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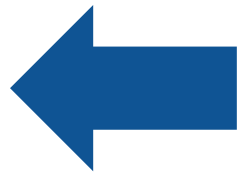
Developing Reliable Evidence through Requests for Documents and Data

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The views expressed are those of the speakers and do not necessarily represent the views of their agencies.

Investigative steps

1. Review initial information (e.g. merger notifications, complaints)
2. Develop possible theories of harm
3. Identify factual issues to investigate
4. Collect the evidence (obtain information, **documents and data**, interview witnesses)
5. Analyse and assess the evidence



Documents Requests

Planning

- **What information you need**
 - Based on the possible theories of harm and key factual elements needed to prove/reject it
- **Who may have this information**
 - Parties, other market participants, third parties, etc.
 - Which individual(s) within the organization
- **In what documents the information may be found**
 - Types of documents
- **Manage the "size" of your request**
 - May differ depending on addressee

"Size" of the request

- **Manage the timing and size of your request**
 - You must be able to review the document production within your merger investigation deadlines
 - Accept submissions on a "rolling basis"
- **Balance the burden of the request against your need for information**
 - Time period, custodians, type of documents, emails (search terms)
 - Scope of the request may differ depending on the addressee
- **Be ready to negotiate the scope of the request**
 - Know your "red lines" in advance
 - Understand where you may have some flexibility, but be ready to push back and "test" the parties' claims
 - Memorialize all agreed to changes to original scope of the request

Sources of documents

- **Merging parties**
 - Including parent companies and subsidiaries
- **Other market participants**
 - BUT beware of burden imposed and confidentiality issues
- Which specific individuals (**custodians**)?
 - Request organigram/org charts
 - Understand company's reporting lines and decision-making process on relevant issues
 - Often need to negotiate scope of the request once issued
- **Cooperation**
 - Documents submitted to other competition authorities can be very good starting point

Types of documents (1)

- Documents created **in connection with the transaction** (any time after the transaction was under consideration)
 - Merger negotiation and valuation documents
 - Synergy documents
 - Board presentations; minutes of Board meetings
 - Investor relation presentations
 - Submissions to competition authorities
 - Ordinary course of business documents
- **Understand rationale for the transaction**
 - BUT approach with caution as they may be self-serving
 - Compare ordinary course of business documents with similar pre-existing ones
 - Advocacy submissions mainly useful if supported by facts/documents (possible red herring)

Types of documents (2)

- Pre-existing documents created in the **ordinary course of business**
 - Third party analyst/industry reports
 - Annual reports, periodic disclosures to regulators, transcripts from earning calls, etc.
 - Internal market intelligence documents
 - Business and strategic plans (including investment plans)
 - Pricing documents
- Include useful **factual information** and **analysis**
- Help understand **market dynamics, competitive landscape, counter-factual absent the merger** etc.

How to write a document request

- **Specifications**
 - What a party is required to produce
- **Definitions**
 - Explain the key terms used in the specifications
- **Instructions**
 - Establish how a party is expected to produce the documents

Specifications

- **Material scope**

- What **type of documents** must be produced
- **Topics**
- **Search terms** if appropriate

If you are not familiar with the industry, let the addressee of the request provide keywords for you to review

Consider asking for a glossary of key terms and market/company jargon

- **Subject scope**

- Legal entities covered
- Custodians

- **Temporal scope**

Definitions

- **Purpose**

- Clarify key terms and avoid ambiguity
- Better target the request

- **Examples**

- "*Documents*": any electronically stored information; information on paper; any files or information or data created or stored in software-as-service, cloud computing, web 2.0; drafts of documents, metadata ...
- "*Board*": any member(s) of the board of directors, any of its committees and/or the company's executive committee, or other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting

Instructions

- **Specify rules for documents collection**
 - Use of search terms (operator "&" and distance between search terms, abbreviations, ...)
 - Treatment of duplicates, email chains...
- **Specify rules for submissions**
 - **Form for electronic production** (OCR, native vs image format, metadata, password protection, documents list)
 - **Delivery method** (USB, DVD, File transfer, etc.)
 - **Deadline** for submission
 - Ask for a **report** specifying the documents collection methodology and procedure
 - Treatment of **privileged** documents – ask for a log to verify the claims

