fixing* [Accessed 26 January 2018].

[5] For individuals, the maximum penalties are ten years in prison and a $1 million fine. For corporations, the maximum fine is $100 million. Fines for both individuals and corporations can exceed the statutory maximum amount by up to twice the gain derived or twice the loss by victims. See, e.g. "Price Fixing, Bid Rigging and Market Allocation: An Antitrust Primer", Department of Justice Antitrust Division, available at *https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes* (discussing the Sherman Act) [Accessed 26 January 2018].

[6] 15 U.S.C. § 15.

[7] Division Update, "Civil Investigations Uncover Evidence of Criminal Conduct" (28 March 2017), Department of Justice Antitrust Division, *available athttps://www.justice.gov/atr/division-operations/division-update-spring-2017/civil-investigations-uncover-evidence-criminal-conduct* [Accessed 26 January 2018].

€12,290,000 on Portugal Telecom after the Commission discovered a non-compete agreement between the two parties as part of its merger review process.[8]

In this case, the investigation was instigated on the Commission's own initiative after it became aware of a non-compete agreement during its review of Telefónica's 2010 acquisition of sole control over the Brazilian mobile operator Vivo, which had been previously jointly controlled by Telefónica and Portugal Telecom. As part of this acquisition the parties included a clause in the contract in which they agreed not to compete with each other in Spain and in Portugal. The merger control review process identified this infringement, and the Commission took enforcement action under art.101, highlighting the importance of ensuring that all agreements are in compliance with competition law, and to carefully review documents that will be submitted to the Commission as part of the merger review process. Other examples of action being taken by the Commission include a dawn raid at the offices of Ineos and Norsk Hydro in 2007, whilst the negotiations were underway for Ineos's proposed acquisition of Norsk Hydro's polymer business. The companies were alleged to have exchanged business information in violation of the EC rules concerning cartel behaviour and other restrictive business practices, and to have taken steps to implement a merger before the Commission's clearance decision. The Commission closed its investigation in 2008, but the raid still sent a strong message to merging parties that the Commission is paying close attention to preclearance activities.[9]

In addition, it should be noted that the European Commission and National Competition Authorities at a Member State level co-operate with each other through the European Competition Network (ECN). The ECN provides a mechanism for competition authorities to inform each other of proposed decisions and to take on board comments from other competition authorities.[10] In addition, members of the ECN have established an EU Merger Working Group in order to ensure increased consistency, convergence and co-operation among EU merger jurisdictions.[11] The ECN enables best practices to be shared between EU merger jurisdictions and ensures a consistent approach with respect to merger reviews. Accordingly, the European Commission and Member State National Competition Authorities are in sync with each other, and collaboration does occur between them during the merger review process.

Increased enforcement at a Member State level

At a member state level, national competition authorities are also increasingly active when reviewing merger control cases.

In 2016, the Dutch Authority for Consumers and Markets imposed a fine of €12.5 million on four companies in the cold storage industry. The companies were involved in merger talks between 2006 and 2009, and during these talks, exchanged competitively sensitive information with each other, such as the utilisation rates of their storage facilities (and thus whether or not they were looking for jobs), shared customers and made price arrangements. One of the companies admitted to having been "too open, too soon" when holding merger talks, higlighting that competition rules can also be violated when exchanging information during merger talks, and the risks are increased if the merger talks continue for a prolonged period of time.[12]

Most recently in 2017, the UK's Competition Markets Authority (CMA) provisionally found that two suppliers of cleanroom laundry services had broken competition law through a market-sharing agreement which prevented each company from supplying customers that were located outside the company's designated area and/or certain types of customers. The case came to the CMA's attention in the context of two related merger reviews, as the CMA had investigated and cleared a merger between the joint venture vehicle that was jointly owned by the suppliers and another undertaking.[13]

The Asia perspective—the risk of bad documents

Merger control is becoming a common feature of deal planning and integration both in China and in Asia more broadly. China's Ministry of Commerce (MOFCOM) handled 395 notifications in 2016. In the Philippines, a new competition regime came into force in 2015, with more than 70 mergers reviewed as of 31 December 2016. Singapore, Japan, Australia, Korea and Taiwan all have well-established merger control regimes. New regimes are in the process of being implemented in Thailand and Myanmar, which include merger control provisions.

