

MERGER ANTITRUST LAW

LAWJ/G-1469-05
Georgetown University Law Center
Fall 2019

Tuesdays and Thursdays, 3:30-5:30 pm
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CLASS 7 ASSIGNMENT—INSTRUCTOR’S ANSWER

Instructions

Submit by email by 3:30 pm on Tuesday, September 24
Send to dale.collins@shearman.com
Subject line: Merger Antitrust Law: Assignment for Class 7

Assignment

Time: Early September 2015
Calls for an outline for a law firm partner

Diane Lockhart, an antitrust partner in your law firm, has received a call from her client Walgreens. Walgreens is considering making an acquisition of Rite Aid and they are seeking your firm’s advice on what they can do to best understand the antitrust risk presented by the transaction and how they might be able to deal with any problems that might arise through the divestiture of some stores. They have asked for a meeting with Ms. Lockhart next week to discuss these questions.

Ms. Lockhart believes that the best way to evaluate the antitrust risk is to prepare a presentation to the investigating agency that gives a complete defense of the deal. Ms. Lockhart likes these initial presentations to have the following sections:

1. An overview of the parties and the transaction
2. The business rationale for the deal
3. Customer benefits from the deal (if any can be identified)
4. Why the market would not allow the deal to be anticompetitive even if the parties had the incentive to raise prices or otherwise harm customers

To make the client meeting next week as productive as possible, Ms. Lockhart has asked you to use these headings and prepare an outline of (1) the documents we would like to receive in advance of the meeting, and (2) the questions we should explore with the client at the meeting.¹ The “loop” within Walgreens is very small and only includes the CEO, the CFO, the GC, the chief strategic officer, and several other very senior executives (all of whom will be at the meeting), so they will be limited in both the types and number of documents they can collect and the questions they will be able to answer at the meeting. That said, the executives will want to

¹ Note that the company should not be burdened with documents you can obtain from the Internet and other public sources, but you should note in your outline the need for any such documents and where you can obtain them.

get a general sense of what a more detailed antitrust analysis will require once more people are brought into the loop as negotiations progress and the companies get closer to a signing.

The transaction is highly confidential, so it is important that you do not identify the target in the memorandum. The code name for the matter is Project Asclepius. The target's code name is Epione.

NB: The reading materials will give you a good sense of the problems that ultimately emerged in the deal. The purpose of this assignment is for you to identify what you would ask the company to provide in terms of documents and information at this early stage in the transaction to begin to determine what these problems are likely to be.

ABLE & BAKER LLP

INSTRUCTOR'S ANSWER

To: Diane Lockhart

FROM: Dale Collins

Project Asclepius

You have asked me to provide you with an outline of information and documents we would like in order to prepare a presentation to the investigating agency that gives a complete defense of the Asclepius transaction. As you requested, the outline contains the following four sections:

- I. An overview of the parties and the transaction
- II. The business rationale for the deal
- III. Customer benefits from the deal (if any can be identified)
- IV. Why the market would not allow the deal to be anticompetitive even if the parties had the incentive to raise prices or otherwise harm customers

Documents marked with an "*" are likely to be requested by the FTC in the first telephone call to the parties informing them of the opening of an investigation.

- I. Overview of the parties and the transaction
 - a. The company
 - i. We should be able to get the necessary information from the company's 10-K and from Internet materials
 - b. Epione
 - i. We should be able to get the necessary information from the company's 10-K and from Internet materials
 - c. The transaction
 - i. We should ask for the following documents in advance of the meeting:
 1. Any 4(c)/4(d) documents^{*2}
 2. A proposed term sheet (if available)
 3. Any management materials or board presentations
 - ii. To the extent that the information is not in the documents, we should discuss the following in the client meeting next week:
 1. The nature of the transaction (e.g., acquisition of 100% of the outstanding stock)

² "4(c) documents" are studies, surveys, analyses, or reports prepared by or for the company's officers or directors that evaluate or analyze the proposed transaction with respect to markets, market shares, competition, competitors, potential for sales growth, or expansion into product or geographic markets. "4(d) documents" are confidential information memoranda ("CIM") (if one was prepared in connection with the sale of Epione), third-party advisor documents, or documents analyzing synergies or efficiencies that might arise out of the transaction

