Information Sharing by Competitors: Minimizing Antitrust Liability

Avoiding Gun-Jumping in Mergers and Competitor Collaborations

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today’s panel features:
Corey W. Roush, Partner, Hogan & Hartson, Washington, D.C.
Robert Schlossberg, Partner, Freshfields Bruckhaus Deringer, Washington, D.C.
Timothy J. Cornell, Counsel, Clifford Chance, Washington, D.C.

Tuesday, January 12, 2010

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Pre-merger Coordination and Information Sharing by Competitors

a/k/a “Gun-jumping”

Corey Roush
January 12, 2010
Applicable Statutes

- Antitrust laws govern the pre-closing conduct of parties to mergers, acquisitions, and joint ventures

- Parties must be careful to maintain separate identities and behave in a competitive manner until a transaction closes
  - Raises question of how much information the parties can exchange in due diligence
  - Limits the amount of control that the acquiring company can exert contractually or otherwise over the other party prior to closing

- HSR Act (Section 7A of the Clayton Act), Section 5 of the FTC Act and Section 1 of the Sherman Act apply to pre-consummation activities
  - HSR Act – Prohibits acquisitions of a certain size without first filing premerger notification and observing required waiting period
  - Section 5 of the FTC Act – Prohibits “unfair methods of competition" as well as "unfair or deceptive acts or practices”
  - Section 1 of the Sherman Act – Prohibits contracts and conspiracies in restraint of trade
Information Exchanges

• **Parties to a transaction need to exchange information for many reasons**
  - Value assets
  - Conduct due diligence
  - Preserve value of deal during HSR waiting period
  - Integration planning

• **Government must ensure that potential transactions do not lessen competition while they are being contemplated or going forward**
  - Maintain competition between the merging parties prior to closing
  - Avoid transfer of information that would harm competition during merger negotiations and review or that would harm the ability of the company being acquired to compete should the merger fall through or be blocked

• **Drawing a precise line between lawful due diligence and unlawful information sharing can be challenging**
Pre-Merger Control

- Prior to closing of a transaction, the parties must continue to compete with one another
  - Acquiring party is generally not supposed to exert control over the acquired party

- However, the acquiring party also needs to be comfortable that the value of the acquired company is not materially diminished while the merger is being reviewed

- This tension often manifests in drafting and executing the terms of the merger agreement

- Drafting a merger agreement that walks the line of avoiding control while still protecting the interests of the acquiring company can be challenging
Guidance from Antitrust Agencies and the Courts

- **Agency Guidance**
  - Speeches and articles by various enforcement officials have generally been consistent
    - Recognize need for exchanges of information in merger context
    - Question need to exchange competitively sensitive information
    - Question reciprocal exchanges
    - Look at whether parties limited collection and dissemination
  - However, thinking seems to have evolved to being more understanding of need for exchange

- **Significant Cases**

- ARCO acquisition of Union Carbide
- ARCO paid full purchase price upon execution of merger agreement and before expiration of HSR period
- Merger agreement:
  - Limited Union Carbide’s rights to engage in certain activities
  - Transferred losses and potential products of Union Carbide to ARCO
- FTC challenged the acquisition as well as the above activities claiming that they were premature transfer of beneficial ownership
- ARCO entered consent agreement whereby it paid penalty of $1 million to resolve FTC’s challenge of premature transfer of beneficial ownership
In the Matter of Insilco Corp. (1998)

• Insilco acquisition of Helmut Lingerman’s aluminum tubing division

• Prior to expiration of the HSR waiting period, Insilco requested and received:
  – Customer-specific information, including detailed price quotes;
  – Current and future pricing plans;
  – Competitive strategies; and
  – Pricing formulas

• FTC challenged the acquisition as well as the above activities alleging that this information transfer “may have detrimentally affected competition in the relevant markets” had the transaction not closed

• Insilco entered consent agreement whereby it agreed not to receive non-aggregated customer specific information

• Computer Associates acquisition of Platinum Technology International, Inc.

• Merger agreement:
  – Prohibited Platinum from offering discounts greater than 20% (without Computer Associates approval) and
  – Required submission by Platinum of competitively sensitive customer information to Computer Associates

• DOJ charged that during the HSR waiting period, Computer Associates:
  – Systematically collected competitively sensitive information relating to Platinum’s competitive bids and
  – Took control of substantial aspects of Platinum’s business

• Computer Associates entered into a consent settlement that included a civil penalty of $638,000

- Gemstar acquisition of TV Guide International

- Prior to consummation, Gemstar and TV Guide allegedly agreed:
  - To “slow roll” their separate customer negotiations,
  - To split services such that TV Guide would market to cable service providers and Gemstar would market to consumer electronic companies,
  - To specific prices and terms, and
  - To share competitively sensitive and customer-specific information

- DOJ charged the companies with:
  - Unnecessarily sharing competitively sensitive information and
  - Failing to continue to operate as separate entities prior to consummation of the transaction

- Gemstar entered into a consent settlement that included a civil penalty of $5.68 million
Omnicare, Inc. v. UnitedHealth Group, Inc. (2009)

- Omnicare is an institutional pharmacy providing pharmacy services to long-term care (LTC) facilities; as such, it negotiates contracts with health insurers who provide coverage to the senior citizens in those LTC facilities
- In 2005, two health insurers – United and PacifiCare – entered into merger talks, conducted due diligence, signed a merger agreement, and ultimately merged
- At the same time, United and PacifiCare each negotiated separate contracts with Omnicare
- Following the merger, United (the acquiring company) terminated its contract with Omnicare and moved its covered lives to the more favorable contract negotiated by PacifiCare
- Omnicare sued alleging a conspiracy (and fraudulent scheme) between UnitedHealth and PacifiCare to coordinate their strategies for negotiating with Omnicare prior to consummating their merger
Omnicare, Inc. v. UnitedHealth Group, Inc. (2009)

- District Court for the Northern District of Illinois granted summary judgment to United

- Decision detailed information exchange between United and PacifiCare prior to the merger agreement being signed and recited a series of meetings that also took place

- Court found that:
  - While information exchanged was identified as “strategic, it was also by and large “general” and “limited”
  - PacifiCare provided United with its expected average reimbursement rate to retail pharmacies for branded drugs
  - PacifiCare also provided United a template of PacifiCare’s standard pharmacy contract
  - PacifiCare and United reciprocally exchanged average bid information

- Decision noted that after signing the merger agreement, United and PacifiCare exchanged additional information in their integration planning
  - Court held that parties exchanged high-level drafts of a memorandum discussing ways in which United might use PacifiCare’s internal Pharmacy Benefits Manager, RxSolutions, after the acquisition was consummated
Omnicare, Inc. v. UnitedHealth Group, Inc. (2009)

• In granting summary judgment, the court noted that:
  – There is “virtually no case law” on point and
  – It needed to “strike . . . a sensitive [balance]” between business need to share information during due diligence and need to avoid wholesale exchange of competitively sensitive information

• Court identified several factors that it found were relevant in assessing information exchanges:
  – Was the information exchanged competitively sensitive?
  – Who was involved in the information exchange; who ultimately received the information; and what precautions were taken to limit distribution of the information?
  – Why was specific information exchanged; did the parties limit their exchange to information that was necessary to evaluate the transaction; did they limit the exchange to averages and ranges rather than specifics?
  – When did the information exchange occur?
  – Was the pre-merger integration planning clearly prospective in nature?
Omnicare Appeal

- Omnicare appealed the District Court’s decision to the Seventh Circuit
- Briefing is complete and oral argument was heard on November 13, 2009
- Relevant to the District Court’s findings on whether the information exchange was evidence of a conspiracy, Omnicare argued that:
  - District Court’s characterization of information exchange was incorrect
    - Omnicare argued that current and future pricing information was exchanged and such an exchange was enough to draw an inference of collusion
    - Omnicare argued the defendants’ admitted brief discussion of difficulties in negotiating with Omnicare was enough to draw an inference of collusion
  - The reciprocal nature of the information exchange gave defendants “motive and opportunity to collude”
  - Dissemination of information to relevant “decision makers” was enough to draw inference of collusion
- Omnicare also argued that the District Court failed to address claim that the information exchange itself was a violation of Section 1 of the Sherman Act (as opposed to being evidence of an overarching conspiracy)
Corey has worked with several online and high-tech companies, as well as a wide range of brick and mortar clients, on issues pertaining to mergers and acquisitions, joint ventures, health care, the defense industry, and intellectual property. He also routinely counsels clients on risk management and strategic planning, as well as complying with various federal and state laws and regulations, including the Sherman Act, the Federal Trade Commission (FTC) Act, the Anti-Kickback Statute, and the False Claims Act.

