Information Sharing by Competitors: Minimizing Antitrust Liability
Avoiding Gun-Jumping in Mergers and Competitor Collaborations

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1pm Eastern    |    12pm Central   |   11am Mountain    |    10am Pacific

Today’s faculty features:

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Information Sharing Between Competitors

December 14, 2010
Strafford CLE Webinar

William Blumenthal
This Presentation

- Focus on mergers, joint ventures, and other legitimate collaborations
- Limited to arrangements between competitors
  - Standards generally more permissive when arrangements do not involve competitors
- Excludes issues arising from cartels and naked restraints
  - Important, but not today’s presentation
  - Distinction from today’s issues sometimes blurs
Two Broad Families of Issues

- “Gunjumping” before merger closing or JV formation
  - “Information sharing / diligence” strand
  - Distinct from “premature control” strand
- Ancillary restraints and collateral effects in the context of ongoing cooperation
  - Examples on next slide
Ongoing Cooperation: Examples

- Joint ventures
  - Where co-venturers compete with each other outside the venture
  - Where a co-venturer competes with the venture

- Joint activity often not performed through entities
  - Joint development arrangements
  - Joint marketing and promotion
  - Joint purchasing

- Standard-setting organizations
Ongoing Cooperation: Examples 2

- Distribution by vertically integrated firms
  - Where a manufacturer sells through independent distributors and through own distribution arm
  - Where a component manufacturer sells to independent downstream firms and transfers in internal manufacturing operations

- Trade association data collection and dissemination

- Benchmarking activities
Some Key Authority on Jointness

- Leading historical Supreme Court cases on price information
  - Maple Flooring (1925)
  - Cement Manufacturers Protective Ass’n (1925)
  - Container Corporation (1969)
  - United States Gypsum (1978)
Some Key Authority on Jointness 2

- Some other key Supreme Court cases
  - National Society of Professional Engineers (1978)
  - Broadcast Music (1979)
  - Maricopa County Medical Society (1982)

- Three lower court cases worth mention
  - Addyston Pipe (6th Cir. 1898), aff’d (1899)
  - United States v. Morgan (S.D.N.Y. 1953)
  - United States v. Brown University (3d Cir. 1993)
Some Key Authority on Jointness 3

- Major government policy statements
  - Health Care Statements (1996)
  - Various business review letters
Main Legal Principles

- Information exchange as discussed here is subject to rule of reason treatment
- Certain content is riskier than other content
  - Price information is riskier than cost and other non-price information
  - Detailed information is riskier than aggregated information
    - Multiplicity of sources
    - Granularity of content
  - Future information is riskier than stale information
But Uncertainties Remain

- When are buffers required?
  - Internal firewalls
  - Third-party intermediaries

- What is required as to efficiencies?
  - When must they be shown?
  - By whom?
  - How proven?
But Uncertainties Remain

- When are buffers required?
  - Internal firewalls
  - Third-party intermediaries

- What is required as to efficiencies?
  - When must they be shown?
  - By whom?
  - How proven?
  - When presumed?
    - Even antagonists recognize potential procompetitive benefits and efficiency gains
But Uncertainties Remain

- How is competitive effect to be assessed?
  - Who has the burden of proving effect?
  - How are benefits and adverse effects to be measured?

- Material differences emerging between US and Europe
  - US standards seem to be more permissive
  - Alan Ryan will be discussing in several minutes

- We will be working through examples of the various uncertainties later in this program
Special Case: The Premerger Context

- Joe Krauss will be addressing in greater detail momentarily
- To anticipate his remarks:
  - Concern expressed by FTC and DOJ beginning around 1990
  - Has led to protocols governing the sharing of competitively sensitive information between competitors
  - Concern largely limited to competitors
    - But parallel strand of “premature control” applies to non-competing merger parties as well
Special Case: The Premerger Context 2

- Mostly developed through agency consent settlements
  - Insilco (1998)
- All involve egregious conduct
- One published case in federal courts
  - Omnicare (N.D. Ill. 2009), on appeal to 7th Cir.
Information Sharing Between Competitors

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Information Sharing by Competitors: In the Premerger Context

Joseph G. Krauss

December 14, 2010
Applicable Antitrust Laws

• Sherman Act Sec. 1 – prohibits contracts, combinations, or conspiracies in restraint of trade
  • Also applies to company’s conduct in premerger time period

• Clayton Act Sec. 7a (HSR Act) – prohibits certain mergers, acquisitions, and joint ventures from being consummated before end of the HSR waiting period
  • Merging parties are prohibited from “acting as one” prior to expiration of HSR period
Guidance from Merger Cases