2. The nature of the consideration (amount and kind (e.g., all cash, all stock, or cash and stock))
3. The financial impact on the company
4. Financing (e.g., internal funds, bank loans)
5. Merger control: The countries in which the company operates and the revenues earned in each country (to determine in which countries besides the United States, if any, a merger control report will be required)³
6. Expected closing date

II. Business rationale

- i. We should ask for the following materials in advance of the meeting:
 1. Any management materials or board presentations
 2. Any synergies analyses (internal or external)⁴
 3. Any documents that address likely present or future changes to business strategies as a result of the transaction
- ii. To the extent that the information is not in the documents, we should discuss the following in the client meeting next week:
 1. An explanation of the business rationale (i.e., how the company expects to make money from the transaction)
 2. The types and amounts of synergies the company expects the transaction to produce
 3. The premium the company expects to have to pay to acquire Epione⁵
 4. How, if at all, the company will change its business plans or strategies if it completes the acquisition

III. Customer benefits

- i. We should ask for the following materials in advance of the meeting:
 1. Any analysis performed by the company that indicate what the effects on the transaction may be on customers (there likely will be no such materials)
 2. A list of the company's top twenty customers for each overlapping non-retail product*⁶

³ We will have to obtain the same information from Epione. Revenue information by country will permit us to do a first cut on the jurisdictions in which a merger control report may be required. Additional information may be required for some jurisdictions.

⁴ This overlaps somewhat with the request for 4(d) documents.

⁵ At least in principle, if the transaction is to make money for the company, the expected present value of the synergies should be greater than the purchase premium.

⁶ The FTC is likely to ask for a list of the company's top ten (or twenty) customers in its first telephone call to the parties.

- ii. To the extent that the information is not in the documents, we should discuss the following in the client meeting next week:
 1. The types of products that each company sells
 2. The types of customers that purchase each of these products
 3. For each type of customer, the company's expectation of the customer reaction (favorable, unfavorable, neutral) and why
 4. The "sales pitch" to customers for the deal (i.e., what can the company tell its customers as to why they should be in favor of the deal)
 5. The types of concerns customers may have about the transaction and what, if anything, the company can do after announcement to ameliorate these concerns

IV. Competitive analysis

- i. We should ask for the following materials in advance of the meeting:
 1. The company's national strategic plan (and, if one is prepared, its national advertising plan) for each of the last three years. If regional plans exist and are readily available, we should ask for those as well.*
 2. Any internal or external market research reports for any overlapping product or service prepared within the last three years*
 3. Any documents that analyze or otherwise assess competitors (especially any documents that discuss Epione).
 4. Any documents that estimate market shares in any overlapping product area
 5. Examples of "customer draw area" maps for any overlapping products (i.e., maps that the company prepares in the regular course of business showing the areas in which a company store draws its customers)
 6. Any documents discussing competition by other types of firms with the company or Epione in any overlapping area.
 7. Any document that addresses how the company sets its prices (especially if it references Epione)
 8. Any planning documents that discuss the methodology for deciding to open or close stores, including any programs or models used to analyze new store locations, expansions, remodeling and closures
 9. Any documents that discuss the effects of actual or projected opening of any store by a competitor on a company store
- ii. To the extent that the information is not in the documents, we should discuss the following in the client meeting next week:
 1. The products and services in which the companies compete
 2. The geographic areas in which the companies compete
 3. In each overlapping product line, who are the company's most significant competitors?

4. In each overlapping product line, how are sales made to customers (and who pays the purchase price)? Are there any significant dimensions of competition besides price (e.g., quality of service, geographic coverage)?
5. Whether the company believes that it has the power—regardless of the incentive—to raise prices for any group of customers as a result of the transaction and, if so, what in products, to what customer groups, and why?
6. If the company does not believe that it would have the power as the result of the acquisition to raise prices to any customer group, why?
7. What the company believes its customers will say about the transaction, especially whether the merged firm will be able to raise prices to them
8. Given the scope of the company and the target in their respective retail operations, are their significant economies of scale to these operations?
9. In each product line, what would it take for a new competitor to enter the market? In particular, would a new competitor face significant barriers to entry?

If the client specifically prepares any materials in response to this request, as opposed to simply collecting pre-existing documents, they should mark the prepared materials as “PRIVILEGED & CONFIDENTIAL—PREPARED AT THE REQUEST OF COUNSEL.”