A PRACTICAL GUIDE TO ANTITRUST COMPLIANCE

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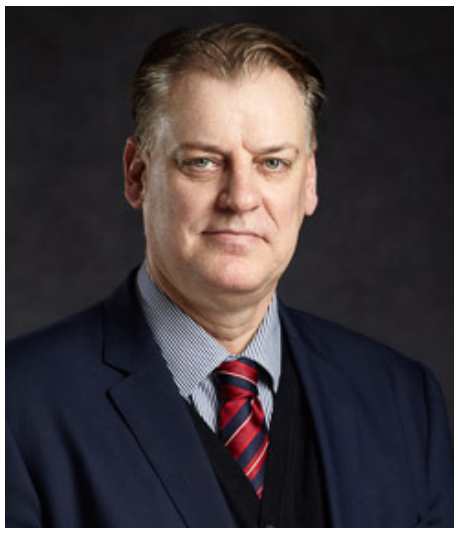
Westlaw



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"Competition brings out the best in products and the worst in people"
- David Sarnoff

ABOUT THE AUTHOR

Kees Jan Kuilwijk focuses his practice on EU competition matters across a wide variety of industries and business sectors, including air and maritime transport, broadcasting, consumer goods, internet & e-commerce, film, TV, music & media, oil & gas, telecoms & technology, and sports.

Dr. Kuilwijk has over 20 years' experience in competition law, including advising on European Commission investigations in cartel and abuse of dominance cases, merger filings, and all aspects of competition litigation.

Kees Jan has developed and helped clients implement effective global compliance programmes to improve risk management and reduce violations. He has designed and implemented employee education programmes, and has prepared content for online antitrust and competition law courseware.

In addition, Kees Jan has extensive experience counseling clients under antitrust law on a broad variety of commercial agreements including exclusive and selective distribution agreements, R&D and production joint ventures, sales joint ventures, information exchange systems, various forms of horizontal cooperation, trademark, patent, know-how and copyright licensing, exclusive and selective distribution agreements, online platforms, franchising, and other vertical agreements.

Kees Jan holds a first degree in business law from Leyden University and a Ph.D. in European Law cum laude from the European University Institute in Florence. He also studied in Germany (University of Tübingen and the Max-Planck Institute in Heidelberg) and the United States (Harvard). During his career, he taught competition law at various universities and worked for different UK law firms and an American firm. He has written extensively on various aspects of antitrust law and repeatedly has been selected for inclusion in well-known legal guides such as the Legal 500.

AKD is one of the largest law firms in The Netherlands. With a team of 220 committed lawyers, civil-law notaries and tax lawyers, AKD delivers high quality legal services and tax matters in nearly all legal fields, based on a full-service approach. The firm's client base is diverse and varies from large multinational companies to local family owned businesses, from financial institutions to municipalities and hospitals.

AKD's competition team in Brussels provides clients with Dutch and EU competition law advice. Our lawyers handle cartel investigations, civil damages claims, merger filings, and everyday counselling for multinational corporations and SMEs in The Netherlands and around the world.

Our competition lawyers regularly develop and help clients implement individually tailored global compliance programmes. They also conduct antitrust compliance audits, and design and implement employee education programmes, critical to developing a culture of compliance that diminishes the risk of antitrust violation.

AKD works with clients to ensure that they are prepared for a dawn raid by advising on and preparing dawn raid guidelines and procedures for employees to follow in the event of an inspection by competition authorities.

The firm's cross-practice investigations team helps clients manage the risks posed by investigations from antitrust, anti-corruption, financial services and other regulators.

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INTRODUCTION

One of a company's top priorities should always be to perform adequate antitrust due diligence before consummating a merger or acquisition. Conducting a thorough investigation on a target company ahead of time could expose potential legal and business risks that may impact business in the long run. Companies should involve their antitrust counsel in any merger/joint-venture transaction from the first day it is being considered as an option in order to adequately identify and/or minimize risks.

The due diligence investigation is important for a number of reasons, but being able to accurately evaluate a merger or acquisition's value is at the top of the list. What if you identify an antitrust compliance violation in the target company? The costs associated with such a violation need to be factored into the equation for the transaction. It is also important to know how the target company generally conducts business – it would be detrimental to acquire a company that has a pattern of conduct not in compliance with antitrust regulations; the purchasing company risks damaging its own reputation, as well as face possible legal liabilities.

EFFECTIVE DUE DILIGENCE

There are a certain number of key issues that should always be part of an effective due diligence programme during a merger or acquisition campaign.

First, does the target company have an existing antitrust compliance programme and is it up to date with current regulatory requirements and laws? Does the programme have the backing of the target business' executives? Are there programme materials that can be reviewed?

In addition, have protocols been put in place as a result of (any) prior antitrust violations? It is vital to uncover any prior violations at this stage in the proceedings – surprises are unwelcome at any stage but it's better to uncover any negative information at the beginning of a potential deal so that possible consequences can be properly assessed.

