Key Takeaways from the Webinar:

Competition & Regulatory Scrutiny in 'The New Normal'

There has been a shift in approach by regulatory enforcement agencies around the world. Industries that historically have been at lower risk of investigation are coming under increasing scrutiny – and the strategies deployed by regulators are changing.

On January 25, 2022, in partnership with Corporate Counsel Business Journal, Epiq led a panel of antitrust and competition experts to discuss the evolving landscape of regulatory scrutiny in 2023 and beyond, focusing mostly on developments in the US market.

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

There has been a significant global surge in merger review and merger control filings. Over the past twelve months, global and US regulators have continued to push the boundaries of antitrust enforcement. A strategic and creative approach remains fundamental.

A NEW SENSE OF DIRECTION

There have been several announcements in the past year from the U.S. Federal Trade Commission ("FTC") and Department of Justice's Antitrust Division ("DOJ") signalling a more involved approach to merger review.

- From the recent labor market/non-compete rulemaking to statements in the FTC's strategic plan about adding questions to Second Requests to target historically underserved communities such as low wage workers or the impact of mergers on underserved communities, the implementation of this new antitrust approach is affecting deals in a comprehensive way. Regulatory agencies are enhancing "classic" theories of harm that focus on whether markets are concentrated, are high combined markets, or subject to forward looking competitive impacts. They are examining the impacts to nascent competition, consolidation of data, and effects on labor markets (called out in President Biden's Executive Order on Promoting Competition in the American Economy).
- One of the significant changes to antitrust policy is the substantial increase in funding that the agencies will see as a result of the Merger Filing Fee Modernization Act ("MFFMA"). With top filing fees for the largest deals now increasing to $2.25M, combined with the increased reporting obligations for HSR filings, the agencies will have increased resources to move their policy agenda forward.

FORGING NEW PATHS: MERGER GUIDELINES AND ADVANCED THEORIES OF COMPETITIVE HARM

Regulators are taking expansive approaches to merger control, scrutinizing vertical combinations, and asking whether deals are likely to stifle nascent competition.

- While the agencies historically have not challenged vertical integrations, recent challenges have embraced vertical theories of antitrust harm. Some of those recent policy changes are already making their way into FTC and DOJ enforcement actions. Recent examples include terminated deals such as NVIDIA / SoftBank Group Corp. (Arm) and Broadcom Software Group / VMware.
- The agencies have been transparent in their aggressive approach to nascent mergers, and avoiding competitive harm. For example, the DOJ brought enforcement actions in the Visa/ Plaid deal, alleging that it would limit competition in the payments industry. A few months later, Visa abandoned the deal. The DOJ also sued to block Sabre Corporation's acquisition of Farelogix, resulting in the parties terminating their merger agreement.
- In 2022, the FTC and DOJ put antitrust enforcement in the employment context at the forefront. The regulators have signaled that they will challenge employment contracts and agreements between employers that increase labor market frictions more aggressively.
- There is also a movement to integrate sustainability values into antitrust thinking. The regulators are warning companies that non-antitrust benefits of a deal – particularly in the environmental, social or governance space - will be considered.

THE INSIDE TRACK: LESSONS LEARNED FROM THE UPTICK IN CONDUCT CASES

Parties must be diligent about what is produced to the agencies and consider the use of artificial intelligence (AI) and analytics workflows up front to get a handle on the information in their documents.
It is important to have a game plan when producing data that could lead to a secondary investigation.

- "Dumping" documents, while perhaps cost effective, may lead to complications if the regulator uncovers something interesting. Some recent cases highlight the importance of having regular technical training for antitrust legal and business teams.
- Many conduct cases result from merger investigations. The infamous canned tuna price fixing case in the 90's resulted from someone at the DOJ spotting suspicious email addresses on documents, effectively uncovering a massive, and heavily documented, price fixing scheme.

THE GREAT AMAZING COMPLIANCE RACE

Substantial compliance can be an elusive concept. With agencies asking for data and documents in some of these non-traditional areas that may not be kept or maintained or easily produced, getting to substantial compliance may be harder than ever.

- Agencies increasingly are asking for non-traditional data sources, which highlights the importance of having strong document creation and retention policies up front.
- Given the impact of the MFFMA, agencies will have more robust tools at their disposal to review and search through document productions to identify problematic documents that can undercut a merger or lead to a related conduct investigation.
- The prevalence of timing agreements, including the addition of more custodians, can leave a trail of additional collection, processing, review and production that can delay or restart "the clock" for deal approval.
- Understanding what problematic conduct may be evident in the data earlier in the merger or litigation process will continue to be critical for all companies. Whether as part of the "race to leniency" or to ensure that merger disclosures are not opening the door for further investigation, companies need to leverage technology to know what is in their data. The updated leniency guidance issued in April 2022 is pushing companies to a more proactive view of risk assessment and monitoring. Legal services providers are leveraging advanced analytics and AI models to identify potential conduct issues, ahead of regulator requests.
- From "Standard Active Learning" or "TAR 1.0" to comply with merger requests, to "Continuous Active Learning" or "TAR 2.0" workflows, there has been a shift in the market in the way corporations are approaching and adopting the analysis of data.

DATA SOURCES WE CAN'T AVOID

Regulators are interested in the expansion of data types, and newly emerging data repositories, such as chat data - WhatsApp, Slack, Teams. These data types pose unique review challenges due to lack of uniformity and structure, specifically around production given that TAR technologies cannot always be leveraged on them.

- It is important to understand the origin of conversation threads and to look across systems to understand what might drive relevance and privilege.
- Organizations need to have a process and policy in place to preserve and collect data from non-traditional data channels.
- There is an increased appetite to leverage analytics to identify privileged information in review.
- In the era of "bring your own device to work," there is a heightened concern around privacy - how conversations are captured, and how to separate the personal from the professional. This has resulted in organizations managing 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.

NOT AT THE FINISH LINE ... YET

Antitrust law is changing in a fundamental and comprehensive way. US antitrust authorities and other competition agencies around the world continue to expand the notion of antitrust and competition law.

- There have been significant policy statements and enforcement actions over the last year, and we expect to see policy changes in the new US merger guidelines that are expected shortly.
- Recent enforcement actions have resulted in more deals falling into the risk spectrum. However, regardless of the shifting factors from the agencies, there has not been a drastic decline in deal flow.
- Parties are becoming more creative, and we expect to see more use of "fix it first" and robust strategic defence approaches in 2023.
- What remains to be seen is how successful antitrust enforcers can be and whether parties are willing to push back by litigating mergers and non-merger investigations.

FOR MORE INFORMATION

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