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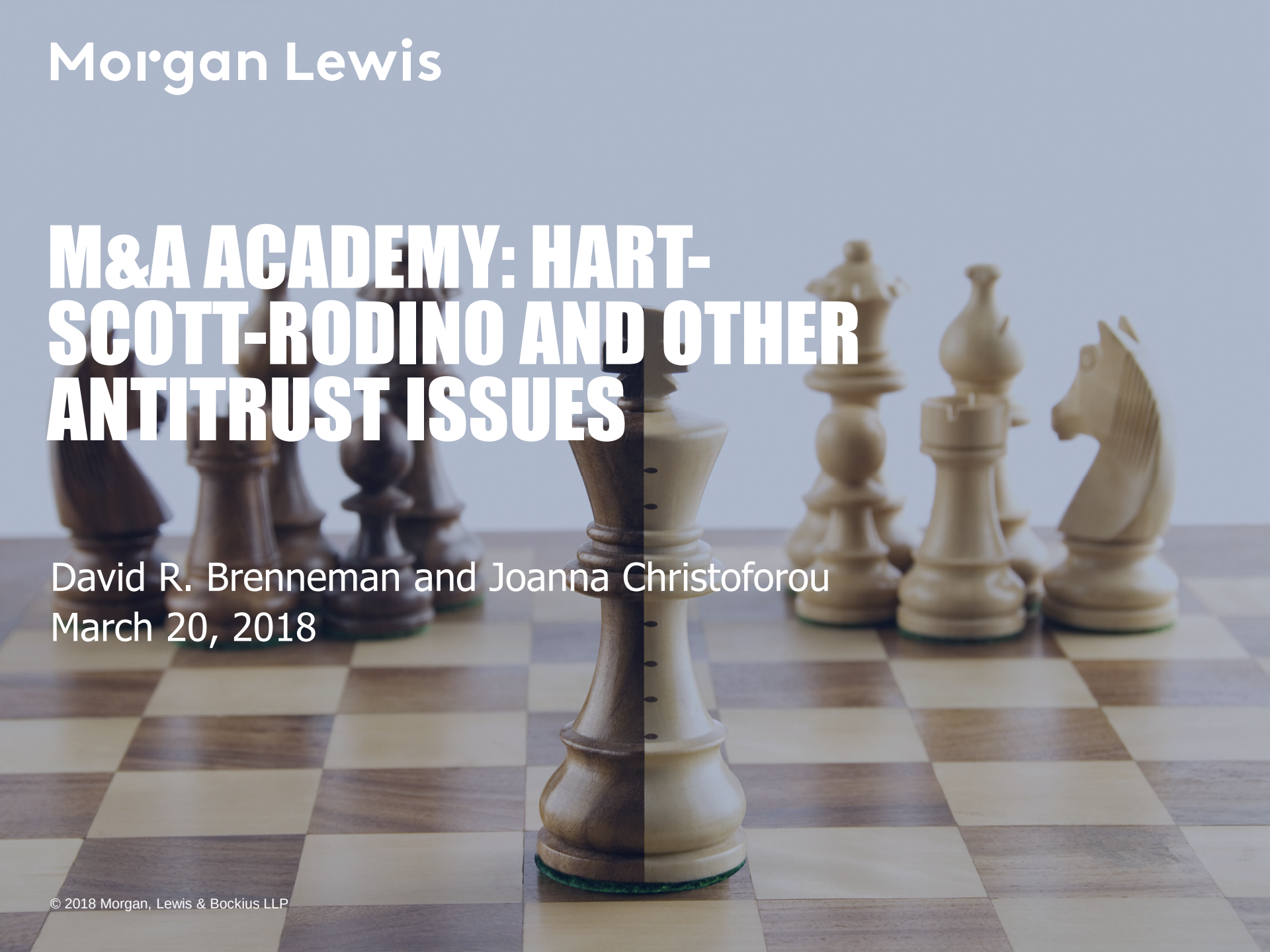
M&A ACADEMY: HART-SCOTT-RODINO AND OTHER ANTITRUST ISSUES



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Merger Control Filings and Antitrust Risk Allocation

1. Merger Control Filings

Majority of countries worldwide maintain some merger control regime involving notification to, and review by, local regulatory authorities

2. Risk Allocation

Risks associated with regulatory process (delay, disapproval, litigation, and/or deal restructuring) are typically negotiated between Buyer and Seller and allocated in deal documents

