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Peace Is Complicated: Global Settlements from an In-House Counsel Perspective

By Valarie Williams, B. Parker Miller, and Alex Brown

Private actions for price-fixing and other antitrust claims are increasingly accepted as an important element of the global enforcement regime. The availability of private actions for corporations creates new opportunities and demands on in-house counsel. They may be called upon to consider whether to file a case in another jurisdiction if the company has purchased goods from alleged cartel participants. Alternatively, to resolve these claims, they may need to consider how to value claims brought in disparate jurisdictions with unique substantive and procedural rules. It is no longer possible to value non-U.S. claims at zero dollars. Simply put, "global peace" is complicated. Whether as plaintiffs or defendants, corporate attorneys have been presented with a new set of challenges and opportunities to add value.

Determining the value of a global settlement can seem daunting as the parties must consider the potential value of the claims in various jurisdictions. A general lack of reported decisions, uncertainty regarding jurisdictional issues and valuation of damages, along with an opaque settlement market makes the task somewhat complex. This article identifies potential issues with respect to valuing and finalizing global settlements, and offers practical guidance on solutions.

Valuing a Global Settlement

First, damages are calculated differently in non-U.S. jurisdictions. European courts have traditionally rejected punitive damages, *e.g.*, treble damages, for antitrust claims. The new European Union Damages Directive is consistent with this tradition, providing for full compensation, but expressly

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forbidding "over compensation" for Treaty on the Functioning of the European Union (TFEU) Article 101 and 102 claims.[1]

Requiring that plaintiffs be limited to compensation for their losses means that if any part of the overcharge is passed on to customers, then that amount should be deducted from damages. The amount of pass-on can be difficult to assess at an early stage in litigation. Similarly, full compensation means that some amount of interest should be allowed. This interest calculation is also an area of uncertainty because the law is unsettled in most jurisdictions regarding how to compensate plaintiffs for the loss of money over time (*e.g.*, weighted average cost of capital, compound interest, simple interest). Also, unlike the United States, umbrella damages are available in the United Kingdom and may be available in other jurisdictions. Umbrella damages result from increased prices paid to non-cartelists because of the increase of the overall market price caused by the cartelists.

Second, parties should assess where potential claims could be or have been successfully filed. If claims can be brought in a favorable jurisdiction, such as the United Kingdom, Germany, or the Netherlands, then those claims are probably worth more than claims that could only be filed in Japan, for example. The United Kingdom is the only one of these jurisdictions that allows for almost U.S.-like discovery and is developing favorable case law for plaintiffs/claimants. Therefore, if one of the alleged cartelists has a corporate entity in the United Kingdom (more specifically, England or Wales), then that fact should be considered in assessing potential liability. An anchor defendant in the United Kingdom may provide for jurisdiction over all of the alleged cartel participants, no matter where they are located. Another consideration in evaluating risk for European claims is that the standard for proving liability is different than in the United States. There is a presumption that the exchange of competitively sensitive information, such as future prices, is an infringement of the antitrust laws.[2] There is no need to prove an agreement. Therefore, a case based primarily on information exchange may be easier to prove in Europe than the United States.

Third, the general lack of reported decisions on these issues makes valuing these cases even more difficult. In the United States, class settlements are typically made public, so some transparency exists in the market. Very few cases have been tried in jurisdictions outside the United States and Canada, and the settlements are typically not public. Furthermore, decisions in European jurisdictions are often not public and, if they are ultimately published, are frequently heavily redacted. In some cases, issues such as pass-on or the proper amount of interest, which involve sensitive business information, are litigated behind closed doors.

Depending on the scope of the litigation, a proper valuation of the claim by either the plaintiffs or defendants may require a rigorous jurisdiction-by-jurisdiction analysis. Regardless of whether a party takes a litigation risk approach to valuation or a more general estimation, for the near term, the parties must next wrestle with the issue of contribution.

The Contribution Dilemma

Unlike the United States, European jurisdictions typically allow contribution for co-conspirators. Most simply, contribution actions allow co-conspirators to recover amounts paid in judgment *or* settlement from other co-conspirators. As a result, settling Defendants often request that plaintiffs

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[1] Directive 2014/104/EU of the European Parliament and of the Council at Article 3 (Nov. 26, 2014), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.349.01.0001.01.ENG ("Damages Directive"). EU Member States have until December 27, 2016 to transpose the Damages Directive into national law. It was designed to promote private enforcement of TFEU Article 101 and 102 claims and harmonize application of these claims across jurisdictions.