When preparing documents relating to a notifiable transaction, it is important to bear in mind the risk that they will need to be provided to one or more regulators as part of the merger review process. More generally, it is important to remember that documents prepared outside the merger context, i.e. in the ordinary course, may, at some point, be requested by a regulator as part of an

[8] Press release, "Antitrust: Commission fines Telefónica and Portugal Telecom €79 million for illegal non-compete contract clause" (23 January 2013), European Commission, available at *http://europa.eu/rapid/press-release_IP-13-39_en.htm* [Accessed 26 January 2018].
[9] Press release, "EU Commission confirms raid on Norsk Hydro UK unit" (13 December 2007), Reuters Staff, available at *http://www.reuters.com/article/us-norskhydro-inspection-eu/eu-commission-confirms-raid-on-norsk-hydro-uk-unit-idUSBRU00619220071213* [Accessed 26 January 2018].
[10] Overview of the European Competition Network, available at *http://ec.europa.eu/competition/ecn/* [Accessed 26 January 2018].
[11] European Competition Network, co-operation in merger control, available at *http://ec.europa.eu/competition/ecn/mergers.html* [Accessed 26 January 2018].
[12] Press release, "ACM imposed fines of EUR 12.5 million on cold-storage firms" (23 March 2016), ACM, available at *https://www.acm.nl/en/publications/publication/15609/ACM-imposed-fines-of-EUR-125-million-on-cold-storage-firms* [Accessed 26 January 2018].
[13] Press release, "Cleanroom laundry businesses alleged to have broken competition law" (20 January 2017), CMA, available at *https://www.gov.uk/government/news/cleanroom-laundry-businesses-alleged-to-have-broken-competition-law* [Accessed 26 January 2018].

investigation. For example, in China, MOFCOM's notification form requires that the concerned parties disclose or confirm their compliance with the Chinese laws applicable to entity establishment, operation, management, foreign investment approval, and industry supervision. This requirement is understood to be used as a hint or clue for the competition authority to spot any serious or material compliance issue (including, but not limited to, competition compliance). MOFCOM may talk with other competition authorities, industry regulators or foreign investment authorities for any spotted compliance issues.

Outside of the merger sphere, the other two competition authorities in China, the National Development and Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC), sometimes require the provision of information and documents as part of broader market studies and inspection campaigns. One example is in relation to the pharma sector, where the NDRC conducted such an exercise starting in June 2016, requiring a large number of market participants to provide internal documents around pricing and commercial strategy. The Hong Kong Competition Commission has also conducted market studies, for example, in relation to building maintenance and autofuels, where companies have been asked to provide information to assist the regulator to understand better the functioning of the market.

Competition authorities in Asia follow US and EU developments closely, and investigations will likely occur in China and elsewhere in Asia in the future as a result of the merger review process revealing competition law or compliance issues which are not specific to the transaction at hand.

The Brazil perspective—increasing scrutiny

Following the path of other jurisdictions, the Brazilian Antitrust Authority (Administrative Council for Economic Defense—or CADE) requires a significant amount of documents in the scrutiny of complex cases. So far, the greatest adversarial result of such document analysis has been the detection of misleading information provided by the applicants to the merger control notification.

In 2012, in a merger between two Brazilian airlines, the parties stated that codeshare agreement between one of the parties and another major Brazilian airline "has never been implemented". However, during the review, CADE found a market report prepared by a third party, but submitted by the applicants themselves, indicating that such agreement was actually in force, substantially changing the transaction's competitive scenario. As a result, the parties were fined BRL 3.5 million (approximately USD 1 million) by CADE.

Even though there is no case in which the submission of documents, within the context of merger review, has resulted in the detection of an anti-competitive infringement (as far as this information is publicly available, as most antitrust investigations in Brazil are confidential in their initial stages) the above example indicates that CADE pays great attention to documents requested during merger review and would not hesitate to open an administrative investigation if that was the case. In this regard, it should be noted that CADE has jurisdiction only over administrative investigations of anti-competitive conduct, but can work alongside the Public Prosecutors Office if the investigation relates to certain anti-competitive practices (essentially cartels) that could also be considered criminal offences. In fact, these authorities currently hold a series of co-operation agreements, through which both offices can work together sharing documents and evidence to support each other's investigation, increasing the exposure of those involved in the investigations.

The Mexico perspective—ongoing review of documents

In Mexico, whilst no specific precedent exists with respect to merger control proceedings resulting in either criminal risks or civil fines, the Mexican Federal Economic Competition Commission (COFECE) has opened separate investigations as a result of a merger investigation.

In May 2015, Delta and Aeromexico notified a co-operation agreement (under the merger control process) to COFECE to jointly operate flights between Mexico and the US. Following a review of the proposed transaction, COFECE found: (i) that the transaction would eliminate the competitive pressure on Aeromexico in cross-border routes by Delta; and (ii) given the high concentration of slots in Mexico City International Airport ("AICM"), price increases on flights between Mexico and the US were likely.[14]

The issues identified by COFECE from the transaction above led the authority to initiate a special proceeding that identified the key infrastructure of Mexico City's International Airport ("AICM") as an essential facility (i.e. runways, taxiways, visual aids, and platforms). In February 2016, COFECE issued a Preliminary Resolution, held that there is potential for anti-competitive effects in the market from the existing rules to access to the essential facility, and found that AICM is not currently being efficiently used due to issues in allocating and monitoring procedures for takeoff and landing schedules ("slots").