1. MERGER CONTROL FILINGS

Merger Control Filings – HSR and Non-US

1. HSR Nuts and Bolts
   a) Background
   b) Jurisdictional thresholds
   c) Traps for the unwary

2. Document Creation
   a) Item 4(c), Item 4(d)
   b) Best practices

3. Non-US Merger Control

HSR Nuts & Bolts: The Basics

- Pre-closing notification (a.k.a. suspensive)
- Each side of the transaction files
  - Filings submitted to DOJ and FTC
- Initial 30-calendar-day waiting period
  - Early termination (ET) of the waiting period
  - "Pull & refile" (another 30 days)
  - Second request (6-plus months)
- Fees: $45K, $125K, $280K depending on deal value
  - Buyer pays unless parties decide otherwise

HSR Nuts & Bolts: The Basics

- Signed writing
  - Non-binding LOI/term sheet
- Confidentiality
  - Information confidential
  - Public notice if ET granted
  - Informal public notice if government contacts third parties
- Outcome
  - Waiting period terminated or expires
  - Approval after consent to divest
  - Litigate

HSR Nuts & Bolts: Jurisdictional Thresholds

- Assets, voting securities, exclusive IP licenses
  - Non-passive minority acquisitions of voting securities
  - Conversions into voting securities
  - Economic control of partnership or LLC
  - Joint venture formations
- Two jurisdictional tests (adjusted annually)
  - Size-of-transaction test: above US$84.4M
  - Size-of-person test: US$168.8M sales/assets and US$16.9M sales/assets
  - Ultimate Parent Entity
  - Non-manufacturing exception
- SOP eliminated for transactions valued above US$337.6M
- Joint ventures
  - US$168.8M/US$16.9M/US$16.9M

HSR Nuts & Bolts: Traps for the Unwary

- Valuation
  - Liabilities for asset deals
  - Liabilities for voting securities deals
- Contingent consideration
- Exemptions, exemptions, exemptions
  - Investment-only exemption
  - Foreign issuer exemption
  - Exempt foreign assets
  - Other exempt assets (*e.g.*, cash)
  - Percentage voting power stays the same or goes down
  - "Flow-thru" rule
- $ 41,484 per day in civil fines
  - Fines can be large, see United States v. VA Partners ($11 MM fine)

Document Creation – 4(c) and Equivalents

- All studies, surveys, analyses, and reports
- That were prepared by or for any officers or directors
- Discussing the proposed acquisition
- Addressing market shares, competition, competitors, markets, and/or potential for sales growth or expansion into product or geographic markets

Document Creation – 4(c) and Equivalents

- Ordinary course documents of Seller if used by Buyer
  - Be careful what is put in dataroom
- Board minutes may need to be submitted, but non-deal content can be redacted
- Cannot redact content specific to other deals from 4(c) documents other than board minutes
- 4(c) documents for prior iteration of the deal if used to analyze new iteration of same deal are also 4(c)

Document Creation – 4(c) and Equivalents

- Email:
  - If an email contains 4(c) content, it must be produced, along with any other attachments, regardless of whether the attachments contain 4(c) content
  - If only the attachment contains 4(c) content, then only the attachment should be produced
  - Emails replying to or forwarding emails with 4(c) content need not be produced unless there is additional 4(c) content in the later strings

Document Creation – 4(d) and Equivalents

- 4(d)(i):
  - Confidential Information Memoranda (CIM) or the equivalent
    - Limited to documents produced up to one year before the date of the filing
- 4(d)(ii):
  - Other third-party analysis evaluating the deal (*e.g.*, "pitch books" or bankers' books) even if unsolicited
- 4(d)(iii):
  - Cost or revenue synergies/other efficiencies of the deal

Quotes from Bazaarvoice Transaction

"*our only meaningful competitor*"

"gives us complete ownership of the category"

"improves our pricing power"

"Better monetization w/o pricing pressure"

"Monopoly in the market"

"less pricing dilution"

"essentially a duopoly"

"removes any cheap entry point for a future competitor"

"making future competition extremely difficult"

Document Creation: Best Practices

- Rule No. 1: replace writing with oral agreement
- Rule No. 2: write clearly and avoid hyperbole (no price increases)
- Rule No. 3: consult with legal before putting pen to paper
- Rule No. 4: have counsel review drafts
- Rule No. 5: school bankers and other consultants