[2] *See T-Mobile Neth. B.V. v. Neth. Competition Auth.,* Case C-8/08, 2009 E.C.R. I-4529; *Dole Food v. Comm'n*, Case T-588/08, ECLI:EU:T:2013:130; *Dole Food v. Comm'n*, Case C-286/13 P, ECLI:EU:C:2015:184.

indemnify the settling defendant against contribution claims from co-defendants. After all, if the goal of settlement is global peace, the settling defendants do not wish to be litigating whether they should reimburse their co-conspirators for the cost of the co-conspirator's judgment or settlement at a later date. Plaintiffs are hesitant to agree to these sorts of protections because full indemnification presents substantial post-settlement risk. Plaintiffs who believe they have been harmed by a cartel generally find it difficult to agree to indemnify a cartel participant. Parties should consider alternative methods to mitigate this risk and improve the chances of settlement. Options include agreeing as part of the settlement to pull the defendant's purchases out of the remaining joint and several claims or the plaintiff agreeing to seek commitments not to pursue contribution from each subsequent co-defendant in settlements.

The Damages Directive seeks to solve this problem by barring non-settling defendants from seeking contributions from those that have already settled.[3] Under the Damages Directive, failure to settle early could leave the remaining parties on the hook for a large damages claim that exceeds their share of the harm under traditional joint and several liability. If, however, the non-settling defendants are unable to cover the remaining claim, plaintiffs are permitted to pursue that part of the claim against the settling defendant.[4] Defendants considering settlement will likely seek to limit the plaintiffs' ability to effectively come back for more after the litigation is complete through express terms in the settlement agreement. The operation of this portion of the Damages Directive will be one of the most watched. There is significant uncertainty as to how it will ultimately work.

Parties seeking global resolution should also consider allocating liability among jurisdictions in settlement agreements, taking into account potential European contribution claims and United States set-off laws. In the United States, defendants may potentially set-off damages in antitrust cases by trebling the amount of the damage award and then deducting any prior settlement amounts from the trebled amount.[5] For example, in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, the direct purchaser plaintiffs achieved an $87 million verdict against Toshiba, which could have been trebled to $261 million.[6] However, the parties ultimately settled for $30 million after Toshiba filed a motion to reduce the damages award to zero after a set-off of the $443 million plaintiffs had racked up to date. In response to that motion, plaintiffs argued that to justify set-off, Toshiba had the burden of proving that the assessed damages "have in fact and in actuality been previously covered in a prior settlement."[7] Although the settlement between the parties meant that this question ultimately went unanswered, parties should consider specifically allocating portions of global settlements to sales in one jurisdiction or another to head off potential conflicts with contribution and set-off. It is unclear what weight a court will give to such an allocation. But an allocation supported by facts and data is more likely to be considered.

Additional Considerations for Settlements

While valuation and contribution are often the focus of global settlement negotiations, additional provisions in the final agreement impacting cooperation, confidentiality, and taxes cannot be ignored. Plaintiffs looking to settle prior to establishing liability should consider their ability to cooperate with the settling defendant to prove the conspiracy. Early settling cartel defendants in the United States often agree to provide a certain number of documents, authentication of documents, and/or testimony to assist in the plaintiff's pursuit of claims against other defendants. A defendant who is

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[3] Damages Directive at Article 19.

[4] *Id.*

[5] *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir. 1957).

[6] Ben James, *Toshiba to Pay Direct LCD Buyers $30M in Price-Fixing MDL*, Law360 (Sept. 11, 2012), http://www.law360.com/articles/377122/toshiba-to-pay-direct-lcd-buyers-30m-in-price-fixing-mdl.

[7] *Cates v. United States*, 451 F.2d 411, 417-18 n. 20 (5th Cir. 1971).

potentially liable for contribution claims from other defendants should consider negotiating for a discount in the settlement, or additional protections from contribution, in exchange for some level of further cooperation.