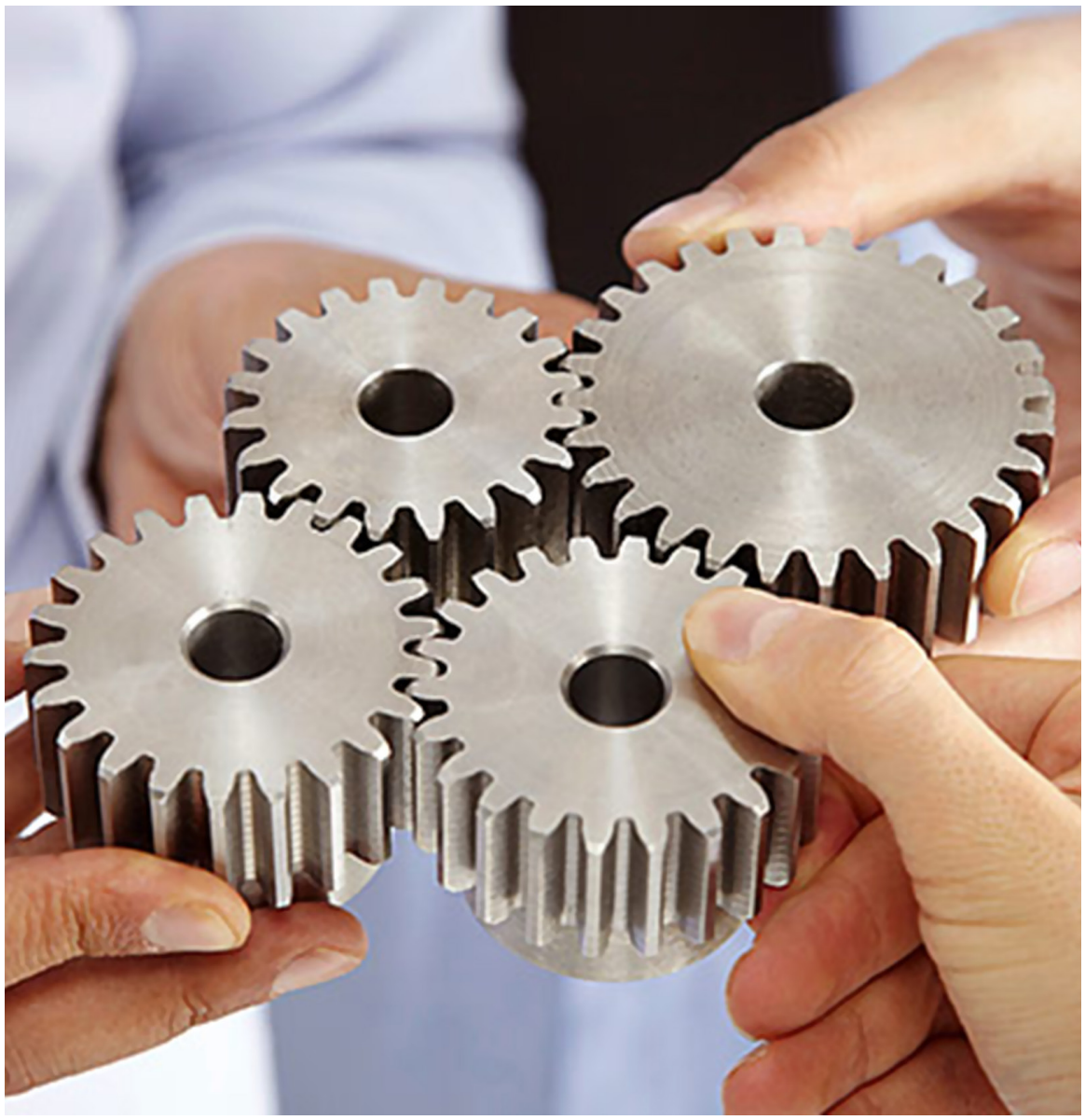
Related to this, but still worth noting on its own, does the target company enforce its compliance policies? What is the "compliance culture," e.g. are employees encouraged to follow policies, report violations and attend compliance training classes? Is there a whistle blower hotline and has it received any calls? Review any records of any calls made to a whistle blower hotline if possible, though respecting the confidential nature of such information.

Next, performing a thorough assessment of the target company's risk profile is required. Are there any trends within the industry that may impact the likelihood and speed of antitrust or regulatory approval? What about trends that may make approval less likely? Who does the target company do business with and are they the subject of any antitrust investigations? Does the company partner with companies or other entities with compliance issues?

Furthermore, where does the company do business? If the transaction involves national security or foreign investment issues, you may face roadblocks getting the transaction approved. The Exon-Florio provision gives the President of the United States the power to suspend or block a transaction for reasons of national security. As is the theme of our discussion here, it is always better to uncover this information earlier than later.

The purchasing company should also be certain to ask about any and all compliance investigations, internal or external, that are currently taking place. This may not be a showstopper for the transaction, but knowing about any ongoing, pending or anticipated investigations helps the purchaser estimate potential consequences in dealing with them, or possibly ceasing operations in an area that has a compliance issue.

Other areas that could be investigated include whether any antitrust sanctions, penalties or damages have been imposed on the target company, whether there are any informal agreements or sales arrangements in place, a review of the board of directors and any shares they may hold in competing companies, and a review of any existing merger control clearances. Along with this last item, it would be wise to insure that the target company has not engaged in "gun jumping," which



There are numerous regulatory requirements that jurisdictions such as the United States and Europe have put into place in order for governing bodies to fully vet a potential merger or acquisition. What this means for companies in the pre-merger stage is that they must remain independent and not prematurely act as one entity prior to the merger.

is when a transaction is implemented prior to receiving all necessary clearances.