Corey has represented clients in federal antitrust, consumer protection, intellectual property, and qui tam cases in several district and appellate courts, as well as in administrative hearings before the FTC. In addition, he has represented clients before the FTC, the Antitrust Division of the U.S. Department of Justice, and various attorneys general around the country.

In the information exchange arena, Corey routinely counsels clients on what information, if any, can appropriately be exchanged with competitors either directly or through third party organizations. Moreover, Corey served as co-counsel to UnitedHealth Group in the Omnicare vs. UnitedHealth Group Inc., et al. case and appeal discussed herein. He also currently represents Methodist Healthcare in an ongoing class action alleging that Methodist and its competitors exchanged wage information in furtherance of an alleged conspiracy to fix nurse wages in Memphis, TN.
For more information on Hogan & Hartson, please visit us at

www.hhlaw.com
Information Sharing by Competitors: Minimizing Antitrust Liability in Mergers and Competitor Collaborations

*Issues of Premature Control and Premerger Coordination*

Robert Schlossberg -- January 12, 2010
Beneficial Ownership & Premature Control

- Indicia of “Beneficial Ownership”:
  - The right to obtain the benefit of any increase in value or dividends
  - The risk of loss of value
  - The right to vote the stock or to determine who may vote the stock
  - The investment discretion (including the power to dispose of the stock)

- Factors analyzed by the antitrust enforcement agencies:
  - Access to confidential information and control over key decisions
  - Ability to reverse any key decision if the merger does not close
  - Harm to overall level of market competition if the seller’s competitiveness is harmed
  - Whether key decisions made by the target pre-closing were reached unilaterally, mandated by the acquirer, or some point in between
  - Attempts by the acquiring firm to hire away key employees, appropriate proprietary know-how, negotiate with important customers, or otherwise preempt attractive opportunities during pre-closing period

- Computer Associates (CA) exercised unlawful “operational control” over significant and important aspects of the target’s business during the pre-consummation period.
- The Merger Agreement and implementing provisions altered the status of the merging parties as “separate and independent economic actors.”
- Although some provisions/restrictions in the Merger Agreement were customary and reasonable, others imposed “extraordinary conduct of business limitations” not normally found in merger agreements, which “severely restricted” Platinum’s ability to engage independently and competitively.

- **Civil Penalty**: $638,000 fine imposed against CA.
- **Injunctive Relief**: CA also enjoined from entering into future merger agreements that allowed it to establish product/service prices, receive bid information, or approve customer contracts prior to consummation.

- **Permitted Conduct:**
  - Provisions requiring firms to carry on business “in the ordinary course in substantially the same manner as heretofore conducted”
  - Restrictions ancillary to a merger agreement if intended to prevent a seller from “taking actions that could seriously impair the value of what the acquiring firm had agreed to buy”

- **Conduct establishing “unlawful control”:**
  - Imposing pre-consummation restrictions on the target’s operations, pricing, information management, and employees in the purchase agreement
  - Restricting the target company’s ability to offer discounts to customers and retaining “sole arbiter” rights to prior approval of discount and consulting contracts
  - Installing employees in the seller’s facilities to review discount requests and contracts
  - Systematically obtaining competitively sensitive information relating to competitive bids and customer information
  - Changing the target’s method of booking revenues
  - Exercising approval authority over the target’s participation at industry trade shows

- Competitors in provision of interactive TV program guides.

- Parties were found to have ceased acting as separate economic entities by discussing and agreeing on a number of coordination steps during the pre-closing period.

- Civil Penalty: $5,676,000 million total fine imposed (maximum civil penalty of $11,000 per day per party).

- Injunctive Relief: Parties prohibited from entering into future agreements that would combine or transfer operational or decisionmaking control of product marketing and distribution; and/or exchange information related to current or future prices.

- Evidence of Gemstar’s premature *de facto* acquisition of TV Guide included:
  - Pre-consummation implementation of standard price and term-setting agreements
  - Draft customer contracts sent by TV Guide for Gemstar’s proposed changes and approval
  - Agreements to allocate customers and phase out competing marketing operations
  - Agreements to “slow-roll” negotiations for long-term agreements with major customers until the merger was consummated
QUALCOMM Inc. / Flarion Technologies (2006)

- The DOJ alleged that Qualcomm acquired beneficial ownership of Flarion’s assets by obtaining premature transfer of operational control.

- Violation of HSR Act resulted from aggregation of potentially problematic provisions in the Merger Agreement (imposed with a purpose of restricting Flarion’s commercialization of products), plus day-to-day management control over pre-closing business decisions that were not required in the Merger Agreement.

- Civil Penalty: $1.8 million fine imposed jointly on QUALCOMM and Flarion.
  - No ongoing antitrust monitoring requirements or restrictions of future conduct.
  - The maximum possible fine was mitigated as a result of the parties voluntarily reporting the gun jumping issues and taking remedial measures.
QUALCOMM Inc. / Flarion Technologies (2006)

- **The merger agreement** -- Flarion required to obtain Qualcomm’s prior written consent before undertaking certain business activities, including:
  - entering into agreements to license intellectual property to third parties (core of Flarion’s business)
  - entering into agreements involving the obligation to pay or receive $75,000 or more in a year or $200,000 or more in the aggregate
  - entering into agreements relating to the disposition or acquisition of intellectual property rights (except for “shrinkwrap” software licenses purchased for less than $10,000)

- **Conduct following the merger agreement** -- Flarion also sought Qualcomm’s involvement and followed any guidance given by the buyer (even when the merger agreement did not purport to require Flarion to do so), including:
  - “routine” hiring of employees in the ordinary course of business
  - review and consent before marketing products and services to current and potential customers (including Qualcomm’s review of entire drafts of customer proposals)
  - requests for approval of price quotations and discounts (including review of Flarion’s margins on certain products)
  - strategic decisions on whether to pursue business opportunities
International Enforcement Actions – European Commission

- **European Commission**: little public focus to date by the Commission on Article 7 compliance

- **EC Merger Regulation, Article 7**: prohibits a “concentration with a Community dimension” from being implemented “either before its notification or until it has been declared compatible with the common market”

- **EC Merger Regulation, Article 14**: provides for the imposition of fines for a breach of suspensory obligation under Art. 7(1) of up to 10% of the aggregate worldwide turnover of the parties in the preceding financial year
International Enforcement Actions – Commission Enforcement

- **Bertelsmann/Kirsch/Premiere, Case IV/M.993, Commission Decision of May 27, 1998**
  - The only case brought by the Commission in relation to gun jumping issues
  - The Commission warned the parties to cease conduct which effectively implemented the transaction (marketing of the other party’s product pre-closing)
  - No fines were ultimately imposed

- **Kerling ASA / Ineos Group Ltd**
  - December 2007 dawn raid inspection of UK hydropolymer companies
  - Phase II investigations into both substantive anticompetitive grounds and whether companies breached waiting period obligations
  - The transaction was subsequently cleared in January 2008 without fines imposed for suspected information exchange
International Enforcement Actions – Other Jurisdictions

- **Norway (2009):** First gun-jumping fine ever imposed by the Norwegian Competition Authority for breach of Norway's suspension obligation, in the amount of NOK 150,000 (US$21,000). The acquiring party assumed control of a provider of brokerage services prior to government clearance.