- Insilco (1998)
- Omnicare (2009)
U.S. v. Gemstar/TV Guide

• Parties were competitors in providing interactive program guides
• Merger stemmed from settlement discussions of a pending patent infringement litigation
• DOJ alleged:
  – “Slow roll” agreement — agreed to delay competing for customers until able to act jointly
  – Allocation of customers — TV Guide agreed to handle cable operators while Gemstar to focus on consumer electronics
  – Agreement on prices and terms to be offered during pre-consummation period
• Remedies:
  – Civil penalties — $5.6 million
  – Optional rescission of contracts
  – Injunction against these acts in future transactions
Omnicare, Inc. v. UnitedHealth Group, Inc., et al. (2009)

- Plaintiff (a customer) alleged that parties shared “strategic” information related to its businesses before the merger was closed.
- Plaintiff alleged this information impacted subsequent negotiations and led to it paying higher reimbursement rates.
- Trial Court decision:
  - acknowledged the need for a buyer to obtain information from a seller during due diligence;
  - noted need to strike a balance between legitimate business conversations during merger talks and opening the door for “sham” merger negotiations with free exchange of competitively sensitive information between rivals;
  - Court set forth factors to consider, including:
    (a) who was involved in the information exchange and what precautions were taken to limit distribution of competitively sensitive information,
    (b) whether the specific information exchanged was necessary to evaluate the transaction,
    (c) whether the information exchanged was competitively sensitive,
    (d) when the information exchange occurred, and
    (e) whether pre-merger integration planning was clearly prospective in nature.
“On the one hand, firms proposing to merge are not yet a single entity, and their activities are subject to Section 1 of the Sherman Act, which governs collective action in restraint of trade . . . [and] Section 7A of the Clayton Act, more commonly known as the Hart-Scott-Rodino Antitrust Improvements Act . . .

On the other hand, the merging firms have a legitimate interest in engaging in certain forms of coordination that would not be expected except in the merger context. The most common forms are due diligence and transition planning, both of which necessarily will involve exchanges of information at levels of detail that would not normally occur among independent firms. In addition, merging firms sometimes enter into covenants or engage in practices that would not normally be seen among independent firms. These forms of premerger coordination will often be reasonable and even necessary to implement the legitimate objectives of the merger agreement.”

Why Is This Still Important?

- Investigations of information sharing can be extremely costly and burdensome
  - Threat of treble damages
  - Substantial civil damages
  - Substantial criminal penalties for some types of antitrust law violations
- M&A transactions threatened
  - An investigation can significantly slow antitrust review of a transaction
    - Substantial document requests
    - Detailed interrogatories
    - Depositions and interviews
    - Major distraction
  - Can delay consummation of merger and put transaction at risk
  - Investigations can result in penalties and loss of business
  - Can happen even if underlying transaction does not raise serious issues
General Guidelines
A Balancing of Interests in Sharing Information Premerger

Legitimate Interests of the Parties

- Value assets
- Preserve value of deal prior to closing
- Integration planning

Government’s Enforcement Goals

- Maintain the parties as independent companies and preserve competition prior to closing
- Preserve the government’s ability to investigate the competitive consequences of a transaction prior to closing
- Ensure that the antitrust agencies can obtain an effective remedy
General Guidelines

• Avoid exchange of information that is competitively sensitive or impose precautions to limit distribution of competitively sensitive information

• Limit information exchanged to that which is necessary to evaluate the transaction or for legitimate transition planning

• Manage the timing of the information exchange – the closer to closing (and after premerger clearance), the better

• Limit premerger integration planning to that which is clearly prospective in nature – plan but not implement prior to closing
What is competitively sensitive information?

- Non-public current or future prices
- Non-public current or future marketing plans
- Competitively sensitive customer-specific or contract-specific data
- Non-public current or prospective profitability or cost data
- Information regarding specific business opportunities for which the parties might compete on prior to closing
- Research and development expenditures
- Trade secrets
- Non-public information on output expansion or reduction plans.
Guidelines for Exchanges of Competitively Sensitive Information

- Avoid disclosure of information which is competitively sensitive for the client, their suppliers or customers, or others
  - Historical information on these topics is generally somewhat less sensitive
- When sensitive competitive information must be disclosed, limit the details of the disclosure and the people receiving the information
  - Do not disclose to pricing or marketing personnel
  - To the greatest extent possible, limit exposure to people who are not involved in any competitive or other business activities between the parties (e.g., accountants, consultants, lawyers and operations personnel from other areas of the parties’ operations)
Concluding Thoughts
Summary Guidelines

• Company and Target must remain independent companies until closing and should not take any action that reduces that independence or reduces any competition between them.