In its Final Resolution issued in June 2017, COFECE proposed corrective measures with the aim of eliminating the restrictions of access to the essential facility and reducing the resulting anti-competitive effects, including establishing an independent body to assign slots, retrieve those slots not being used by air carriers, and to create a

[14] See CNT-050-2015. Note, following this decision, Delta and Aeromexico notified a second transaction in November 2016, which allowed Delta, who owns more than 36% of Aeromexico, and the latter to coordinate fares and schedules, as well as jointly market and sell tickets in the Mexico-US market, see CNT-127-2016.

Reserve Fund of takeoff and landing schedules for new entrants. This was the first time that COFECE initiated a proceeding of this nature.[15]

In addition to opening investigations as a result of information being submitted to it, COFECE also reviews information that becomes publicly available from alternative sources—even after a merger has been approved.

In July 2015, Moench and Gibart notified the acquisition of a stake in Marzam (one of the main medicine distributors in Mexico) by Moench from Gibart.[16] This transaction was approved by COFECE under the merger control proceeding. However, following the "Panama Papers" leak, COFECE found that this transaction might have resulted in a concentration involving Nadro and Marzam (two of the major medicine distributors in Mexico). COFECE is currently evaluating its ability to challenge a previously approved merger, ultimately involving Nadro and Marzam following the data that COFECE obtained in the "Panama Papers". In fact, COFECE just published (on 10 January 2018) the commencement of an investigation to challenge an illegal concentration in the market of medicine distributions, that could be related to the transaction reported by Moench and Gibart.[17] However, at this stage, it is not clear if COFECE would have the necessary legal grounds to investigate this transaction as it was already approved under the merger control process.[18]

It is clear that on the basis of the above, COFECE reviews documents submitted to it carefully, and will, if appropriate, open a separate investigation about wider market conditions. In addition COFECE also carefully monitors other publicly available data to ensure compliance with merger control rules. As COFECE pays close attention to documents either submitted by firms, or related to these firms requesting merger control approval, if the right sets of facts occurred, it is highly likely that COFECE would open an administrative investigation if the facts merited such a cause of action.

The South Africa perspective—when merger control investigations open a can of worms

The South African Competition Commission ("Competition Commission") possesses wide investigative powers under its prevailing merger control regime and uses these powers to issue extensive information and document requests to merging parties. Documents that are not necessarily merger specific are often the subject of these requests. There have been cases in which documents submitted pursuant to a request issued in the context of a merger investigation have triggered competition law concerns unrelated to the merger.

By way of example, in a case in which various franchise agreements were requested as part of the merger investigation, the Competition Commission expressed concerns with exclusivity provisions contained in the agreements, claiming that the concerning clauses would have a restrictive effect on competition. The Competition Tribunal, the adjudicative body deliberating upon the merger, noted that non-merger specific antitrust issues cannot be investigated through the "back door of merger control" but invited the Competition Commission to investigate its concerns separately.

Further, in a case involving a merger investigation of property funds, lease exclusivity provisions were raised by the Competition Commission as a concerning feature of the way in which business is done. Similarly, the Competition Tribunal remarked that while the impugned clauses in the lease agreements existed pre-merger and the implementation of the merger would not alter that situation, "enforcement through the prohibited practices regime is the more effective tool". Following this, the Competition Commission initiated a market inquiry with a specific focus on lease exclusivity provisions in contracts.

What is clear from these examples is that documents submitted within the context of a merger investigation run the risk of unearthing unrelated antitrust issues. These issues carry risk of administrative, civil and criminal consequences if the respondent firm is ultimately found to be liable.

Key lessons

Merger review does not exist in a vacuum. Documents always tell a story, and attorneys need to be sure that the documents—which have to be submitted as part of the merger review process—tell a story that supports the proposed deal and do not result in other investigations being launched. Once documents are submitted to a competition enforcer or regulator, parties can expect that they will be closely reviewed, not only with respect to the transaction at hand, but also with an eye toward both civil and criminal actions. The US example highlights the collaboration between the DOJ's civil and criminal sections. The fines in the European cases serve to remind companies that the exchange of commercially sensitive information may be forbidden by competition rules. Similarly, the examples from the rest of the world emphasise the growing risks and implications following the submission of documents to antitrust authorities.

Companies need to be increasingly aware of the risks ordinary course documents present and implement proper document management procedures. The cases above also highlight the importance for companies to have an effective compliance program in place in order to ensure compliance with the relevant competition laws. Whilst

[15] See IEBC-001-2015.
[16] See CNT-074-2015.
[17] See IO-001-2018.
[18] See CNT-074-2015.

easy to state, ongoing compliance with competition law is the most straightforward way to ensure that documents submitted for a merger review tell the story the merging parties want told.