- **Germany (2008):** €4.5 million ($5.91 million) fine imposed on US company for closing transaction before completion of German merger review process; following HSR approval, Mars/Nutro Products carved out German and Austrian distribution businesses and closed transaction. First fine applied to transaction between two non-German companies and highest fine imposed to date.

- **Greece (2002):** Piraeus Leasing alleged to have acquired common control over OTE Leasing by gaining rights to have representatives present in target company and requiring consent for all financial decisions (except day-to-day business) pre-closing. Buyer fined GRD 85 million ($350,000) and seller fined total of GRD 15 million ($62,000) for violating suspensory obligation and failure to notify.

- **Belgium (1998):** Bodycote International/HIT fined BEF 1 million for appointing members of the Board to the new entity prior to clearance by Belgian Competition Council; BCC determined this implied that voting rights of the acquired shares had been exercised.

- Antitrust regulators have also imposed fines for breach of suspension obligations in Cyprus, France, Israel, Netherlands, Poland, Romania, Slovakia, South Africa, Switzerland, Taiwan, and Turkey.
Best Practices for Avoiding Premature Control

- Enforcement agencies recognize that an acquiring party has legitimate commercial and practical interests, and will expect and allow reasonable post-signing covenants designed to protect the target’s value.

- Cause for concern arises where a purchase agreement limits a target’s pre-closing conduct, inhibits the target’s ability to retain its competitive and operational independence, and/or effectively transfers operational control of the seller to the buyer.

- Parties must carefully consider covenants in merger agreements that impose restrictions on premerger conduct and/or require buyer approval to ensure that ordinary course competition is not restricted (*Omnicare*).

- No business integrations may begin until after clearance is obtained; parties cannot allow for even the appearance or suggestion that parties have started to act as a single entity.

- Clear guidelines should be issued early in the transaction process.
Best Practices – What is Considered Permissive Conduct?

- Conduct generally considered permissible by Antitrust Authorities:
  - Agreements to operate in the “ordinary course of business” consistent with past practices
  - Certain restrictions on conduct that would cause a “material adverse change” in the target’s business
  - Joint conduct considered lawful independent of the proposed merger
  - Joint marketing/advertisements that generally promote the transaction (with appropriate guidelines and controls)
  - Joint customer calls to discuss general benefits of the merger
  - Disclosure of confidential business information related to competing products in the context of litigation or settlement discussions (subject to a protective order)
Best Practices - What is Considered Prohibited Conduct?

- Conduct generally to be avoided:
  - Agreements to exit certain businesses pending completion
  - Agreements to “slow roll” (or delay negotiations) with certain customers
  - Obtaining the other party’s pre-clearance for routine business decisions
  - Coordinating business strategies, production, sales, distribution or discount policies
  - Covenants in the merger agreement that entitle the buyer to review or approve the seller’s ordinary course of business activities in areas in which the companies compete
  - Relocating staff to other party’s premises
  - Joint bidding for contracts when the normal industry practice does not allow for this activity
  - Attending joint meetings with customers or other party’s internal meetings
  - Discussion of post-merger conduct of either party in relation to sales/marketing prospects or mutual customers
Biography

Robert Schlossberg
Partner, Washington, DC
T +1 202 777 4500
E robert.schlossberg@freshfields.com

- For more than 25 years, Bob has represented clients on the full range of antitrust matters with a particular emphasis on practice before the FTC and the Antitrust Division of the Justice Department. He has considerable experience with antitrust issues in mergers and acquisitions and has guided scores of national and international transactions through antitrust review to a successful conclusion. He has worked with a wide variety of industries, including chemicals, consumer goods, energy, industrial machinery, medical devices, pharmaceuticals, publishing, software and transportation.

- Bob is past chair of the M&A Committee of the ABA Antitrust Section and editor of the third edition of the ABA Antitrust Section treatise on US antitrust law as applied to mergers and acquisitions. He is currently a member of the Section’s Merger Standards Working Group. Global Counsel, Euromoney Expert Guides and The International Who’s Who of Competition Lawyers have listed him as a leading lawyer. Bob is a non-governmental adviser to the International Competition Network, the only international body devoted exclusively to competition law enforcement, whose members are national and multinational competition authorities.

- As part of his merger practice, Bob counsels on the national security issues that arise under the Exxon-Florio Act. He has developed and coordinated successful filing and clearance strategies under the Act.

- Bob graduated from The George Washington University National Law Center; he was Articles Editor of the Law Review there and a member of the Order of the Coif. He then clerked for the US Court of Appeals for the Ninth Circuit.
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Avoiding Information Exchange Problems In Transactions

Timothy Cornell
January 2010
What We Will Discuss Today

• Legal Concerns In Information Exchanges

• Recent Adjudications and Agency Messages

• Risk Avoidance
Introduction

• Not every transaction faces the potential for information exchange problems

• When competing firms enter into a transaction, the antitrust laws treat those firms as competitors until consummation of the transaction

• Preclosing information exchanges can lessen competition between transacting competitors, especially where the transaction does not eventually close

• Information exchange investigations can lead to:
  • Transactional delay
  • Additional cost
  • Fines
  • Conduct remedies
Certain Information Exchanges Are Unlawful

- Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade
  - Preclosing information exchanges may be considered by US antitrust agencies to be unlawful restraints of trade under Section 1
- Section 5 of the FTC Act, prohibiting unfair competition and deceptive practices, may also be implicated
- Both apply regardless of whether the transaction is filed under the HSR Act
- HSR Act violations may also occur
The Legal Analysis

- Conduct needs to result in a competitive effect
  - 95% of transactions likely to have no issue
  - 5% require a more fact-specific examination
- Generally, the conduct is assessed under the rule of reason
- The analysis is the same as that applied to ancillary restraints
  - Is the exchange reasonably necessary to the transaction?
  - Is the exchange no broader than necessary to achieve the required result?
- Spillover effects
- Only the most egregious cases have been prosecuted
Legal Concerns in Information Exchanges

Legal Analysis in Practice

- National Association of Music Merchants (2009)
  - Not a transactional information exchange, but illustrative of the analysis applied
  - The FTC alleged that NAMM violated Section 5 of the FTC Act by enabling and encouraging the exchange of competitively sensitive price information among its members
  - NAMM members were encouraged to, and did, share information about prices and business strategy
  - The FTC alleged that the conduct served no legitimate business purpose
  - The FTC further alleged that NAMM members coordinated pricing based upon the information exchanged
  - NAMM agreed to a consent order that:
    - Bars it from coordinating the exchange of price information and/or certain pricing agreements
    - Requires it to implement an antitrust compliance program
    - Requires review by counsel of any written materials and prepared remarks by any member of its board, employees, or others related to price terms
  - The consent order expires in 2029
Agency Messages

- Pre-2005 message
  - Interpreted by some to prohibit conduct beyond what was intended
- More recently, expression that
  - Transacting parties must engage in preclosing information exchanges at levels of detail not ordinarily permissible
  - Early planning for integration is key to a successful merger
  - Certain information exchanges are reasonable and necessary to the transaction
- Acknowledgement that only the most egregious conduct has been prosecuted
RECENT ADJUDICATIONS & AGENCY MESSAGES

Insilco / Computer Associates

- **Insilco (1998)**
  - FTC alleged violations of Section 5 of the FTC Act
  - Preclosing, the parties exchanged customer-specific price information, current and future pricing plans, competitive strategies and pricing formula
  - FTC challenged both the acquisition itself and the preclosing data exchange
  - FTC obtained a consent agreement whereby Insilco agreed not to receive non-aggregated, customer-specific information prior to the closing of future transactions