These due diligence tasks are only the beginning of the compliance process for a merger or acquisition. The next step would be for the purchasing company to implement its compliance procedures, controls and antitrust measures at the target company.

How is this done without causing panic amongst employees who may fear or be resistant to change, be concerned about losing their jobs as mergers and acquisitions usually see a reduction in staffing levels due to streamlining of operations, or who are harbouring information on some wrongdoing at the target company? First, consider holding antitrust training sessions for employees. Also, consider having transition teams for each area of the company, and conduct specific antitrust compliance sessions with these groups.

In addition, think about offering an internal "amnesty" programme for employees who may have witnessed or been part of some wrongdoing within the target company. Give a specific amount of time for employees to come forward with relevant information. In turn, this information could be used on an amnesty or leniency application with an appropriate antitrust agency should it be necessary.

Asking for staff in the target company to own up to any known wrongdoing may lead to some awkward and uncomfortable situations, thus antitrust counsel should be included in all of these discussions, as well as issue-specific counsel. Issues could arise in a number of areas, including employment law. Be sure to explore all aspects of the potential wrongdoing.

GUN JUMPING

There are numerous regulatory requirements that jurisdictions such as the United States and Europe have put into place in order for governing bodies to fully vet a potential merger or acquisition. What this means for companies in the pre-merger stage is that they must remain independent and not prematurely act as one entity prior to the merger.

Antitrust agencies refer to this practice as "gun jumping." The term is loosely defined as actions that merging parties may enter into prior to closing the transaction in order to expedite the integration of the companies. An example of this would be merging parties who coordinate their prices or terms on products offered to customers prior to the merger.

United States

There are two specific laws that pertain to gun jumping, violations of which can lead to civil or even criminal penalties. First, there is Section 1 of the Sherman Act. This law prohibits agreements that involve restraint of trade, such as price fixing and market allocation. Companies who are in the pre-merger stage should avoid even the appearance of impropriety in this regard, as even basic agreements not to compete may result in civil litigation or even criminal penalties.

The other law is known as the Hart-Scott-Rodino Act. This law, referred to as HSR, established the federal premerger notification programme, which provides the Federal Trade Commission (FTC) and the Department of Justice (DOJ) with information about large mergers and acquisitions before they occur. It requires merging parties to abide by waiting periods following notification to the government of certain stock or asset acquisitions.

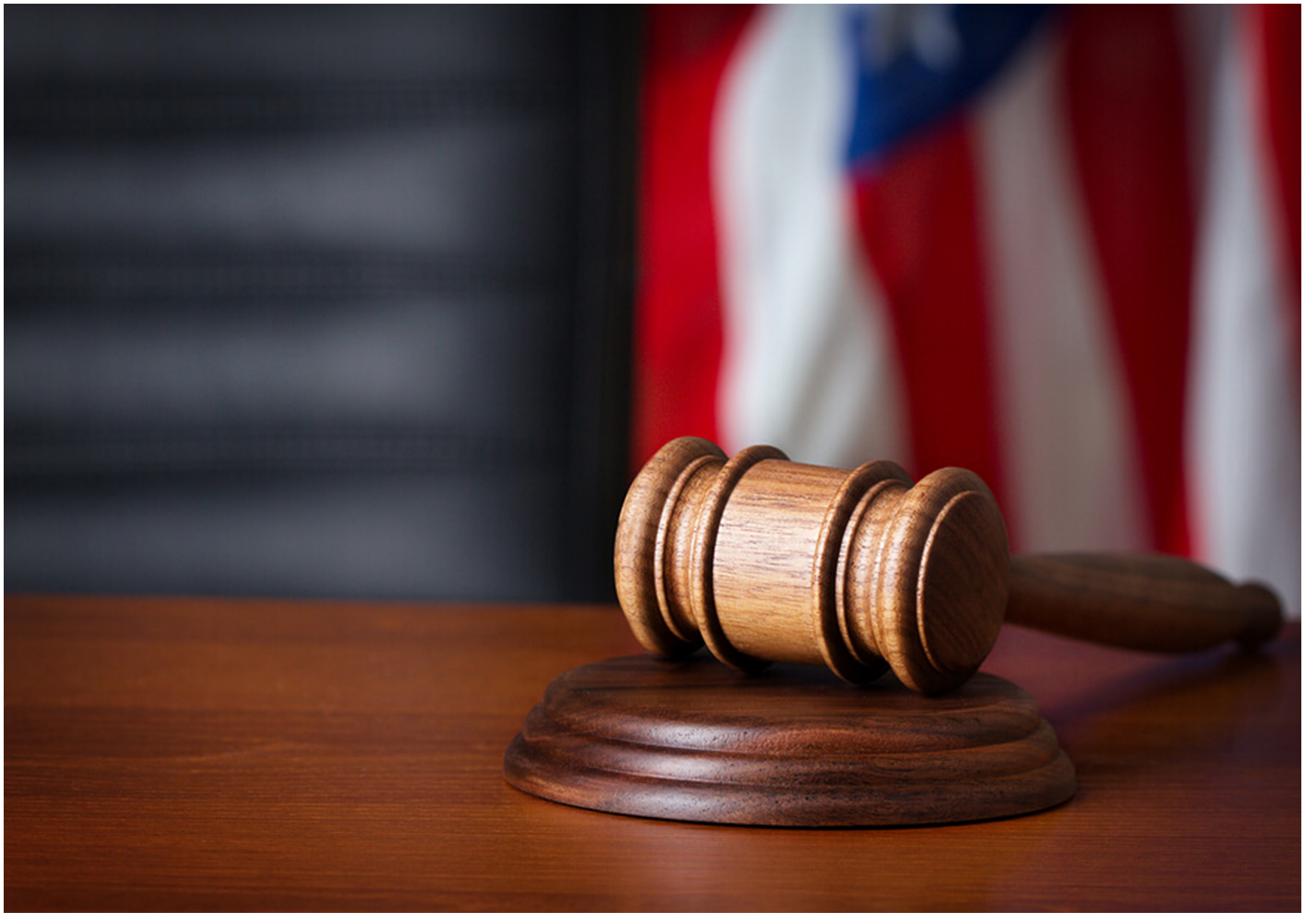
The Department of Justice, Antitrust Division, interprets the HSR Act to prohibit an acquirer from exercising "substantial operational control" over an acquired company prior to the expiration of the HSR waiting period. Unless the government requires additional information, the HSR waiting period is usually 30 days.