• But, due diligence/integration teams can and should be allowed to review non-public information to properly value the business and make plans that will enable the parties to integrate their operations after the acquisition has closed.

• There should be no discussions, agreements, understandings, or exchanges of information that would eliminate or reduce any competition between the companies before the acquisition is completed.

• Company and Target cannot become involved in each other’s day-to-day operations.
Biography

Joe Krauss is a partner in the Antitrust, Competition and Economic Regulation Practice Group of Hogan Lovells US LLP, resident in the firm’s Washington, D.C. office. His practice is devoted entirely to the area of antitrust and economic regulation, with a particular emphasis on merger and acquisition counseling and litigation in all industries, and before federal, state, and foreign antitrust authorities. He has counseled clients in numerous matters relating to mergers and acquisitions, joint ventures, distribution issues, Sherman Act, and Hart-Scott-Rodino Act compliance. Joe has represented clients from a number of industries, including automotive, electric utility, manufacturing, health, natural resources, e-commerce, computer hardware and software, and telecommunications, before both the U.S. Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice in merger investigations, civil nonmerger investigations, and in compliance matters before the agencies.

Joe joined Hogan & Hartson in 1999 after serving 11 years at the FTC. During his tenure at the commission, he served in a variety of capacities, most recently as the Assistant Director of the Premerger Notification Office and Acting Assistant Director and Deputy Assistant Director of the Mergers II Division where he was responsible for the management and oversight of investigations of proposed mergers in a number of industries, including computer, chemicals, natural resources, and automotive parts. Joe’s career at the commission included serving two commissioners as an attorney advisor counseling on matters of antitrust policy and enforcement.

He has spoken numerous times on antitrust enforcement and policy. In addition, he has traveled to Eastern Europe to assist competition agencies there in their development and enforcement of antitrust law and policy, and has met with numerous representatives of competition bureaus throughout the world to advise and discuss issues of antitrust enforcement and policy. He has spoken at international competition conferences in Bonn, Germany; Capetown, South Africa; Bogotá, Columbia; and Moscow. Joe is a nongovernmental advisor to the Mergers Working Group of the International Competition Network (ICN).

Joe recently was appointed Trustee at the request of the U.S. Department of Justice to oversee the divestiture of a steel mill to resolve competitive concerns raised by a merger of international steel producers. Joe oversaw the sales process and negotiated a definitive purchase agreement valued at $810 million.

He has also been profiled in a number of prestigious publications, including the most recent Chambers USA, which noted, "Formerly at the FTC, Joseph Krauss... gained client commendation for his 'strategically sound' advice and 'strong negotiation skills with the agencies.'"

**EDUCATION**

J.D., Delaware Law School of Widener University, 1983
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Information Sharing by Competitions
The EU perspective

Alan Ryan
14 December 2010
No “one size fits all” approach to information sharing across all scenarios

Different approaches to

- Pre-merger discussions
- JVs: within the JV, JV to parent, parent to parent
- Efficiency – enhancing information exchange vs hard core cartels
Pre – merger discussions

- Art 7(I) EC Merger Regulation prohibits “implementation” prior to clearance
- No case law on information exchange as implementation (some decisions on deal closing) but several investigations
- Pre-merger information exchange also falls under Art 101 TFEU, again no specific case law
- Standard practice is to apply US practice to pre-merger exchanges, including due diligence but to apply greater caution as no “legitimate interest” exception
Joint Ventures

- No JV exception
- Only exception to “standard” competition law is for subsidiary with no independent autonomy from parent (see Viho), i.e. wholly owned subsidiary or majority owned subsidiary with small, inactive other shareholders
- Numerous cases of a JV or affiliate being fined for cartel behaviour separately from its parents
- Several cases of parties being fined for conspiracy with a subsidiary (e.g. Kodak)
- Even a “concentrative JV” cleared under the EC Merger Regulation is an independent party from its parents so can be fined for parent-JV conspiracy
Joint Ventures

- Need for strong firewalls between parent and JV and parent to parent
  
- e.g. COMP/M.4760 Amadeus/Sabre/JV (Moneydirect), para 25: “The Commission has analysed closely the arrangements that will be put in place by Amadeus and Sabre to prevent anti-competitive information “spill-over” to and from the JV. The Joint Venture Agreement specifies which types of information will be shared between Moneydirect, Amadeus and Sabre. No information that is not normally available to shareholders of a JV will be disclosed by Moneydirect to its parent companies. As a general rule, information obtained and produced by the JV will be treated as confidential and will not be made available to the parent companies. Amadeus’ and Sabre’s access to information will be limited to their own respective transactions. The parties state in the Joint Venture Agreement that they consider it paramount to keep confidential pricing and transaction information of the JV’s customers. The only persons from the parent companies that will be granted access to detailed information about customer’ payment transactions will be employees formally seconded to the JV that do not have any sales or managing function within Amadeus or Sabre.”
Legitimate efficiency – enhancing information exchanges