- **Computer Associates (2002)**
  - DOJ alleged violations of Section 1 of the Sherman Act
  - DOJ alleged the parties exchanged competitively sensitive information, including the prices and amounts of discounts that specific customers were offered and the justifications for those proposals
  - $638,000 in civil penalties
Gemstar / Omnicare

- **Gemstar (2003)**
  - DOJ alleged violations of Section 1 of the Sherman Act
  - DOJ alleged that the parties shared competitively sensitive, customer-specific information, including detailed and specific information about many offers and counter-offers to customers, rate cards, and draft customer contracts without a legitimate business purpose
  - Civil penalties of $5,676,000

- **Omnicare (2009)**
  - Private lawsuit
  - Omnicare alleged that competitors United and PacifiCare exchanged competitively sensitive information prior to merging
  - Court found the exchanges reasonable
  - Dismissed on summary judgment
  - Currently on appeal
Adjudication Take Aways

- Reasonable and necessary information exchanges prior to closing the transaction are permissible.
- Prosecution arises when there is attendant conduct that adversely affects competition.
- If the parties are competitors:
  - Bid information, information concerning current or future pricing, pricing projections, and/or contract offers may be exchanged during due diligence.
  - But only if the exchange is materially necessary and reasonably related to the understanding of the future earnings and prospects of the target.
  - Such information must only be exchanged pursuant to a non-disclosure agreement, and the non-disclosure agreement must prohibit disclosure to anyone directly involved in the marketing, pricing, or sales of overlapping products.
An Improper Information Exchange May Become A Global Issue

• In cross-border transactions, information exchanges may lead to fines and delay
• Article 101 of the Lisbon Treaty
• Chapter 1 of the UK’s 1998 Competition Law
• Foreign competition agencies have not been as aggressive in addressing the issue in the pre-transaction context
• Same general principles apply domestically and internationally
Where Information Exchange Issues Are Likely To Arise Preclosing

- Due diligence / valuation
- Complying with merger covenants
- Integration
What Is Generally Considered Competitively Sensitive Information

- Bids, prices, rebates, and other discounts
- Pricing policies and/or plans
- Current and future costs of supplying particular services or products
- Marketing, business, product development, and strategic plans
- Details on research and development projects or other proprietary technology and data
- Customer lists and other documents containing customer-specific information
- Plans to reduce or expand operations
- Trade secrets
What Is Generally Not Considered Competitively Sensitive Information

- Human resources information
- Lagged or aggregated revenue, cost, and financial information
- Tax information
- Environmental information
- Organizational structure information
- Health and safety data
- Regulatory and compliance information
- Employee benefits and aggregated payroll information
- Building, plant, and facility management information
- Information systems and technology information
- Other "back-end" information
Who Is More Risk Averse?

Buyers and sellers are likely to approach the risk differently

- Buyers generally are anxious to close and integrate, and are thus less risk averse
- Sellers are more cautious, wanting to ensure that the deal is not delayed by government investigations and to protect information in the event the transaction does not close
- The different motivations can be meaningful
Minimizing Information Exchange Risks: Available Techniques

Control the information flow:

- Use redactions to avoid sharing competitively sensitive information
- Disclose or exchange only that confidential information necessary (e.g., to plan integration or value the transaction)
- Limit disclosure to those with a need to know
- Consult counsel before sharing certain competitively sensitive information (e.g., cost information, pricing information, and details of customer relationships)
- Exchange confidential information pursuant to confidentiality and non-disclosure agreements
- Consider timing and defer information exchanges where it does not cause an efficiency penalty
- Keep records of what information was exchanged and with whom
Minimizing Information Exchange Risks: Available Techniques

When appropriate, compartmentalize confidential information:

- Form valuation/transition teams
- Limit teams to more senior-level executives and outside advisors not involved in day-to-day commercial operations
- Minimize the use of sales, marketing, or other operational business people in due diligence and integration planning
- Make team members aware of their confidentiality obligations
- Limit the dissemination of memoranda and documents created by the teams
- Avoid spillover effects
- If necessary, use clean teams and third parties (legal, accounting, or consulting firms) to review competitively sensitive information
Minimizing Information Exchange Risks: Available Techniques

• Maintain separate organizations and conduct business as usual
• Do not base business decisions on another party's competitively sensitive information
• Use legal counsel to supervise integration planning and due diligence
• Avoid the perception of information exchanges
  • Create documents carefully, especially 4(c) documents
  • Avoid reference to a competitor's sensitive information
  • Assume that all officer and director documents will be produced to the government
  • Avoid joint discussions among the employees involved in day-to-day commercial operations
Special Note About Due Diligence

- Due diligence is necessary to value the transaction and to understand potential synergies
- Due diligence information exchanges are generally permissible
- More competitively sensitive information should be shown only to select individuals, with a need to know
- Outside counsel (and inside counsel acting in a legal capacity) are generally safe from information exchange concerns during due diligence
Worldwide Contact Information
29* Offices in 20 countries

Abu Dhabi
Clifford Chance LLP
13th and 14th Floors
Al Bahar Building
Airport Road
Sector W-14/02
PO Box 29482
Abu Dhabi
United Arab Emirates
Tel +971 (0)2 419 2500
Fax +971 (0)2 419 2900

Amsterdam
Clifford Chance LLP
Dropog 1A
1013 CE Amsterdam
PO Box 251
1000 AG Amsterdam
Tel +31 20 7119 000
Fax +31 20 7119 999

Bangkok
Clifford Chance (Thailand) Ltd
Sinthorn Building Tower 3
21st Floor
130-132 Wireless Road
Pathumwan
Bangkok 10330
Thailand
Tel +66 2 401 8800
Fax +66 2 401 8801

Barcelona
Clifford Chance S.L.
Av. Diagonal 962
08034 Barcelona
Spain
Tel +34 93 344 22 00
Fax +34 93 344 22 22

Beijing
Clifford Chance LLP
Room 3326
China World Tower 1
No. 1, Jingguomenwai Dajie
Chaoqyang District
Beijing 100004
People's Republic of China
Tel +86 10 6505 9018
Fax +86 10 6505 9028

Brussels
Clifford Chance LLP
Avenue Louise 65
Box 2
1050 Brussels
Belgium
Tel +32 2 533 5911
Fax +32 2 533 5959

Bruxelles
Clifford Chance LLP
Avenue Louise 65
Box 2
1050 Brussels
Belgium
Tel +32 2 533 5911
Fax +32 2 533 5959

Bucharest
Badea Clifford Chance SCA
Excelsior Center
28-30 Academiei Street
12th Floor, Sector 1
Bucharest, 010016
Romania
Tel +40 21 66 36 50 1
Fax +40 21 66 36 50 9

Budapest
Clifford Chance LLP
10th Floor
10-12 Kerepesi ter
1053 Budapest
Hungary
Tel +36 1 4 60 17 00
Fax +36 1 4 60 17 99

Düsseldorf
Clifford Chance LLP
PO Box 32 01 25
40416 Düsseldorf
Königsallee 59
40215 Düsseldorf
Tel +49 211 43 55-0
Fax +49 211 43 55-6000

Frankfurt
Clifford Chance LLP
PO Box 11 42
60049 Frankfurt am Main
Mainzer Landstrasse 46
60325 Frankfurt am Main
Tel +49 69 71 99-01
Fax +49 69 41 59-4000

Hong Kong
Clifford Chance LLP
Unit 3509 & 3510
International Finance Centre
168 King's Road
Central
Hong Kong
Tel +852 2821 3831
Fax +852 2821 3839

Hong Kong
CLIFFORD CHANCE
嘉偉律師行
29th Floor
Jardine House
One Connaught Place
Hong Kong
Tel +852 2825 8888
Fax +852 2825 8800

Kiev
Clifford Chance LLP
75 Zhylyanska Street
01022 Kiev, Ukraine
Tel +38 (044) 390 5836
Fax +38 (044) 390 5886