Drafting the right confidentiality language is also key. Plaintiffs are best positioned with a confidentiality clause that allows them to use early settlements offensively against future settlement targets. At the same time, both plaintiffs and defendants will want to ensure that the settlement terms may not be disclosed without their permission to avoid a negative impact in negotiations with other parties, as well as the current and potential future litigation.

Finally, both parties must consider the tax implications of the settlement and will likely need to engage local counsel in each jurisdiction to determine the impact on the value of the settlement.

Key Considerations to Maximize Global Settlements

- Seek out counsel with experience handling cartel actions in the jurisdictions, industry, and even the specific markets in which the company is involved. The lack of clarity in the law and opaque settlement markets makes niche practitioners especially valuable.
- When a company is engaged in litigation in both the United States and abroad, make sure to get plugged in to all of the company's issues, as decisions made in one jurisdiction can substantially impact others.
- Before engaging in settlement negotiations, map out what the settlement will look like—do not just aim for a number. Thinking through the domino effect that each discrete issue will have on the settlement in advance can add significant value to the final resolution of the claims.

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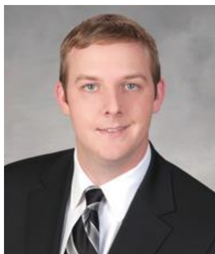

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Market Definition and Competitive Effects in Merger Review: The Staples-Office Depot Example

By Leah Brannon and Kenneth Reinker

The Corporate Counseling Committee's Monthly Update program, presented on May 3, 2016 by Leah Brannon, Patrick Bock, Elaine Ewing, and Ken Reinker of Cleary Gottlieb Steen & Hamilton LLP, covered antitrust developments in March and April 2016. This article uses the Staples-Office Depot transaction to discuss how regulators analyze mergers.[8]

The Federal Trade Commission's recent successful lawsuit to block the Staples-Office Depot transaction is a good example of how the U.S. antitrust agencies currently approach market definition in merger analysis. Even before the 2010 Horizontal Merger Guidelines, the agencies began placing decreased emphasis on market definition and increased emphasis on a direct inquiry into competitive effects. Today, the agencies seek to understand pricing relationships and how a merger will affect competitive dynamics. If the agencies conclude that a merger is likely to reduce competition, then they will define a market for purposes of a lawsuit based on where they anticipate anticompetitive effects. Staples-Office Depot illustrates.

Market Definition and Competitive Effects

Traditionally, merger review began by defining the relevant product and geographic markets, and case law continues to indicate that defining a relevant market is a necessary step to prove that a merger violates the antitrust laws.[9] Market definition asks whether and to what extent customers would react to a price increase by switching away from a particular product or geography to other products or geographies.[10] Defining a market makes it possible to count the number of competitors and calculate market shares and concentration ratios and, in appropriate cases, these metrics can be proxies for whether a merger is likely to harm competition.[11]

But market definition now plays a limited role in agency merger analysis. The agencies instead focus directly on competitive effects, engaging in a detailed factual and empirical analysis of how a merger is likely to affect pricing and other aspects of competition. The relevant market is defined after the fact as a way to describe the particular subset of customers that are likely to suffer anticompetitive effects from the merger.[12] As the 2010 Horizontal Merger Guidelines put it, "competitive effects can inform market definition" and "evidence that a reduction in the number of significant rivals offering a group

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[8] Mr. Reinker advised a third party in the Staples/Office Depot transaction, and Cleary advised other third-parties in some of the transactions discussed. The discussion in this article is based solely on public materials.

[9] *See United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974) ("Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act.").

[10] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §§ 4.1-4.2 (2010) ("2010 HMG").

[11] 2010 HMG at §§ 2.1.3; 4.

[12] 2010 HMG at § 4 ("First, market definition helps specify the line of commerce and section of the country in which the competitive concern arises. In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition.").

of products causes prices for those products to rise significantly can itself establish that those products form a relevant market."[13]

Thus, as a practical matter, merging parties should consider up front how a transaction is likely to affect pricing and marshal detailed evidence on the competitive dynamics of the industry. Parties generally should not overemphasize market definition. Even if the parties view themselves as competing in a broad overall market, the agencies may conclude that there is a narrow set of customers that are likely to be harmed by the merger.

