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When Opportunity Knocks, Open the Door! Why Your Competitor's Deal May Be Your Next Opportunity

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What You Need To Know:

- **Some deals will be allowed to close only after the parties agree to divest some assets to satisfy antitrust concerns.**
- **Buying divested assets can be a significant business opportunity for your company.**
- **Antitrust counsel can help you position your company for that opportunity, and help you avoid statements that can come back to haunt you.**

In the final weeks of 2020, opportunity knocked for Sazerac Company, Inc (Sazerac), Precept Brands LLC (Precept), and Vie-Del Company (Vie-Del) and each opened the door.

After a 20-month investigation that found E. & J. Gallo Winery's (Gallo) proposed $1.7 billion purchase of certain assets from Constellation Brands Inc. (Constellation) would eliminate head-to-head competition between Gallo and Constellation and likely substantially lessen competition in the U.S. for six types of wine and spirits products, the Federal Trade Commission (FTC) allowed the transaction to move forward with some help from Sazerac, Precept, and Vie-Del (click here for the FTC's press release).

Each year, the vast majority of deals go unchallenged. However, there are a number of deals like Gallo's that are challenged, but move forward with a "fix." What do we mean by "fix"?

Where appropriate, the antitrust enforcers will allow a deal to go forward with a settlement that preserves competition through a divestiture intended to remove the competitive overlap between the parties to the deal. A divestiture may include tangible assets (for example, a plant) and/or intangible assets (for example, intellectual property or even customers). Divestitures work as remedies only to the extent that they maintain or create viable competition that replaces the competition that would otherwise be lost in the transaction at issue. Therefore, antitrust enforcers have a strong preference for the sale of ongoing business lines to remedy their competitive concerns, because the ongoing business lines are seen as having a higher likelihood of remaining viable after the divestiture. Despite that strong preference, there are plenty of instances in which the divestiture of a more limited asset package can satisfy the antitrust enforcers' concerns.

Another issue of concern for antitrust enforcers when considering divestiture remedies is the identity of the potential buyer of the divested assets. As a first concern, of course, the buyer ideally would pose no competitive concern as the new owner of the divested assets. Second, the buyer must be an entity with sufficient related experience and track record to provide some confidence that the divestiture will be viable over the long term. As may seem obvious,

those two concerns often may be in conflict: a buyer with experience in the business may pose an antitrust concern, while a buyer that does not pose a competitive concern may not have enough experience in the business (or a closely related business) to provide sufficient assurance of long-term viability.

In Gallo's case, for example, Sazerac stepped up by agreeing to buy Constellation's Paul Masson brandy business, Precept agreed to pick up Gallo's Sheffield Cellars and Fairbanks low-priced port and sherry brands, and Vie-Del stepped up by agreeing to buy Constellation's grape-based concentrates business. Each of these transactions in the FTC's view remedied the likely anticompetitive effects of the proposed transaction. (More on the FTC's reasoning can be found here.)

The possibility of buying divested assets can be a significant business opportunity for a company, for example, to grow its current business by adding complementary assets or by lateral expansion into an adjacent related market. And a savvy buyer will have the opportunity to help structure the divestiture to ensure its value to the buyer, because ensuring the value of the divested assets to the buyer parallels the antitrust enforcers' concerns about its long-term viability.

How can you position yourself to benefit from being part of a fix as Sazerac, Precept, and Vie-Del succeeded in doing? To begin, ensure that you have clear sight to your competitive intelligence or marketing group. If your company is like most, these folks track what your competitors say publicly and what they are up to. As soon as a competitor announces a deal, for example, the emails fly and the slide decks are made analyzing what the deal means for you. That analysis may lead to your objecting to the deal, or it may lead to you seeking an opportunity to be a divestiture buyer, or it may do both, if your objections are best resolved by a divestiture of assets to you as the buyer.

But what your company says and writes about your competitor's deal might end up being part of an antitrust enforcer's review of the deal, or even of an enforcement action to stop that deal from closing. This is so even if you are not a party to the deal. It is common for antitrust enforcers to issue a subpoena, or a Civil Investigative Demand (CID) seeking relevant emails, presentations, reports, and other documents that reflect on the deal from other third-party industry participants like yourself. Even without issuing a subpoena, or CID, antitrust enforcers may contact you by email or phone to get your company's views on the proposed deal, the parties involved, and the state of competition in your industry.

What you say and write–particularly about the nature and amount of competition in the industry–not only may have meaning for the deal under review, but also may impact your ability to benefit from a fix, or even may impact a future deal of your own.

So if you have strong views on someone else's deal in your industry, it is a good idea to seek antitrust advice before anyone in the company writes emails, or memos, or PowerPoint decks about the deal, to ensure both that any written views traceable to your company reflects the views you want them to reflect, and that those views will not come back to haunt you in a future deal of your own. (When the Antitrust Division challenged the US Airways and American Airlines merger back in 2013, for example, the Complaint quoted extensively internal analysis of other airline mergers touting the benefits of industry consolidation and more.)

Beyond knowing what your competitive intelligence and marketing folks are up to, what can you do? Make sure your folks know what *not* to say. In our client alert, Hey Fintech: Watch What You Say, and Be Mindful of What Others Say on Your Behalf, we offered some thoughts on how to avoid "overstatement" about deals, especially those that are broadly applicable to the industry.

The next time your competitor announces a deal, consider hitting pause before having your competitive intelligence or marketing group analyze the deal. Pausing to engage antitrust counsel early has the benefit of helping you identify and manage risks, and may help you identify your next deal.

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