Kuala Lumpur
Clifford Chance LLP
28th Floor
Menara UOB
128 Jalan Ampang
50450 Kuala Lumpur
Malaysia
Tel +60 3 2303 2000
Fax +60 3 2303 2001

Kuala Lumpur
Clifford Chance LLP
28th Floor
Menara UOB
128 Jalan Ampang
50450 Kuala Lumpur
Malaysia
Tel +60 3 2303 2000
Fax +60 3 2303 2001

Kyiv
Clifford Chance LLP
75 Zhylyanska Street
01022 Kiev, Ukraine
Tel +38 (044) 390 5836
Fax +38 (044) 390 5886

London
Clifford Chance LLP
10 Upper Bank Street
London
E14 SJ
Tel +44 20 7066 1000
Fax +44 20 7066 5555

Luxembourg
Kremer Associés & Clifford Chance
2-4 place de Paris
B.P. 90018
L-1011 Luxembourg
Grand-Duché de Luxembourg
Tel +352 48 50 50 1
Fax +352 48 13 85

Milan
Clifford Chance Studio Legale
PIAZZETTA M.BOSSI, 3
20121 MILAN
Italy
Tel +39 02 806341
Fax +39 02 80634200

Moscow
Clifford Chance CIS Limited
Ul. Gasheka 6
125047 Moscow
Russian Federation
Tel +7 495 258 5050
Fax +7 495 258 5051

Mumbai
Clifford Chance LLP
40th Floor
Bund Centre
222 Yan An East Road
Shanghai 200002
China
Tel +86 21 6335 0086
Fax +86 21 6335 0337

Moscow
Clifford Chance CIS Limited
Ul. Gashaeva 6
125047 Moscow
Russian Federation
Tel +7 495 258 5050
Fax +7 495 258 5051

Moscow
Clifford Chance CIS Limited
Ul. Gashaeva 6
125047 Moscow
Russian Federation
Tel +7 495 258 5050
Fax +7 495 258 5051

Munich
Clifford Chance LLP
40th Floor
Bund Centre
222 Yan An East Road
Shanghai 200002
China
Tel +86 21 6335 0086
Fax +86 21 6335 0337

New York
Clifford Chance US LLP
31 West 52nd Street
New York, NY 10019-4131, USA
Tel +1 212 878 8000
Fax +1 212 878 8375

Paris
Clifford Chance Europe LLP
9 Place Vendôme
CS 50018
75038 Paris Cedex 01
France
Tel +33 1 4 44 05 52 2
Fax +33 1 4 44 05 52 00

Prague
Clifford Chance LLP
Jungmannova Plaza
110 00 Prague 1
Czech Republic
Tel +420 222 555 222
Fax +420 222 555 000

Riyadh**
Al-Jadaan & Partners Law Firm
Fifth Floor
Al Ushaif Tower 1
Al-Malaz
Riyadh, KSA
PO Box 3515, Riyadh 11481,
Kingdom of Saudi Arabia
T +966 1 476 0220
F +966 1 476 9332

Shanghai
Clifford Chance LLP
40th Floor
Bund Centre
222 Yan An East Road
Shanghai 200002
China
Tel +86 21 6335 0086
Fax +86 21 6335 0337

São Paulo
Clifford Chance Ltda.
Rua Helena 260 - 6th Floor
04552-050 São Paulo
Brazil
Tel +55 11 3049 3188
Fax +55 11 3049 3198

São Paulo
Clifford Chance Ltda.
Rua Helena 260 - 6th Floor
04552-050 São Paulo
Brazil
Tel +55 11 3049 3188
Fax +55 11 3049 3198

Singapore
Clifford Chance Pte Ltd
One George Street
16th Floor
Singapore 049145
Tel +65 6410 2290
Fax +65 6410 2288

Tokyo
Clifford Chance Law Office
Akasaka Tametaka Tower, 7th Floor
1-7 Akasaka 2-Chome
Minato-ku, Tokyo 107-0052
Tel +(81 3) 5561 6600
Fax +(81 3) 5561 6699

Tokyo
Clifford Chance Law Office
Akasaka Tametaka Tower, 7th Floor
1-7 Akasaka 2-Chome
Minato-ku, Tokyo 107-0052
Tel +(81 3) 5561 6600
Fax +(81 3) 5561 6699

Washington, D.C.
Clifford Chance US LLP
2001 K Street NW
Washington DC 20006-1001, USA
Tel +1 202 912 6000
Fax +1 202 912 6000

Washington, D.C.
Clifford Chance US LLP
2001 K Street NW
Washington DC 20006-1001, USA
Tel +1 202 912 6000
Fax +1 202 912 6000

Bucharest
Clifford Chance LLP
13th and 14th Floors
Al Niyadi Building
Airport Road
Sector W-14/02
PO Box 29482
Abu Dhabi
United Arab Emirates
Tel +971 (0)2 419 2500
Fax +971 (0)2 419 2900

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The Road to *Omnicare*:
The Evolution of Antitrust Standards on Premerger Coordination

William Blumenthal

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Background Materials for Interactive Teleconference on
Information Sharing by Competitors: Minimizing Antitrust Liability:
Avoid Gun-Jumping in Mergers and Competitor Collaborations

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The Road to Omnicare:
The Evolution of Antitrust Standards on Premerger Coordination

William Blumenthal *

These background materials trace the evolution of antitrust standards and practices on the issue of premerger coordination, leading up to the district court decision in January in Omnicare, Inc. v. UnitedHealth Group, Inc.1 For the past two decades, a debate on the limits of permissible coordination had proceeded without guidance from the courts. What passed for “law” in the area had been derived principally from scholarly articles by antitrust practitioners and from speeches and consent settlements from the Federal Trade Commission and the US Department of Justice.

Omnicare arose from a private challenge under Section 1 of the Sherman Act to certain preclosing activities of merging competitors in the field of health insurance. It is the first modern judicial decision to articulate standards on the issue of permissible coordination. Mindful of the sensitive tension between the legitimate demands of complex mergers and the public’s interest in avoiding anticompetitive collusion, the court ruled that the activities at issue did not constitute improper preclosing coordination.

The materials below summarize the key articles, speeches, and consent settlements that formed the background against which Omnicare was decided. It then turns to the details of Omnicare. Part I simply notes the applicable antitrust statutes. Part II quickly distinguishes the two intertwined lines that have emerged in the agencies’ enforcement program -- excessive information sharing and premature control. Part III collects the primary speeches and articles on the topic. Part IV collects the consent settlements. Finally, Part V summarizes Omnicare.

I. Antitrust Statutes Applicable to Gun Jumping Issues

Pre-merger coordination activities may be subject to Section 1 of the Sherman Act, which prohibits collective action in restraint of trade.2 Depending on the size of the transaction and the timing of the coordination, these activities may also be subject to Section 7A of the Clayton Act,3 commonly known as the Hart-Scott-Rodino Antitrust Improvements Act. Unlike Section 1, which lays out a substantive prohibition, Section 7A is just a procedural requirement that

* The author is grateful to Valeria Calafiore of the New York office of Clifford Chance US LLP for her assistance in the preparation of these materials.
1 594 F. Supp. 2d 945 (N.D. Ill. 2009).
2 15 U.S.C. § 1. In enforcement actions by the FTC, conduct in violation of Section 1 is pursued under Section 5 of the FTC Act, 15 U.S.C. § 45.
prohibits the acquisition of beneficial ownership without first filing premerger notification and observing a waiting period.

Section 1 of the Sherman Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” The analysis of Section 1 in gun jumping cases is a standard ancillary restraints analysis conducted against the backdrop of a transaction— the merger—that is recognized as a lawful form of contract with ancillary coordination activities that would otherwise be considered suspect. Section 1 analysis applies to all transactions, even those that are not subject to reporting obligations under HSR. Moreover, transactions subject to HSR remain subject to Section 1 until the merger is consummated and even if they receive HSR clearance long before consummation. The receipt of clearance, however, should favorably affect the reasonableness analysis.