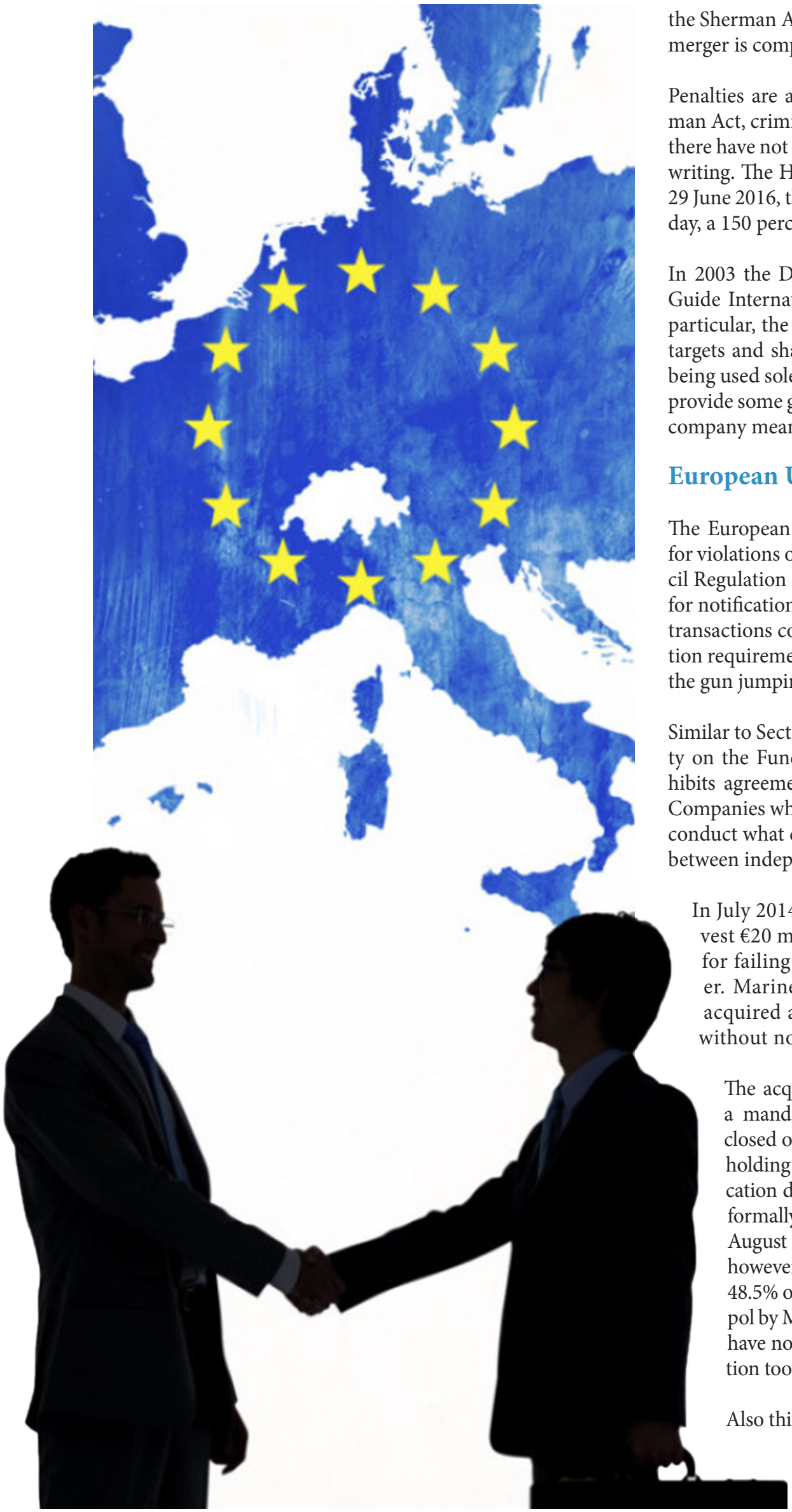
While on the surface it may seem that the two laws cover very similar violations, there are differences. There are three areas in particular where the two laws are distinct – the conduct prohibited, the time frame during which the statute applies, and the penalties for violating the statute.