- “Above the Table” information exchanges often, but not always, analysed under Art 101 (3) TFEU (Similar purpose to rule of reason analysis): focus on type of information exchanged and market structure might it lead to reducing competitive uncertainty

- “But not always”: depends on perceived purpose of exchange: if profit maximisation, then even if done at customers’ request, real risk of being sanctioned as a hard core cartel

- “under the table” information exchanges always investigated as hard core cartel e.g. Plasterboard
UK Tractor Registration Exchange

- Commission decision of 1992, upheld by European Court of Justice (Case C-7/95P)

- UK Government Scheme for exchange of information on tractors registered by type and location

- UK tractor sales market considered oligopolistic

- Very detailed information: retail sales and market shares pre locality (based on post code), tractor type and time period

- Information only available to producers, not consumers

- Exchange found to infringe the Art 85, now 101
Woodpulp

- Commission Decision: system of price announcements considered to support an illegal cartel
- European Court of Justice annulled: price announcements might be rational response to need for sellers and buyers to minimise commercial risk
EC Merger Regulation clearance for Global Freight Exchange: B2B platform “facilitating the sale of air freight capacity between air freight forwarders (the buyers) and air freight carriers (the sellers)”

“GF-X is setup in such a way (i.e., confidentiality rules, firewalls safeguards etc) as to prevent the exchange of commercially sensitive information between the members. The Commission’s investigation confirmed that such an exchange is technically impossible. In particular, member carriers will not have access to the air freight fares or capacity figures of other member carriers. Moreover, sales negotiations will be conducted on a bilateral basis and as such they will not reveal more information than is currently made available to buyers under the existing sales channels (i.e., telephone or fax). the creation of the joint venture will therefore not lead to any co-ordination for the competitive conduct of the parent companies on the market for air freight transport”
Hypothetical #1

Giant Defense Manufacturer (GDM) produces nosecones, rockets, and engines, which together make a "rocket system." It is the only fully-integrated supplier of rocket systems (at least of the type relevant here). Specialized Engine Supplier (SES) purchases nosecones and rockets from GDM, which SES then marries up with its proprietary engines to offer a competing rocket system. A lot of technology goes into each of the components, and the components need to work together, so that SES needs to provide detailed technical specifications to GDM. In addition, to develop its bids for the rocket systems that it sells, SES needs detailed transfer pricing for at least the nosecones and rockets that it purchases from GDM. Are there any limits on GDM's using its knowledge of SES's technical specs and costs (that is, the price received by GDM, the cost to SES, for the nosecones and rockets) when it frames the pricing for its own rocket system?
Hypothetical #2

Major Sports League has 20 teams in various geographic areas. All of the teams sell paraphernalia, such as caps and jerseys. Each reserves the right to license its own marks to vendors and to sell the paraphernalia. In addition, each licenses Major Sports League Marketing (MSLM), a joint venture of the 20 teams, to use and sublicense its marks to paraphernalia vendors, with MSLM then selling the products to national accounts, which have a presence in the geographic area served by every team. Are there any limits on the respective teams' sharing information with MSLM about the prices at which they sell their individual paraphernalia? And are there any limits on the information that the individual teams, as co-owners of MSLM, receive about the prices at which MSLM sells to the national accounts?
Hypothetical #3

Widget Standard Setting Organization (WSSO) has a central role in developing voluntary standards on key technologies that are central to the production of modern-day widgets, and 200 widget producers, their suppliers, and their customers are all members. WSSO passes a bylaw requiring that members disclose all patents, patent applications, and in-lab technologies that may reasonably anticipated to give rise to patent applications within two years. Legal or illegal?

Midsize Widget Company (MWC), with roughly a 5% share of widget sales, is developing a break-through technology in its labs, and it believes the technology will enable it to leapfrog the rest of the industry. The technology can be invented around, though, so MWC believes it will yield a material competitive advantage for only three years from the date that rivals learn of its existence. In light of WSSO's bylaw, it files a notice objecting to the WSSO bylaw and asserting that they bylaw is unlawful. In return, WSSO cancels MWC's membership and bars MWC from technical meetings, depriving MWC of access to information about forthcoming standards with which the new technology would have to operate. Legal or illegal?