Section 7A of the Clayton Act provides: “[N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification . . . and the waiting period . . . has expired.” Section 7A applies only to transactions that exceed HSR’s statutory thresholds and satisfy certain jurisdictional requirements. This analysis focuses on whether the conduct at issue has had the effect of shifting beneficial ownership. While HSR rules do not define beneficial ownership, factors that are commonly used for identification of beneficial ownership include, for instance, the right to gain in the value of the underlying asset, the risk of loss in value, the right to receive distributions, the right to vote stock or designate management, and discretion over investment decisions.

II. Key Issues: Information Sharing and Control

The analytical basis for the challenges brought under Section 1 and Section 7A against premerger coordination may broadly be grouped into two categories: (1) information sharing, and (2) control. Information sharing activities generally include information exchanges for purposes of due diligence or transition planning. Control activities, in contrast, include interim covenants, other agreements, or other conduct that restricts the freedom of one or both of the merging entities to conduct business operations independently. Some activities fall into both categories.

Information sharing between entities engaged in merger discussions can result in actual or presumptive coordination that may adversely affect competition. Some sharing of information obviously is necessary in a merger situation, either as part of the parties’ due diligence or as part of their integration planning, and thus it is ought not to be viewed as inherently suspect conduct. Where the information to be shared is competitively sensitive and where its dissemination is unnecessarily broad or unprotected, however, the risk of challenge increases, particularly if the sharing results in the modification of one or both firms’ competitive conduct.

Premature control or influence by the purchaser over the seller’s business may also provide a basis for challenge. If provisions in the merger agreement provide the buyer with so
many attributes of control as to have effect of transferring beneficial ownership, they may be
deemed to violate HSR. If provisions in the merger agreement limit or prohibit the disposition
of material assets or material changes in the capital structure, they have sometimes been
construed as eliminating the acquired entity’s investment discretion and thereby prematurely
confering excessive control onto the purchaser. Beyond HSR considerations, the premature
transfer of managerial or operational control may raise Section 1 concerns if the acquiring entity
is setting prices, selecting customers, or specifying product lines.

III. Guidance through Speeches and Articles

Much of the guidance relating to premerger coordination has been provided by the FTC
and DOJ through speeches and public statements by enforcement officials. Some guidance,
often at odds with the government views, has come from the private bar in scholarly articles and
other materials.4 Not surprisingly, the enforcement agencies have often been materially less
permissive than the private bar, although the agencies themselves have split from time to time
on at least the intensity of their concerns.

The evolutionary tree traces to a debate during the 1989-94 period with respect to
information exchanged during premerger due diligence. A speech in April 1989 by the FTC’s
General Counsel expressed the view that

the most interesting topic in premerger reporting deals with the potential
for Sherman Act problems in premerger negotiations. More than once in
the past few years we have had reason to question the need for reciprocal
exchanges of competitively sensitive information between prospective
merger partners, whose transactions were otherwise properly filed.5

In a speech a half-year later, the GC added the concern that some merger negotiations might be
“a sham to conceal an explicit agreement with anti-competitive purposes.”6

The FTC’s position was pointedly rejected in 1990 by the Assistant Attorney General for
Antitrust, who explained that firms interested in merging would need to determine whether the
merger was commercially sensible and whether the efficiencies were available.7

4 In addition to the authority discussed in the text, one private sector compilation is ABA ANTITRUST SECTION,
Because drafting of the book was largely completed before the clarification of agency position in Blumenthal
Speech, infra note 19, and because the book relies primarily on Older authority, its analysis tends to be unduly
conservative.
5 Kevin J. Arquit, General Counsel, Federal Trade Commission, Remarks before the ABA Antitrust Section
Federal Trade Commission Subcommittee, 37th Annual Spring Meeting, at 8-13 (April 7, 1989) (“Arquit
Speech”).
6 Kevin J. Arquit, General Counsel, Federal Trade Commission, Remarks before the Cleveland Chapter of the
7 60 Minutes with the Honorable James F. Rill, Assistant Attorney General, Antitrust Division, U.S. Department
To suggest that this analysis has to be done in an abstract way, where there is not an exchange of useful, often sensitive, information, could have very far-reaching consequences that might deter the formulation of mergers and joint ventures.8

On a different panel at the same meeting, the Deputy Director of the FTC’s Bureau of Competition reiterated the FTC view and expanded on it by identifying two factors relevant to the FTC’s consideration of an enforcement action: (1) whether there existed legitimate justifications for the information exchange and (2) whether the parties took precautions to prevent unlawful collusion.9 In another speech a year later, the Deputy Director reiterated the concern over sham negotiation and added that Section 1 exposure is present until the day of consummation “where information about future business plans, obtained during pre-merger talks, allows companies to ‘jump the gun’ and cease acting as competitors before they have consummated the deal.”10

The views expressed by FTC officials of the era were criticized by the private bar. An article published in 1990 argued that the FTC’s position did not make sense from either a substantive or policy perspective. Substantively, “one firm acting alone, based on enhanced information, cannot by definition be engaged in any agreement on price” in violation of Section 1.11 From a policy point of view, the article said, the FTC’s position was flawed because it risked “creating antitrust doctrines that [would] chill a market for corporate control that must be allowed to operate efficiently and without unnecessary restraint.”12 On this view, a target company should be free to exchange information with a potential acquiror so long as the exchanges were covered by appropriate security and confidentiality restrictions.13

Further criticism came from the private bar in a 1994 article14 that argued that merging firms “must enter into agreements and engage in communications and conduct that go considerably beyond the norm for independent firms,” as this was necessary “to protect the transaction and the value of their respective interests in the transaction.”15 On this view, most of the routine premerger activity was lawful, and it was only beyond this “fuzzy line” that coordination could pose Section 1 or Section 7A risks.

Over the years, the debate over premerger coordination continued. The FTC and Antitrust Division have continued to provide additional guidance as to each agency position in

8 Id.
12 Id.
13 Id.
15 Id. at 54.
the form of speeches and public statements,\textsuperscript{16} most of which identify and elaborate on the consent settlements that are described below in Part IV of these materials.

Many of the statements, particularly from the FTC, expressed considerable hostility to premerger coordination. For example, in a 1998 speech the Director of the FTC’s Bureau of Competition expressed these contentions:

Where a definitive contract to acquire is joined with the exercise of operational control through a management contract before the expiration of the waiting period, beneficial ownership is transferred and the HSR Act is violated.

. . . .

When to-be-acquired firms release information that goes beyond due diligence because they are told to do so by their future bosses, they and their bosses are jumping the starting gun that is supposed to be triggered by the expiration of the waiting period. Early release of confidential business information to the buyer can prejudice antitrust relief, even when a consent order requires divestiture of only a single product. For example, marketing information once given can irretrievably handicap the ability of the business to be divested, or of a firm that buys a divested product line, to sell its products in competition with the buyer. Information that is exchanged for the purpose of planning can also increase interim competitive harm; for example, the existence of a corporate integration plan can induce critical employees to leave during the waiting period, thereby lessening competition between the buyer and the seller. Absent special circumstances, we consider that the release of information violates the HSR Act even when the acquired firm maintains its release is voluntary, unless the acquired firm can show that it would have provided such information to a firm other than the acquiring firm.\textsuperscript{17}

Similarly, the following year the Director contended:

once a purchase contract is signed, the parties may not proceed further with joint activity. In the jargon of HSR, signing the contract transfers some \textit{indicia of beneficial ownership}. By itself, that transfer is entirely lawful. But the transfer of additional indicia of ownership during the waiting period -- such as assuming control through management contracts, integrating operations, joint decision making, or transferring confidential business information for purposes other than due diligence inquiries -- are inconsistent with the purposes of the HSR Act and will constitute a violation.\textsuperscript{18}

A significant shift in FTC rhetoric (although not necessarily in actual enforcement practices) was signaled in a 2005 speech by the FTC’s General Counsel (a different individual

\textsuperscript{16}A list of illustrative speeches is compiled in Blumenthal Speech, \textit{infra} note 19, at n. 6.