Staples-Office Depot Illustration

The Staples-Office Depot case, litigated in April 2016, illustrates the direct focus on competitive effects and the declining role of market definition.

Staples and Office Depot operate office supply superstores and contract to sell office supplies to businesses on a nationwide basis. In February 2015, Staples and Office Depot agreed to merge. They were the only two remaining national office supply superstores after the 2013 merger between Office Depot and OfficeMax, which the Federal Trade Commission (FTC) cleared without conditions.[14]

In December 2015, the FTC sued in federal district court in the District of Columbia to obtain a preliminary injunction blocking the merger. After a two-and-a-half week hearing, the court granted the preliminary injunction.[15] The parties abandoned the transaction, and Staples paid Office Depot a $250 million break-up fee.[16]

In its complaint, the FTC did not allege harm to consumers who shop at office supply superstores. Instead, the FTC alleged harm to large business-to-business customers that contract to purchase consumable office supplies for delivery to their business locations. These customers often have nationwide footprints and prefer to purchase office supplies on a nationwide basis from a single vendor. These customers also demand a variety of special services, such as custom-designed web portals and next-day desktop delivery. The FTC argued that Staples and Office Depot were the only two companies that provided the necessary services on a nationwide basis. The FTC presented evidence—including bidding data, internal documents, and testimony from customers—that Staples and Office Depot compete head-to-head for these customers, that they are the two closest alternatives for these customers, and that prices would increase for these customers post-merger.

The merging parties argued that the FTC "gerrymandered" the market to inflate market shares. They asserted that the FTC wrongly: (1) limited the market to large business customers, excluding other customers that buy the vast majority of office supplies; (2) excluded ink and toner and non-office supply products from the market; and (3) ignored the significance of local and regional office suppliers and Amazon Business, which they argued could provide alternatives for large business customers. The parties argued that the FTC's market definition was so flawed that it had failed to establish a prima facie case that the merger was anticompetitive, and the parties rested without presenting affirmative evidence of their own.

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[13] 2010 HMG at § 4.

[14] *See* Press Release, *FTC Closes Seven-month Investigation of Proposed Office Depot/OfficeMax Merger* (Nov. 1, 2013), https://www.ftc.gov/news-events/press-releases/2013/11/ftc-closes-seven-month-investigation-proposed-office.

[15] *See* Mem. Op., *FTC v. Staples*, No. 15-2115 (D.D.C. May 17, 2016) ("*FTC v. Staples* Opinion").

[16] Brent Kendall and Drew Fitzgerald, *Federal Judge Blocks Staples-Office Depot Merger*, Wall Street Journal (May 11, 2016), http://www.wsj.com/articles/federal-judge-blocks-staples-office-depot-merger-1462920789.

The court ruled for the FTC. The court held that the "[a]ntitrust laws exist to protect competition, even for a targeted group that represents a relatively small part of an overall market."[17] The court disagreed that the FTC had "gerrymandered" the market. Instead, the court found that the FTC's narrow focus was appropriate because the agency had identified a set of customers and products that were subject to different competitive conditions. The court found that, for large business customers, Staples and Office Depot were the only two options for consumable office supplies, even though other companies competed to supply ink and toner and non-office supply products to these customers. Further, the court found that the FTC had satisfied its burden of showing that the merger would result in higher prices,[18] and the court found that the defendants had failed to present evidence to support their "assertion that utilizing a collection of regional or local office supply companies would meet the needs" of large business customers or that such customers could "shift their entire office supply spend to Amazon Business."[19]

Other Recent Cases

Other recent cases also illustrate these dynamics. For example, the Department of Justice (DOJ) sued to block Electrolux's proposed acquisition of General Electric's appliance business because it concluded that the transaction would harm competition in the sale of ranges, cooktops, and wall ovens in general and to "contract-channel purchasers" in particular. The DOJ concluded that contract-channel purchasers—such as homebuilders and property managers—preferred dealing with a single supplier that offered a full range of appliance types, models, and price points. The DOJ alleged that the transaction would create a duopoly in selling these products to contract channel customers and likely would lead to price increases. The merging parties argued that the DOJ was seeking to "slice and dice the relevant cooking-appliance markets" and that contract channel purchasers were not a relevant market because they bought the same products as other customers and could switch to buying from retail outlets.[20] General Electric chose to terminate the transaction near the end of a month-long trial before a decision by the court.[21]