Follow ups

- **Check completeness of response and compliance with instructions**
- **Follow up if something seems to be missing**
 - Do submitted documents suggest that other documents are missing?
- **Check legal privilege claims**
- **Plan the document review before receiving the document production**
 - Set up and brief review team
 - Prioritize topics or custodians
 - Find a workable way to efficiently store and retrieve most relevant documents

Data Requests

Planning

- **What data do you need?**
 - Based on the possible empirical analyses that you plan to undertake, which depend on the key issues in your investigation
 - What are the priority items?
- **Who may have this information?**
 - Parties, other market participants, third parties, etc.
 - Private vendors may have useful information for whole industry
- **How do the firms maintain their data?**
 - What kinds of databases do they have?
 - How much consistency is there among the firms?
- **Manage the "size" of your request**
 - What are you really going to be able to use?

What data do you need?

- **Market shares**
 - Sales (revenue, quantity)
 - Capacity
- **GUPPI analysis**
 - Some measure of diversion
 - margins
- **Entry/exit events**
 - Sales (revenue, price, quantity)
 - Locational information
- **Win/loss analysis**
 - Identity of competitors, nature of bids
 - Parties may not have best information
- **Demand analysis**

How do the firms maintain their data?

- Best to have a dialogue before issuing your request
 - Could potentially request a “Data Map,” analog to org chart
- Review of the initial filing may give you some insight into what the parties have and use
- It may be helpful to request a sample of particular data before issuing the request or while negotiating compliance
- How feasible is it to combine datasets?
 - Are there common fields across datasets that make matching feasible?
 - Do different firms define things and measure them in the same way?
- Are there **privacy concerns** with respect to the data?
 - There may be fields you would rather not have produced

How to write a data request

- **Specifications**
 - What a party is required to produce
- **Definitions**
 - Explain the key terms used in the specifications
- **Instructions**
 - Establish how a party is expected to produce the data

Specifications

- **Material scope**

- What **specific data** must be produced?
- How granular should the data be?
- Only request “ordinary course” data, or direct them to assemble in a certain way?

If the latter, require them to explain how they assembled the data, which datasets were used, which fields, etc.

- **Subject scope**

- Legal entities covered
- Databases: typically need a conversation to identify what they have, to identify what will be useful

- **Temporal scope**

- What is feasible to produce at reasonable cost?
- Time frame for data request may differ from document requests. Are there useful natural experiments?

Documentation

- **You will no doubt need help to understand what they have produced to you.**
 - Explicitly ask for the documentation you will need
 - For example:
 - for each Data Set provided in response to Specification 7(b), provide a data dictionary that includes:
 - (i) a list of field names and a definition for each field contained in the Data Set;
 - (ii) the meaning of each code that appears as a field value in the Data Set; and
 - (iii) the primary key in the Data Set or table that defines a unique observation.
- **To make sure you understand the data, it may be useful to calculate a quantity you know from another source.**

Instructions

- **The data will not be useful if they are not in a useable form**
 - Explicitly specify that you want data produced in a machine-readable form (no paper data submissions!)
 - Ensure that the data are produced in a way that is compatible with the software that you have available
 - For example:
 - b. Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact. Submit data separately from document productions.

Dealing with Large Volumes of Material

- Sometimes the parties will provide *huge* amounts of material
- For example, we may get dozens of spreadsheets containing various analyses that the parties routinely perform
 - E.g., a form that they fill out for each account they bid on
- We need to be savvy about how to spend our time
 - Sometimes there is a payoff to slogging through
 - But often there isn't
 - We're often better off spending a lot of time really understanding some key materials than trying to cover and assimilate huge volumes of less important material

Verifying Quantitative Claims

- Sometimes the parties will submit a quantitative analysis
- Typically we will ask for the underlying data
- Whatever the economic merits of the analysis, we want to be able to reproduce their answer exactly
- This is a good opportunity to make sure we understand the data
- It also serves to pin down just what claims they are making
- If we can't get their answer exactly, they need to help us figure out why
 - This can go all the way to the “where did the number in cell Q33 in the spreadsheet come from?” level of detail
 - This process can be very illuminating