With regards to conduct, the Sherman Act looks at whether conduct between two parties would violate its rules, even in the absence of a merger. The theory behind this is if two companies could engage in the behaviour without a merger, they could be able to engage in the conduct while merging as well.

The HSR Act seeks to prevent acquiring companies from exercising "substantial operational control" over target companies. What exactly does this mean? It is understood that by agreeing to merge, there is an assumed transfer of ownership, but the HSR Act requires a waiting period before undertaking additional duties such as integrating operations, decision-making for both companies, and even transferring information outside which is needed for due diligence purposes. Such behaviour will trigger an HSR violation.

Timing is another area where the two laws differ – the HSR's prohibition on gun jumping only applies for a limited period of time, after which certain actions are permissible. However, for





the Sherman Act, a ban on all joint activities is in effect until the merger is complete.

Penalties are also unique to each provision – under the Sherman Act, criminal and civil penalties may be imposed, although there have not been any criminal prosecutions at the time of this writing. The HSR Act is enforced through civil penalties. Since 29 June 2016, the maximum HSR Act civil penalty is $40,000 per day, a 150 percent increase from the previous $16,000.

In 2003 the DOJ brought an action against Gemstar and TV Guide International, Inc. because of pre-merger violations. In particular, the companies were cited for agreeing on marketing targets and sharing information about customers that was not being used solely for due diligence purposes. This case served to provide some guidance to what "exercising control" over a target company means. The fine imposed was US$5,676,000.

European Union

The European Commission has also called companies to task for violations of the European Union Merger Regulation (Council Regulation No. 139/2004). This legislation contains the rules for notification and assessment of concentrations, including the transactions covered, the jurisdictional thresholds, the notification requirement, the substantive assessment standard as well as the gun jumping prohibition.

Similar to Section 1 of the Sherman Act, Article 101 of the Treaty on the Functioning of the European Union ("TFEU") prohibits agreements such as price fixing and market allocation. Companies who are in the pre-merger stage should refrain from conduct what could be viewed as an anticompetitive agreement between independent companies.

In July 2014 the European Commission fined Marine Harvest €20 million for violating the standstill obligation and for failing to properly notify the Commission of a merger. Marine Harvest, a Norwegian seafood company had acquired a 48.5% stake in Morpol, a competitor, in 2012 without notifying the Commission.

The acquisition closed on 18 December 2012, triggering a mandatory public offer under Norwegian law, which closed on 12 March 2013. This resulted in Marine Harvest holding 87.1% of the shares in Morpol. It began pre-notification discussions with the Commission shortly after and formally notified the transaction to the Commission on 9 August 2013. The transaction was conditionally approved; however, the Commission took the view that acquiring 48.5% of Morpol in 2012 was exercising control over Morpol by Marine Harvest and as such, Marine Harvest should have notified the Commission in 2012 when that transaction took place.

Also this case is a reminder to communicate merger activities promptly, and be diligent in avoiding transactions that could even give the appearance of exercising control over a target company.

INFORMATION EXCHANGES

Introduction

Once a merger between two entities has been announced and the paperwork has been signed, it can be tempting to begin exchanging information in order to expedite the transition to one entity. However, before the two companies become too intertwined, it is critical to remember that communication and actions between merging parties are subject to strict antitrust laws as described previously.

Certain types of information can and should be exchanged – some information exchange is permitted to facilitate post-closing implementation. There are a number of guidelines that merger teams, working with antitrust counsel, can follow to limit their exposure to antitrust risks associated with a merger or acquisition.

United States

The Sherman and HSR Acts have been discussed, but it bears repeating some important points. For example, in general, merging companies should avoid sharing pricing information about services or products with one another. Price fixing in particular is prohibited under the Sherman Act.

Surely, part of any merger and/or acquisition involves an investigation of the target company's accounts. If it is correct to assume that accounts involve figures "*en mass*" then it should be possible to gain at least an indication of that company's pricing structure. Another part of the acquisition process is to look at "business in hand", in other words, money that is in the pipeline – that involves more specific data. For example, the company's accounts would include, as an example, value of stock held, value of included in current transactions, and revenue expected from current sales in progress.

There are some exchanges of information and agreements that may be acceptable, even if there is an adverse effect on a particular market. The test for judging these is known as the "rule of reason," and states, "precompetitive benefits of the conduct at issue are balanced against the anticompetitive effects, and only if the overall effect of the activity is anticompetitive will the activity be deemed to violate the Sherman Act."

The applicability of these laws creates a clear picture – in the eyes of antitrust laws, the parties are still two independent companies and must act accordingly.

European Union

EU law takes a similar approach, although there appears to be less guidance on what companies can and cannot do. When a merger or acquisition is subject to approval from the European Commission, companies must continue to act in a competitive manner as if no merger is on the table.

It's best to bring in antitrust counsel to help navigate through a merger. While there are some guidelines, such as Article 101, there are no clear rules as to what are, and what are not, acceptable pre-merger actions. Consequences such as those mentioned in the Marine Harvest case can have a huge impact on a company and it is best to take precautions prior to a merger rather than face large fines at a later date.

Setting the stage

When a merger or acquisition is in its early stages, antitrust counsel should be brought in to discuss what communications are acceptable between potentially merging parties. Company executives should be provided guidelines in order to minimize risk of potential antitrust violations.