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Ex-US Merger Control
Timing, Confidentiality and Signed Writing

- Pre-closing notifications (a.k.a. suspensive) required in most jurisdictions (*e.g.*, Brazil, China) but not all (*e.g.*, Argentina, Indonesia)
- Filings tend to be jointly made (*c.f.* in Europe generally the purchaser)
- Some jurisdictions require definitive contracts (*e.g.*, China)
- Some jurisdictions publicize fact of filing (*e.g.*, Germany)
- Some jurisdictions have deadlines for filing (*e.g.*, India)
- Phase I waiting period is typically 30 to 45 days
- Phase II can be several additional months depending on the jurisdiction
- Pre-notification discussions can materially extend the timeline (e.g. European Commission)

Ex-US Merger Control Issues of Stock Deal

- Sales, asset, and market share test
- Collect sales and assets by country for target
  - Brazil: look at buying group and selling group (20%)
    - US$235M/US$23.5M in local sales
    - Special rules for transactions involving private equity funds
  - China: target has US$59.2 local sales
  - Germany: target has EU €5M in local sales
- Lots of traps for the unwary, *e.g.*, negative purchase price or US joint ventures may be notifiable ex-US
- China can take several months to get approval
- Other regulatory filings (*e.g.*, Investment Canada)
- In Europe, there may be referrals from Members States to European Commission, and *vice versa*

2. ANTITRUST RISK ALLOCATION

Antitrust Risk Allocation

- "What's the worst that could happen?"
- A year of investigation/litigation while outcome is uncertain
  - Employees bolt
  - Customers wander
  - Competitors poach
  - Shareholders lose patience
- Transaction completely blocked by regulators
- Even a conditional approval generally involves divestitures or other remedies that strip value from deal

Buyer Concerns Regarding Regulatory Risk

- How do I evaluate the degree of risk associated with the transaction when the key documents and information may be tightly held by the Seller?
- How do I incentivize the Seller to support a joint effort to obtain speedy, unconditional approval?
- If regulatory approval is delayed or withheld, can I abandon the transaction without consequence?

Seller Concerns Regarding Regulatory Risk:

- How do I incentivize the Buyer to obtain speedy, unconditional approval?
- How committed is the Buyer if the regulatory path becomes challenging?
- If the transaction is blocked or the Buyer decides to abandon it, what damage will I suffer and how can I be compensated for it?

Solution: Parties to Transaction Negotiate Antitrust Risk Allocation Terms Specifying Level of Commitment and Consequences of Regulatory Action

- Cooperation commitments specify parties' roles and responsibilities during regulatory review
- Litigation covenants specify whether parties are obligated to defend litigated merger challenge
- Risk-shifting provisions spell out which party bears what risks in the event regulatory approval is denied or is granted conditionally
  - "Hell or high water" provisions bind Buyer to do whatever it takes to secure regulatory approval
  - "Capped divestiture" provisions limit Buyer's obligation to divest
  - "Commercially reasonable efforts" standard, with nothing more, allows Buyer to walk away after failed effort to obtain unconditional approval
- Reverse termination fees compensate frustrated/wounded Seller
- Ticking fees incentivize Buyer to move things along

Antitrust Risk Allocation Provisions Present an Opportunity for Creative Lawyering – They Are a Tool for Avoiding Misunderstandings and an Essential Component of Every Antitrust-Sensitive Transaction, BUT:

- Some Sellers unrealistically insist on absolute deal certainty
- Some Buyers are weakly committed to the transaction
- The gaps can be difficult to bridge

Think of antitrust risk allocation provisions as a deal-specific, buyer-issued insurance policy guaranteeing regulatory approval within negotiated parameters

Questions?

Biography

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David R. Brenneman represents clients primarily in mergers, acquisitions, joint ventures, and civil antitrust litigation. In the merger process, David works on premerger notification under the Hart-Scott-Rodino Act, international merger control, merger investigations, second requests, and compliance with consent orders. David represents pharmaceutical, chemical, and financial services clients before the Federal Trade Commission and US Department of Justice, and he coordinates filings for multimillion- and multibillion-dollar transactions worldwide. David is a member of the Morgan Lewis Committee on Foreign Investment in the United States (CFIUS) working group.