Similarly, in the proposed Sysco-US Foods merger, the FTC focused on competitive effects in broadline foodservice distribution services, which provide, among other things, a wide array of food products, next-day delivery, and value-added services. The FTC alleged that the transaction would harm national customers that typically contracted for these services with one vendor on a nationwide basis. The FTC also alleged harm in certain local markets. The merging parties argued that the market was for "foodservice distribution" broadly defined. They also argued that the market could not be "sliced and diced" to be limited to broadline distributors for nationwide customers. But the court agreed with the FTC and granted a preliminary injunction blocking the merger. The court reviewed the evidence in detail and explained that "broadline distributors must offer a particular kind of 'product'—a cluster of goods and services that can be delivered across a broad geographic area—to compete for national customers."[22]

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[17] *FTC v. Staples* Opinion at 44.

[18] *Id.* at 60-61, 74-75.

[19] *Id.* at 66-68, 72.

[20] Defs.' Pre-Trial Br. at 4, *United States v. AB Electrolux*, No. 15-1039 (D.D.C. Dec. 14, 2015).

[21] General Electric then sold its appliance business to Haier for $2.1 billion more than what Electrolux would have paid and also received a $175 million break-up fee. *See* Laurie Burkitt, Joann S. Lublin, and Dana Mattioli, *China's Haier to Buy GE Appliance Business for $5.4 Billion*, Wall Street Journal (Jan. 15, 2016) (GE was selling its business for $3.3 billion to Electrolux, versus $5.4 billion to Haier), http://www.wsj.com/articles/chinas-haier-to-buy-ge-appliance-business-for-5-4-billion-1452845661.

[22] *See FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 38 (D.D.C. June 29, 2015).

Conclusion

When evaluating a transaction, the U.S. antitrust agencies focus first and foremost on likely competitive effects. Relevant markets are defined after the fact to fit the identified harm. In several significant recent cases, this approach has been effective in court.[23] Thus, in assessing transactions and in advocacy before the agencies, as well as in court, counsel should focus directly on competitive effects, not only on market definition.

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[23] The FTC also recently lost two trials involving hospital mergers—Penn State Hershey Medical Center/PinnacleHealth and Advocate/NorthShore—but it is appealing both decisions. In Hershey/Pinnacle, the district court ruled that the FTC failed to establish that the relevant geographic market was limited to the area surrounding Harrisburg, Pennsylvania because more than 50% of Hershey's patients came from outside that area. *See* Mem. Op. and Order at 8-12, *FTC v. Penn State Hershey Med. Ctr.*, No. 15-2362 (M.D. Pa. May 9, 2016). In its appellate brief, the FTC argued, among other things, that the court wrongly ignored the extensive evidence of the merger's anticompetitive effects on insurance companies by "completely ignor[ing] both the role of insurers in negotiating hospital prices and the bargaining process through which hospital prices are set." *See* Br. of the FTC and the Commonwealth of Pennsylvania at 26, *FTC v. Penn State Hershey Med. Ctr.*, No. 16-2365 (3d Cir. June 1, 2016). In Advocate/NorthShore, the district court ruled that the FTC failed to establish that the relevant geographic market was limited to hospitals in Chicago's North Shore because the FTC excluded "destination hospitals" and hospitals that compete with one (but not both) of the merging parties. *See* Am. Mem. Op. and Order at 7, *FTC v. Advocate Health Care*, No. 15-11473 (E.D. Ill. June 20, 2016). The FTC has indicated that in its appeal it will argue that the question is whether insurers would pay higher rates as a result of the merger rather than forego having North Shore hospitals in their networks, not how the relevant market was constructed. *See* Mem. of Law in Supp. of Pls.' Mot. for Inj. Pending Appeal at 3-6, *FTC v. Advocate Health Care*, No. 15:11473 (E.D. Ill. June 16, 2016) ("Contrary to the Court's framing of the geographic market issue, no hospital was excluded from Plaintiffs' proposed geographic market based on purportedly flawed selection criteria. Hospitals outside of the North Shore Area, including downtown 'destination hospitals,' are not added to Plaintiffs' proposed geographic market because a hypothetical monopolist of the North Shore Area hospitals could profitably impose a SSNIP on commercial payers without owning those other hospitals."). Thus, these cases confirm that the agencies focus on direct evidence of competitive effects, although the district courts in these cases focused on other evidence.