In addition, parties on both sides should all sign non-disclosure agreements (NDAs) as early as possible in the transaction. The agreements should detail what information is being exchanged as well as who will have access to it. Keep in mind that these written documents may be discoverable should litigation or antitrust investigations ensue. Having detailed records and correct documenting can assist in clearing up any questions that arise.

What kinds of information can be exchanged?

In general, the kind of information that can be exchanged prior to a merger agreement is that information which would be used for due diligence and deal valuation purposes. However, some transactions may be at higher risk than others. It's a good idea to look at the information that is to be exchanged and assess the risk associated with them.

Low risk information exchanges would include sharing information about information technology, basic features of plant and facilities, computer systems, servers, real estate, buildings, furniture and office equipment. Information exchanges that may require minimal supervision include human resource data, accounting and tax information, vendor contracts and other administrative issues.

Information that should probably be examined by counsel prior to exchange includes research and development data, proprietary technology information, manufacturing output, and related information about what is being produced at facilities. Again, parties should avoid disclosure on costs and other information that could lead to anticompetitive behaviour.

The highest risks in any information exchange should definitely be closely examined by counsel, and should only be exchanged with supervision and valid protections in place. This information includes core business information such as future business plans, future marketing and pricing strategies, production costs, investment plans, and anything that includes information on current, recent or future pricing. This is the type of information that triggers inquiries from regulating bodies, and should thus be handled with the utmost care.

It's important to remember that regulators judge compliance programmes on their effectiveness, not their good intentions. If a violation occurs, the regulator will not give lenience simply because a programme exists; it must be effective at preventing violations in the first place.

What is the purpose of the information exchange?

Information exchange between merging parties is permissible in cases where the parties have a legitimate purpose and reason for the exchange. A purpose is considered legitimate if it is reasonably expected to be necessary to carry out the lawful objectives of the transaction.

There are a number of legitimate purposes for information exchange. First, due diligence and valuation. The buying company has a right to information that pertains to the value of the target company and any potential liabilities.

Second, parties may exchange information that pertains to integration planning. When companies are merging, there is a transition period of blending the businesses together. However, companies want to ensure that certain aspects of the business are blended from day one. Sharing of information that can help the companies do this is considered as necessary for a legitimate purpose.

In addition, regulatory approval information must be exchanged. Merger control law contains specific pre-merger notification requirements. Both parties contribute to providing information for these requirements, and as such, an information exchange is needed. Furthermore, information on any pending investigations must be shared immediately as this is a risk that must be dealt with as soon as possible.

Who is receiving the information?

The information that is exchanged between parties prior to a merger is often sensitive. It is important to be sure that only parties who have a "need to know" are able to see such information – need to know means that they have a legitimate purpose for using the information, such as due diligence and valuation. As discussed previously, all parties should be required to sign a non-disclosure agreement.

Certain documentation and information may only need to be seen by those acting in a legal capacity during any transaction. As a consequence, such information that needs not to be seen by anyone other than the legal team should be identified and clearly marked as such to avoid issues.

Another option that can be used is the formation of a "clean team." This is a group of employees or consultants who work for the buyer under a defined set of procedures that have been agreed to by the seller. Clean teams are useful for facilitating the exchange of information, so long as no clean team

members have duties that relate to pricing, sales terms, or marketing strategies.

When will the information be exchanged?

Antitrust issues may arise at any point during the merger and acquisition process, and companies must constantly be aware of proper procedures and potential risks pertaining to information that is shared. However, there is a bit of a "sliding scale of sensitivity" with regards to information. As the transaction nears its end and the merger is heading towards completion, some information that may not have been previously appropriate to exchange can become acceptable to exchange.

The most sensitive time in the lifecycle of a merger is the negotiation period prior to the signing of the agreement. Information exchange for legitimate purposes such as due diligence may occur, but counsel should be heavily involved in reviewing information during this period of time to be sure no antitrust issues arise.

Companies should still take the utmost precaution even if the transaction is close to being completed, especially if there is a waiting period in effect as a result of the HSR Act. As discussed earlier, HSR Act violations can be costly.

How will the information be exchanged?

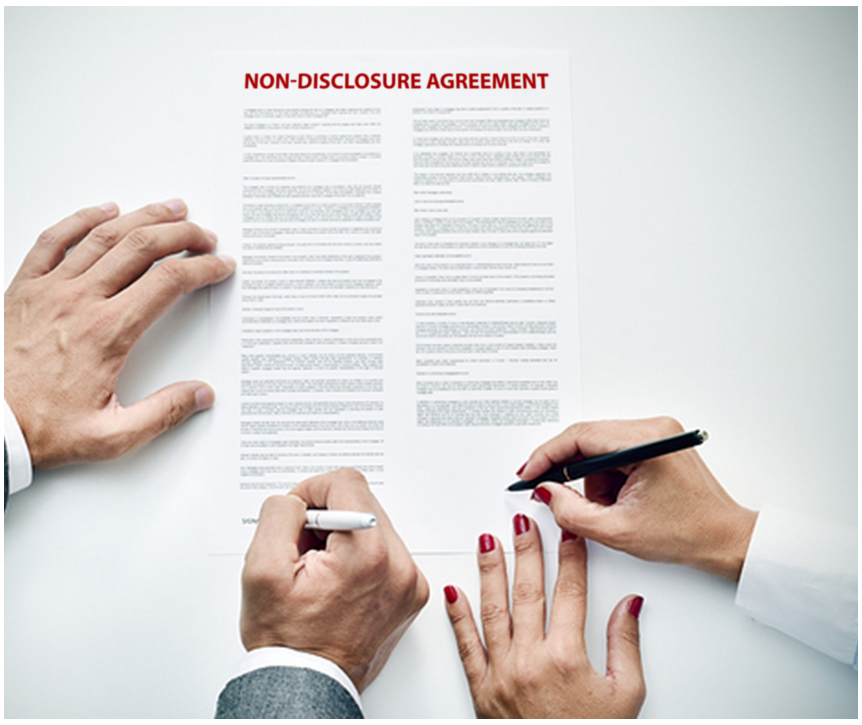
After identifying what information is to be exchanged, a process should be established to formalize how the information will be exchanged. To minimize risk, the number of exchanges should be limited. In addition, there should be designated contact people who have received training and are well-versed in the proper protocols on how to use and distribute the information. If the information is to be shared verbally, counsel should attend every meeting and be prepared to address any issues.