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Joanna has experience representing clients in EU and UK antitrust matters before the European Commission, the European Court, the Competition and Markets Authority, the Financial Conduct Authority, the Competition Appeal Tribunal, and antitrust authorities in other jurisdictions. She advises on the application of competition law to a wide range of commercial agreements and practices, and defends clients in relation to investigations, competition disputes, cartels, dominance, pricing, refusals to supply, and dawn raids. Joanna also represents clients in mergers, acquisitions, restructurings, and joint ventures. She works across a broad range of industries, including retail, grocery, financial services, commodities, pharmaceuticals and healthcare. Joanna is admitted to practise in England & Wales and Ireland.

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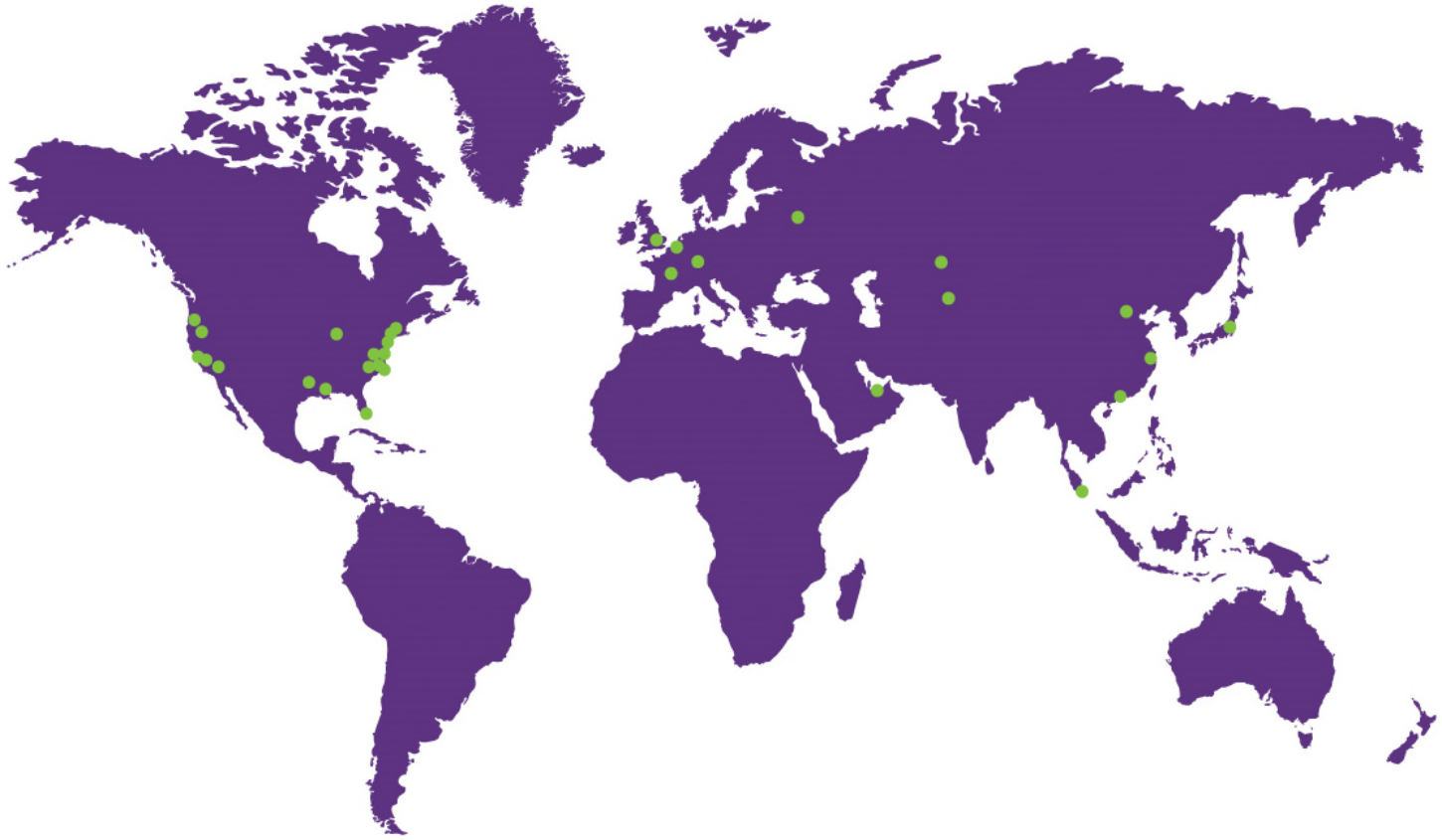

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