2016 Spring Meeting Program Summary: Lessons from In-House Counsel – Taming the Beast of Antitrust Investigations and Litigation

By Elai Katz

In-house counsel from three major corporations shared their views on what they face when managing complex antitrust investigations and litigation during a program at the 2016 Antitrust Spring Meeting. The panel, entitled Taming the Beast – Corporate Counsel Speak, was sponsored by the Corporate Counseling Committee and the Agriculture & Food Committee. Panelists included Bradford A. Berenson, Vice President, Litigation & Legal Policy at General Electric Company, Alex D. Madrazo, Vice President, Division General Counsel – Commercial and Operations at Dean Foods Company, and Bernadette Miragliotta, Group Counsel, Litigation at American Express Company. The program was moderated by Susan A. Creighton of Wilson Sonsini Goodrich & Rosati and chaired by Elai Katz of Cahill Gordon & Reindel LLP.

Among other topics, the panel members shared what they expect from antitrust litigators, how to best manage processes and costs, and the reasons for their increasingly active role in strategic decisions and expert selection.

The panel began with a discussion of the importance of communication and education, especially at the start of a new matter. For example, panelists recommended planning meetings to educate outside counsel about the business, including site visits or a tutorial about the relevant product line(s) involved in the dispute. It is also often helpful for outside counsel to take the time to explain to their clients general antitrust concepts, such as relevant markets. As part of the relationship between outside and inside counsel, outside antitrust lawyers should remember not to use jargon and to be responsive to suggestions from business leaders. In addition, antitrust counsel should focus on how an antitrust case can be different from other cases with which business executives and in-house lawyers may be more familiar. Finally, outside counsel must always keep in mind the budgetary constraints facing corporate legal departments.

The panelists discussed the differences between antitrust matters and other cases, including the impact of joint-and-several liability on settlement discussions and the possibility of divestiture as a remedy in merger cases. They then addressed discovery issues, such as the need in many cases to implement a litigation hold to prevent the destruction of documents. The group explained that in antitrust cases, a document hold may require retention of virtually every document in the company's files, sometimes for as long as a decade or more.

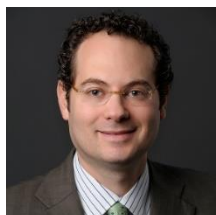
Next, the panel addressed the challenges for in-house counsel when they face restrictions on access to information and documents in litigation. Antitrust litigation often involves discovery of rivals' competitively sensitive materials. The parties and courts usually restrict the sharing of such materials to outside counsel to prevent an improper exchange of information. In some cases, inside counsel are also excluded from reviewing such materials, making it difficult for inside lawyers to evaluate the evidence in the case and to advise business executives on the matter. One of the panelists was involved in a merger challenge in which this issue was addressed by a court. In *United States v. AB Electrolux*,[24] the court ruled that in-house counsel who are not involved in competitive decision making may be granted access to confidential information, but adversaries and non-parties may

[24] 139 F. Supp. 3d 390 (D.D.C. Oct. 9, 2015).

object. Limitations on in-house counsel's access to information can also make it difficult to oversee the preparation of expert witnesses when their reports contain restricted information.

An antitrust matter that starts as a government investigation, for example, can "snowball" into private litigation. One case can mutate to become several litigations in multiple jurisdictions. A company may face investigations by various regulators in many countries around the world. The panel discussed the complexities of this aspect of antitrust matters. In addition, panelists noted the intricate relationship with co-defendants, who are often aligned on many issues in a litigation but at the same time may find that their interests diverge. In some cases, parties enter into agreements to allocate their exposure, although there may be legal challenges to such agreements.

The panelists' candid and informal discussion of their experiences and concerns provided the attendees—whether outside lawyers, regulators, or other inside counsel—with insight into valuable perspectives and strategies for "taming the beast" of antitrust investigations and litigation.



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