\textsuperscript{17}William J. Baer, Dir., Bureau of Competition, Fed. Trade Comm’n, Report from the Bureau of Competition before the ABA Antitrust Section Spring Meeting 1998, at nn.25-26 and accompanying text (Apr. 2, 1998), \url{http://www.ftc.gov/speeches/other/baeraba98.htm}.

than at the time of the 1990 speeches and, as it happens, the author of these background materials). Noting that some practitioners heard the FTC’s message to prohibit conduct beyond what the agency intended, the speech explained that the FTC did not seek unduly to jeopardize the ability of merging firms to implement the transaction and achieve available efficiencies and that the agency understood that many forms of premerger coordination were reasonable and even necessary. It acknowledged that conservative counseling, particularly by those who are less experienced and sophisticated in antitrust matters, [has resulted in reading] the agencies’ interventions and statements over the past decade as implying a more absolutist approach than is actually the case. It is possible, too, that the public has mistakenly read the relief provisions in the consent orders settling the agencies’ interventions over the past decade as representing across-the-board prohibitions applicable to all situations, whereas the relief actually was targeted to particular violators whose objectionable conduct occurred as part of a wider array of activities.

The agencies’ overriding enforcement message has been, and remains, that merging firms are separate entities and that they must continue to reflect those separate identities until the applicable legal standards allow them to do otherwise. Under Section 1 the merging firms are not permitted to engage in collective actions that adversely affect competition; conduct is particularly risky where it is not reasonably necessary to protect the integrity of the merger transaction and where the merging firms are competitors or are otherwise in a relationship that affects competitive interactions in the marketplace. Under Section 7A the merging firms are not permitted to engage in conduct that effectively transfers beneficial ownership of the acquired business until the Hart-Scott-Rodino waiting period has ended. As a practical matter, the most serious transgressions have occurred where the merging firms prematurely combine significant aspects of their day-to-day operations and manage themselves as one. In the six cases that the agencies elected to bring, the conduct clearly violated this proscription. In none of the cases was the conduct designed or intended merely to facilitate an integration that would occur in the future. Rather, the parties acted as if the merger already had occurred. Where illegality is so flagrant, agency explanations and cautions need to be commensurately clear and forceful, as does relief.


\[20\] Id. at 6-7.
IV. Consent Settlements

A. “Control” Cases

United States v. Atlantic Richfield Co.\textsuperscript{21} ARCO agreed to acquire the assets of a business of Union Carbide. It paid the full purchase price of $220 million upon the execution of the merger agreement and before the expiration of the HSR period. The merger agreement limited Carbide’s rights to engage in extraordinary activities in the business, and it provided for the transfer of losses and potential profit gains from Carbide to ARCO. The FTC contended that this amounted to a premature shift in beneficial ownership. It also filed a substantive challenge to the transaction under Section 7. A consent settlement provided for limited divestitures to resolve the Section 7 claims and for each of the companies to pay a civil penalty of $1 million to resolve the Section 7A claim.

United States v. Atlantic Richfield Company and U.F. Genetics, Inc.\textsuperscript{22} U.F. Genetics entered into a contract to acquire Atlantic Richfield’s subsidiary, ARCO Seed. The contract immediately transferred the right to vote 49% of ARCO Seed’s stock. The FTC contended that this amounted to a premature shift in beneficial ownership in violation of Section 7A. A consent settlement provided for ARCO Seed and U.F. Genetics to pay a civil penalty of $290,000 and $150,000 respectively.

United States v. Input/Output, Inc.\textsuperscript{23} Input/Output (I/O) sought to purchase Laitram’s subsidiary, DigiCOURSE (Digi), a manufacturer of cable positioning systems. I/O used Digi’s cable systems in the seismic data acquisition systems that it manufactured. After signing the acquisition agreement and before any HSR filings, I/O began to integrate its operations and personnel with Digi. I/O started to restructure its company into product-based divisions to better incorporate Digi. I/O took several additional measures to incorporate Digi, including appointing Digi officers to leading positions within I/O, moving Digi officers to I/O offices, and giving Digi personnel new I/O e-mail addresses and business cards. The Antitrust Division viewed this as premature integration in violation of Section 7A. A consent settlement provided for each of the companies to pay a civil penalty of $225,000.

FTC Informal Staff Opinion.\textsuperscript{24} B agreed to purchase S. The merger would result in B’s firing of many of S’s employees. S notified its employees about the merger and the potential consequences for their jobs. To motivate employees, S wanted to send letters to employees saying that they would receive enhanced severance benefits if they stayed on through the closing period. S wrote to the FTC to ask whether such conduct would be considered gun-jumping. In an informal opinion, FTC staff advised that this conduct was distinguishable from Input/Output and would not violate Section 7A because S would be acting independently from B, and B would not be exercising “operational control” over S’s employees.

\textsuperscript{22} 1992-1 Trade Cas. (CCH) ¶ 69,803 (D.D.C. 1992).
\textsuperscript{23} No. 99-0912 (D.D.C. Apr. 12, 1999).
\textsuperscript{24} No. 0312002 (Dec. 5, 2003).
United States v. Qualcomm, Inc. Qualcomm and Flarion negotiated to merge. Before the consummation of the merger, Qualcomm exercised significant control over Flarion’s day-to-day operational activity, such as by hiring consultants and employees, engaging in marketing activities, and choosing customers. On occasion, Qualcomm also rejected price terms offered by Flarion to its customers. The Antitrust Division viewed this as impermissible exercise of control and brought an enforcement action, which concluded with a consent settlement providing for a civil penalty of $1.8 million.

B. “Information Sharing” Case

In re Insilco Corp. Insilco agreed to purchase Helmut Lingerman’s aluminum tubing manufacturing division. Before the expiration of the HSR waiting period, Helmut shared with Insilco customer specific price information, future pricing plans, and competitive strategies, as well as all pricing formulas. The FTC also filed a substantive challenge to the transaction under Section 7. A consent settlement provided for the divestiture of two plants to resolve the Section 7 claims and Insilco not to receive non-aggregated customer specific information to resolve the Section 7A claim.

C. Mixed Cases

In re Torrington Company and Universal Bearings, Inc. During the HSR waiting period applicable to a proposed merger between Torrington Company and Universal Bearings, Universal told axle shaft consumers to deal only with Torrington. Universal at one point refused to quote a price to a customer attempting to purchase axle shafts. According to Universal, this apparent customer allocation was meant to “speed up” the process and “keep the business in the family.” A consent settlement provided for each party not to consolidate its business in any acquisition with that of the other party prior to consummation. The companies subsequently abandoned the merger.

United States v. Titan Wheel International, Inc. Titan entered into an agreement to purchase a tire plant from Pirelli Armstrong. On the same day of execution of the purchase agreement, Titan took control over Pirelli’s plant, all its inventory, equipment, and machinery, and received customer lists and proprietary information from Pirelli. Titan’s activities after execution of the purchase agreement took place before any HSR filings. A consent settlement provided for Titan to pay a civil penalty of $130,000. The merger was abandoned.

In re Commonwealth Land Title Insurance Co. Commonwealth and First American entered into agreement to consolidate the operation of two title facilities in the Washington, DC area. The companies were the only two firms operating title facilities in the geographic market as defined. While the transaction was pending, the companies agreed to terminate any separate customer agreements, and they required customers to sign new “Interim Plant Use Agreements”
in which the companies had a common price, which for many customers was substantially higher than prior prices. A consent settlement provided that Commonwealth would restore operation of its independent facility, that prices would be reset to former levels, and that customers would be refunded overpayments. In addition, Commonwealth was precluded for a period of 10 years from merging, combining or consolidating its operations with any other title plant without prior notice to the FTC.