It is also an excellent idea to maintain communication logs to track communications between the two companies. In essence, the more documentation you have pertaining to communications and appropriate procedures, the better. All employees who are involved at any level of the transaction should be well versed in the proper methods of exchanging information.

A merger or acquisition could potentially expose a company to antitrust violations and risks. By following proper procedures and performing due diligence, involving counsel early, and implementing proper procedures for the exchange of information, risks can be mitigated and the transaction should be smooth sailing for both buyer and seller.

Use of a Checklist

Navigating the complex waters of antitrust due diligence takes time and requires exceptional levels of attention to detail on matters relating to the transaction. It is critical to be organized when investigating any associated risks, and many companies find that using a compliance risk checklist helps to highlight antitrust violations, identify red flags, and mitigate any potential risks in a purchase for the purchasing company.



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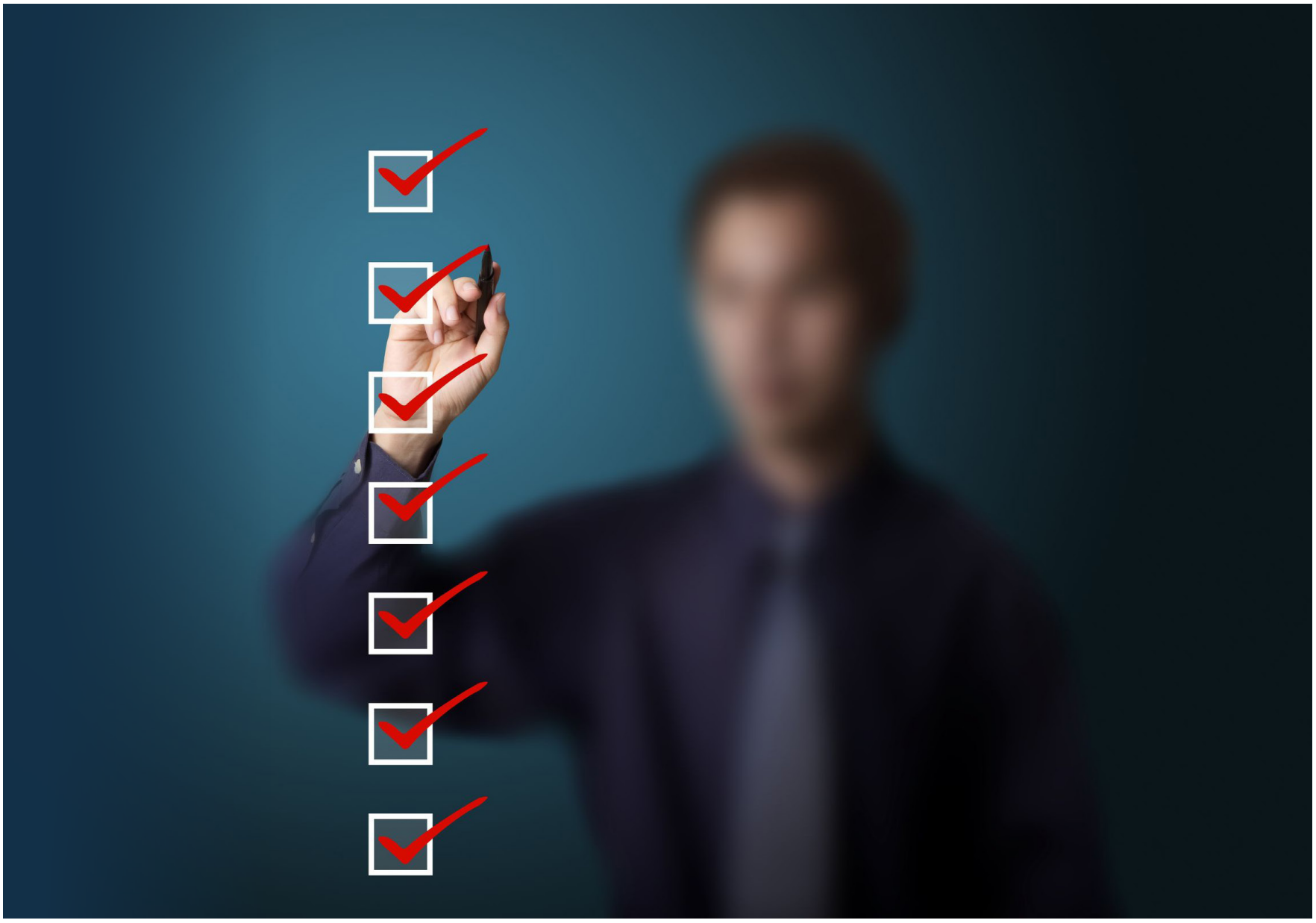
An effective checklist will help with early detection of any potential antitrust issues, in particular through the use of specific questions about the target company's business transactions. In the case of an acquisition, the purchasing company should ask specific questions regarding compliance with federal and state antitrust laws. Conducting this due diligence also includes asking about associated partners who may have also been required to comply with antitrust laws. In a merger, both companies would perform the same activities on both sides.

