Key Takeaways from the Webinar:

Competition & Regulatory Scrutiny in the 'New Normal'

2022

As the Covid-19 pandemic subsides, and the world adjusts to the 'new normal,' there is mounting evidence of a shift in approach by regulatory enforcement agencies around the world. Industries that have historically been at lower risk of investigation are coming under increasing scrutiny – and the tactics used by regulators are changing.

On November 17, 2022, in conjunction with *The Lawyer*, Epiq led a panel of competition experts to discuss recent developments.

OUR PANEL INCLUDED:

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This document summarises the discussion and provides an overview of the key 'takeaways' from the event.

First Line of Defence

In the field of merger control, there is an identifiable pattern of increased intervention globally, with more deals being investigated and an increased number being blocked or requiring remedies. The entire process for global deals is generally taking longer and becoming more complex to navigate.

- There continues to be close coordination between regulators, from the Competition and Markets Authority (CMA) and the European Commission, to the Department of Justice (DOJ), the Federal Trade Commission (FTC), and the Canadian Competition Bureau (CCB).
- However, there are certain differences in approach between the regulators. In the UK, for example, the CMA has been able to adopt a more 'elastic' approach to its jurisdiction, and in some ways has been seen as leading the charge as a global policeman with a more interventionist stance. Most recently, under its Article 22 EUMR powers, the European Commission formally investigated a high-profile merger which did not meet the threshold for formal review, but where the European Commission was convinced that it nonetheless merited scrutiny due to the potential loss of competition.
- Deals involving dynamic markets, such as digital, healthcare and pharmaceuticals, where innovation is critical, are facing particular scrutiny, including so-called 'killer acquisitions.'
- Although private equity purchasers in these industries historically have encountered little scrutiny from regulators, there is ongoing evidence suggesting that this is changing, particularly in the case of cross-directorships.
- There is also an increase in the number of additional data requests being issued by regulators, such as Second Requests in the US and Supplementary Information Requests in Canada. Additionally, we are seeing more aggressive merger challenges, where, in certain cases, the regulators are seeking to establish legal principles through litigation, rather than working out remedies with the parties.

Recent examples of increased enforcement and review include:

The U.S. government sought to block a proposed merger between book publishers Penguin Random House and Simon & Schuster, stating that the proposed merger might "substantially lessen competition." After a trial, the Court agreed with the Government's position and blocked the merger. Simon & Schuster's parent, Paramount Global, recently terminated the sale.

The DOJ challenged an alliance between American Airlines and JetBlue, contending that it would reduce competition in the transportation market. The parties await the Court's verdict, post-trial.

The DOJ sought to block the merger of Booz Allen Hamilton and Everwatch, two large government contractors. Ahead of issuing a Second Request, the DOJ sought a preliminary injunction pursuant to Section 1 of the Sherman Act, moving directly to block the merger through litigation. The Court found in favour of the companies and the deal closed in Q4 2022.

Prepare for the Unexpected: Dawn Raid Readiness

It is imperative that organisations are prepared for, and can respond to, unannounced inspections at all levels of the company. In many cases, 'dawn raid readiness' only extends as far as knowing whom to call when a need arises, but no further, a situation that can lead to problems responding to, or even over-sharing data with, the regulator.

- The panellists shared their recommendations and insights into risk avoidance policies, and company-wide dawn raid communication plans. Organisations need to develop and/or adjust policies in partnership with external counsel and document management experts. Many have tested this out with mock dawn raids.
- Companies have an obligation to preserve and produce written communications during an investigation. In 2021, J.P. Morgan Securities was fined $200 million by two U.S. regulators regarding charges relating to employees' use of WhatsApp and other chat platforms to communicate sensitive company business. J.P. Morgan's apparent failure to preserve and document these conversations, which involved senior personnel responsible for compliance, was found to have violated federal securities laws. The responsibility is on the company to ensure that employee communications are archived for regulatory scrutiny.

Big Data is Not a Small Problem

Although large data requests have always been a feature of the U.S. merger control landscape, they are now becoming increasingly common in the UK and EU as well. The exploding volume of data, combined with the increase in regulatory scrutiny, introduces the 'double whammy' of more data and the likelihood of it being subject to discovery requests.

- The increased prevalence of remote work has resulted in organisations possessing a wider digital footprint than ever before, with employees relying more heavily on instant messaging, video conferencing, apps that incorporate chat functions, and internal company messaging systems that allow users to communicate in real time, rather than in-person meetings that did not create digital records.
- Using personal devices for business functions – often known as 'grey' or 'shadow' IT – makes it more difficult to determine where data resides, and how to ensure preservation and collection. Regulators are aware of these trends. Although this is not unique to chat data (as people also store documents and emails on personal devices), the amount of chat data on these devices is particularly significant. Common obstacles to consider when collecting chat data include its lack of uniformity and complex structure.

Technology that makes life easier for users can conversely create unique issues for those who need to manage, collect, analyse, review, and ultimately produce data.

- Regulators are becoming increasingly savvy in the application of technology, which then informs their production requests to ensure that they receive data in a format that is most helpful for applying predictive analytics. Legal teams should speak to the regulators as early as possible to advise on their approach to technology and proposed workflows, as these negotiations can be iterative and impact compliance timelines. When working with competition authorities on multi-jurisdictional matters, workflows in parallel investigations must be monitored to ensure consistency. A global response will drive efficiencies in the review and disclosure process while also ensuring that privilege protections and legal obligations are met.

- Artificial Intelligence, in combination with the traditional use of search terms, can be effective in identifying privileged content and prioritising those documents for efficient review. Legal counsel, partnering with legal technology providers, can train algorithms to identify privilege, just as they do for relevance.
- With the advancements in neurocomputing, counsel and advisors can now train corporate systems using AI to spot risk issues as they are occurring, thus providing valuable information in an effective and efficient manner.

The Need for Leniency

With an increased focus on the ethical and responsible behaviour of corporations, there have been recent changes regarding leniency procedures, in which regulators incentivise early action from companies through the possibility of material reduction in fines.

- The US Department of Justice announced significant guidance updates to its leniency program in April 2022 – the first major change in 20 years – introducing an accelerated requirement for self-reporting that puts the onus on companies to act quickly when anticompetitive behaviour is reported or suspected. In the UK, the CMA is in the process of considering reforms aimed at encouraging self-reporting of competition law infringements through immunity from private damages actions as well as direct sanctions.
- As the development of corporate leniency programmes and the implementation of ongoing compliance programmes are on the rise, we are seeing growth in the role of advanced analytics and AI tools that can identify conduct that may violate competition laws. How companies respond to investigations can increase their exposure to liability. As a result, there is increased focus on compliance, monitoring and preventative measures. As part of an organisation's defensibility programme, it is vital for it to work closely with its legal advisors to understand its risk profile and identify any areas that require further intervention, then use AI and predictive tools to assist with preventative and proactive audits.

Settlement agreements with regulators may require an active monitoring component, especially for corporations that have gone through an investigation, to ensure that communications are continuously analysed to assess potentially illegal behaviour.

In sum, there is more data than ever to navigate. Organisations must know their data types and sources, be prepared, and understand their starting position with the regulators. As part of this process, they should retain experts in document management and legal technology who understand data science and have the right technology options and consultants to assure timely compliance. Being prepared is critical.

Contact

For further information, please reach out to us on legalsolutions@epiqglobal.com

Webinar Recording: click here to view the webinar recording

Please note that the comments provided by the panellists are their own, and do not represent their organisations. This document does not constitute legal advice.