**United States v. Computer Associates Int’l, Inc.** Computer Associates agreed to acquire Platinum. CA installed its own employees in Platinum offices, Platinum gave employees of CA competitively sensitive information about prices and what discounts were given to specific customers, as well as the justifications behind giving such discounts. A consent settlement provided for a civil penalty of $638,000.

**United States v. Gemstar-TV Guide International, Inc.** Gemstar and TV Guide International began merger discussions in 1999. Before consummation of the transaction, the companies agreed to “slow roll” their separate customer negotiations. They further agreed to split services: TV Guide was to market to cable service providers only and Gemstar was to focus on consumer electronics. The companies collectively set specific prices and terms and agreed to share competitively sensitive and customer specific information. A consent settlement provided for a civil penalty of $5,676,000, the statutory maximum available in the case.

V. **Omnicare**

The conduct in *Omnicare* related to matters with precursors in the line of consent settlements -- the sharing of competitively sensitive information, and a covenant restricting target’s ability to enter into material contracts without purchaser’s approval. The facts were as follows:

UnitedHealth Group and PacifiCare Health Systems, Inc., two competing health insurance providers, initiated merger discussions, including a period of due diligence, in January 2005. On July 6, 2005, the two entities entered into a Merger Agreement, in which UnitedHealth agreed to acquire PacifiCare for $8.8 billion. A provision in the Merger Agreement prohibited PacifiCare from entering into any contracts prior to closing “without [UnitedHealth’s] prior written consent...[where PacifiCare] or any of its Subsidiaries [would] incur a liability in excess of three million dollars” (the “Approval Provision”).

While UnitedHealth and PacifiCare were in merger talks, each of them was also independently negotiating an agreement with Omnicare, Inc., the nation’s largest institutional pharmacy. A contract with an institutional pharmacy such as Omnicare would have permitted the insurer to be certified for participation in the federal government’s Medicare “Part D” program, which requires health insurers to demonstrate that they can provide pharmacy services to individuals in long-term care facilities. A week after the Merger Agreement was signed, PacifiCare broke off its negotiation with Omnicare and proceeded to obtain Medicare

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certification without Omnicare in its pharmacy network. After PacifiCare was certified, it resumed its negotiation with Omnicare, striking a deal more favorable than UnitedHealth, which was still not Medicare certified, was able to achieve. After the merger closed, UnitedHealth abandoned its contract with Omnicare, choosing instead to use the more advantageous terms of the PacifiCare-Omnicare contract.

Omnicare filed suit against both UnitedHealth and PacifiCare alleging, among other things, that the two entities violated Section 1 of the Sherman Act by improperly sharing competitively sensitive information prior to the consummation of the merger, as well as by excessively coordinating the preclosing activities as demonstrated by the Approval Provision in the Merger Agreement.

The challenge was based upon three grounds. First, Omnicare alleged that the Merger Agreement by its own terms established the existence of a conspiracy in restraint of trade because it gave acquiror UnitedHealth premature control over target PacifiCare. Second, Omnicare alleged that PacifiCare’s actions prior to consummation were economically irrational and could only be explained as being the product of concerted action with UnitedHealth. Third, Omnicare alleged that UnitedHealth and PacifiCare engaged in excessive and improper sharing of competitively sensitive information, including information pertaining to each of their respective contract negotiations with Omnicare, which resulted in a conspiracy that injured Omnicare. To establish that these activities violated Section 1 of the Sherman Act, Omnicare needed to prove three elements: (1) the existence of a contract, combination, or conspiracy between buyers; (2) an unreasonable restraint of trade in the relevant market; and (3) injury caused by the restraint.

The court dismissed each of Omnicare’s allegations on summary judgment, finding that there was insufficient evidence that the premerger activities of UnitedHealth and Pacificare, or their Merger Agreement, gave rise to an illegal contract, combination or conspiracy as required to establish the first element of a Section 1 violation.

A. Theory of Premature Control

Omnicare’s challenge to the Merger Agreement itself focused on a provision that required PacifiCare to obtain UnitedHealth’s approval before entering into any transaction, other than in the normal course of business, that exceeded $3 million. According to Omnicare, this provision set such a low threshold that it essentially prematurely granted UnitedHealth control over all of PacifiCare business, including its ability to enter into Part D contracts such as Omnicare was negotiating with PacifiCare. In support of its argument, Omnicare relied on the consent settlements in Computer Associates and Gemstar-TV Guide. According to Omnicare, the Antitrust Division in both actions challenged an approval provision similar to the one in UnitedHealth’s merger agreement to find that the merger agreements gave rise to a conspiracy in restraint of trade.

The court rejected Omnicare’s argument on several grounds. First, the court found that the approval provision at issue could not factually establish the conspiracy alleged by Omnicare because it expressly exempted approval on Part D contracts. Second, other undisputed evidence
indicated that PacifiCare did not ask for UnitedHealth’s approval prior to entering into any Part D contracts with Omnicare or with any other pharmacy provider. The court rejected Omnicare’s reliance on the consent decrees, which had no precedential value and involved provisions that were clearly distinct from the one challenged by Omnicare. For instance, the court noted that the provision at issue in *Computer Associates* prevented the target from setting prices below a certain level and thus did not seem to have any legitimate motivation. The provision at issue in *Gemstar-TV Guide* was similarly distinguishable.

The court noted that approval provisions are common practice in merger agreements and therefore could not provide the basis to conclude that a conspiracy in restraint of trade exists.

**B. Theory of Economic Irrationality**

Omnicare’s second theory -- that certain business strategies adopted by PacifiCare during the preconsummation phase evidenced an illegal conspiracy -- focused on contract negotiations between PacifiCare and Omnicare. PacifiCare had been in negotiation with Omnicare over a contract that would have permitted it to obtain certification as a national prescription-drug-plan (“PDP”) sponsor. Prior to consummation, PacifiCare broke off its negotiation with Omnicare and began negotiating a similar contract with an Omnicare competitor. According to Omnicare, this decision made no economic sense for PacifiCare, because it jeopardized PacifiCare certification and risked the loss of $64 million in Part D profits that PacifiCare was expecting in 2006.

The court dismissed these allegations as not probative of any illegal conspiracy. Instead, the court found that PacifiCare’s business strategy made business sense since PacifiCare was able to get a better contract with the Omnicare competitor and obtain the requisite PDP certification. The fact that PacifiCare subsequently was able to negotiate a better bargain with Omnicare was not evidence that PacifiCare acted against its economic interest. The court noted that in its second round of negotiations with PacifiCare (i.e., after PDP certification), Omnicare did not attempt to bargain for a more favorable contract, and thus the fact that PacifiCare obtained better terms could not be evidence of an antitrust conspiracy.

**C. Theory of Excessive Information-Sharing**

As to Omnicare’s third theory -- that preconsummation communications and information sharing between UnitedHealth and PacifiCare provided direct evidence of the existence of a conspiracy -- the court noted the absence of legal standards establishing when premerger discussions amount to anticompetitive conduct. The court explained that it needed to strike a sensitive balance between permitting merger talks without unduly exposing firms to antitrust liability and ensuring that rivals do not use merger transactions as a tool to exchange competitively sensitive information. The court found that while some of the information exchanges raised some doubts, they were insufficient on their own to establish a Section 1 violation.

In particular, the court found that the sharing of competitively sensitive information outside of the parameters established in the confidentiality agreement between PacifiCare and
UnitedHealth created a risk that the information shared could have been used in anticompetitive ways. The court held that this evidence “coupled with other evidence of improprieties during merger negotiations…might well be inconsistent with independent conduct.”32 The court found, however, that other exchanges of information challenged by Omnicare were appropriate as ancillary to the merger. For instance, the court was not troubled by the sharing of a form contract that did not contain specific information, nor was the court troubled by the sharing late in the merger process of price information in the form of averages and ranges rather than specific bargained-for rates.

32 594 F. Supp. 2d at 969.