Antitrust counsel is a good place to start with creating an overall antitrust compliance program, and beginning with a checklist is a great start. It can then be used to educate the company about the risks and challenges associated with complying with antitrust laws, as well as help the acquisition team members identify key factors to address with the target company.

CHECKLIST

1. Document creation – All members of the deal team should be educated on creating documents that could lead to regulatory issues. Documents should be reviewed by counsel and should reflect a legitimate purpose for doing the deal. Legitimate purposes include items such as cost savings and developing new product categories or services.
2. Legitimate purpose for commencing negotiations – All negotiations should be entered into for a legitimate purpose and not violate any competition laws. For example, entering into negotiations to fix prices on an item or service, or acquiring a competing brand in order to shut its business down are not legitimate purposes.
3. Avoid creating liability issues with third parties – Intentional interference with business relations is a tort which can give rise to damages and can also lead to complaints to regulatory agencies. Do not interfere with existing or prospective relationships that are potentially inflammatory.
4. Antitrust counsel – Both sides of a deal should have antitrust counsel, who should be involved in the transaction as early as possible.
5. Confidentiality agreement – All parties should sign non-disclosure or confidentiality agreements prior to the commencement of any discussions.
6. Hallway/informal discussions – Mergers and acquisitions are highly regulated. All discussions with opposing parties should be formal, documented and follow proper protocols.
7. Review of deal documents – Counsel on both sides of the deal should have ample time to review draft documents, and correct any language that could potentially compromise regulatory approval.
8. Government notification issues – Most countries nowadays have some merger notification rules in place. Be sure to notify the proper governing body of the transaction in a timely manner.
9. Broad definition of a merger – Merger notification laws apply not only to traditional mergers, but also to stock and asset acquisitions, changes of control, some joint ventures and also exclusive licenses. Consult counsel for the applicable rules.
10. Triggering events – There are some merger events that, upon their occurrence, require notification to the regulatory body. For example, when a binding agreement is signed between the parties, most regulatory bodies require a notification. Be sure counsel is kept up to date on all actions so that notifications are properly submitted.
11. Notification in other jurisdictions – Counsel should be given proper time to meet notification requirements for all necessary jurisdictions, even those that seem irrelevant.



12. Waiting periods – Many mergers, and those subject to the HSR Act, will have a waiting period before a merger can be completed. This allows for a regulatory agency to conduct investigations and insure the deal is in compliance with antitrust regulations. It is critical that companies do not "gun jump" and consummate the deal until this waiting period has concluded.
13. Time required preparing the notification form – Counsel should be given ample time to prepare any notification forms.
14. Courtesy notifications – Occasionally, a transaction may not be required to be reported to regulatory agencies. However, it is advisable to notify agencies simply out of courtesy.
15. Notifications required by prior governmental action – There may be a past case or issue in which a company has a special or unique reporting obligation. Ample time should be allowed for this process.
16. Notification by accumulation of smaller deals – The size of a deal often determines whether notification is required – however, this occasionally is cumulative, meaning several smaller deals with the same party could trigger notification requirements. Take into account all prior and future planned transactions with the same party when assessing notification requirements.
17. Desirability/undesirability of notification – Doing the necessary work to complete a notification may be a hassle, but it can also provide protection from later legal challenges.
18. Gun jumping and due diligence issues – Don't "jump the gun" on the transaction and begin acting as one company prior to the end of the waiting period. This can result in severe penalties and can also cause the transaction to be terminated. Parties are allowed to perform due diligence work in order to assess the transaction, but in a purchase, the buying party is not allowed to exercise control over the seller during the waiting period.
19. Subject to regulatory approval – Counsel should add a clause in the contract or agreement that states closing is subject to regulatory approval.
20. Break-up fee – The buyer may be required to compensate the seller if the transaction cannot be completed due to antitrust reasons. Counsel from both sides should work together to understand what type of regulatory provision could trigger this.
21. Best effort – In general, performance on a contract requires parties to act in good faith and use their best effort to perform tasks related to closing the deal. However, counsel may want to implement a best effort clause, which commits both parties to cooperating with the regulatory compliance process.
22. Required spin offs/divestitures – If a spin off or divestiture is required, provisions should be reviewed by all counsel.
23. No material change provision – Contract changes can often cause issues prior to completion of a merger. A "no material change" provision will keep the seller from making any material changes prior to the completion of the deal.

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CHAPTER 5

FROM DAWN TILL DUSK: HOW TO SURVIVE A CARTEL INVESTIGATION

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SEPTEMBER 2016