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Key considerations for dealmakers in a pro-enforcement antitrust environment

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More than ever, M&A transactions can be subject to detailed antitrust reviews in multiple jurisdictions. This can complicate deal negotiations, extend closing timelines and raise greater risks of divergent results. Recent developments in the US, EU and UK show greater enforcement, increased fines, new theories of harm and longer investigations. Companies planning M&A activity should consider antitrust issues early to manage risk and maximize the prospect of clearances.

In Europe, the UK Competition and Markets Authority (CMA) and the European Commission (EC) are using their flexible jurisdictional tests to review a wide range of deals, including transactions with limited local nexus that would have previously been exempt from close scrutiny. In the US, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) have taken a stronger pro-enforcement stance and, unlike previous administrations, have shown a greater willingness to challenge deals that raise non-traditional theories of competitive harm. Moreover, many other jurisdictions, such as China, India, Brazil and others, may also have jurisdiction to review transactions.

While each of these competition authorities is theoretically applying similar principles to evaluate a transaction, in practice each may approach its analysis very differently. In addition, there are substantial differences in *process* between the US (where antitrust enforcement authorities must go to an independent court to block a deal) and most other jurisdictions (where a competition commission or similar authority has the unilateral power to block a transaction, subject to some level of judicial review).

Against this backdrop, it is important to be mindful of the current antitrust environment when planning and executing M&A transactions.

Practical considerations to keep in mind for deal planning include:

- **Anticipate potential antitrust issues early and coordinate strategy from the outset.** Effective coordination between deal teams and antitrust counsel is fundamental especially where substantive issues may arise and multiple jurisdictions are in play. Companies planning complex cross-border deals should therefore engage antitrust counsel with integrated teams that can advise seamlessly in key jurisdictions with the most active enforcement regimes (EU, US and UK).
- **Substantive assessments should assess *all* possible theories of harm.** The scope of antitrust assessments has widened, given the range of areas of potential harm the authorities have challenged in the recent past, and agencies have signaled more expansive approaches to merger review (see, for example, the 2023 DOJ/FTC draft merger guidelines discussed in our previous client update). For example, this extends to transactions:
  - between firms offering products at different levels of the supply chain or complementary products (e.g., *Microsoft/Activision Blizzard* and *Illumina/GRAIL*);
  - where there are dominant or large companies buying smaller players even if there are no actual or potential horizontal overlaps or vertical relationships (e.g., *Amgen/Horizon*);

- where there are private equity firms acquiring a series of competitors as part of a roll-up strategy (e.g., the FTC's recent complaint against Welsh Carson and its controlled entity U.S. Anesthesia Partners discussed in our previous client update); and
- where there are substantive concerns such as reduced innovation or decreased product choice, even if there are no negative price effects as a result of the deal.

– **Multi-jurisdictional review needs to be considered carefully in connection with the negotiation of deal documents.** A deal subject to review in multiple jurisdictions may have a substantially more complicated and uncertain path to closing than a transaction subject to review in only one or two jurisdictions. Parties need to identify potential filings up front and determine how these filings impact key deal provisions.
  - **Antitrust provisions in deal documents should contemplate the risk of lengthy antitrust reviews (which may take up to two years for complex matters).** As a result, sellers are more intent on seeking longer drop-dead dates and reverse termination fees. Due to increased uncertainty around the outcome of proposed remedies (especially for multi-jurisdictional reviews), firms should also consider ahead of signing whether merger control risk can, if necessary, be reduced through an upfront restructuring or fix-it-first.
  - **Coordination between multiple regulators may increase complexity and disrupt timelines.** Antitrust authorities (especially the EC, CMA and the FTC/DOJ) regularly coordinate their reviews and/or share information with each other. This coordination may, for example, prompt one regulator to investigate an area that it may not have otherwise been inclined to focus on, even if the outcomes of each regulator's investigations ultimately diverge.
  - **The impact of non-antitrust regulatory filings needs to be carefully assessed.** Consideration must be given to potential foreign investment reporting requirements, as well as possible notification obligations under the new EU Foreign Subsidies Regulation (see our previous client update), the EU Digital Markets Act and, in due course, the UK Digital Markets, Competition and Consumers Bill (DMCC) (see our previous client update). In most jurisdictions, these requirements will also be mandatory and suspensory. Transacting parties must consider the risk of disruption to deal timelines and ensure adequate protections are reflected in deal documents.

– **Note that deals do not have to be notifiable to be called-in.** In many transactions, there is the risk that regulators in the EU and UK could exercise their discretionary powers to call in a deal which does not obviously meet the jurisdictional thresholds. Accounting for this potential scenario in the diligence stage and in contractual documents is important.
  - **The EC can exercise its discretion under Article 22 of the EU Merger Regulation to review deals that do not meet EU or Member State filing thresholds.** The EC now routinely raises questions on high-value deals, particularly in sensitive sectors (e.g., pharmaceuticals (*Illumina/GRAIL*), and critical minerals). Consequently, transacting parties may choose to be proactive and submit a briefing paper to the EC in advance to mitigate the risk of a call-in.
  - **The CMA's flexible share of supply test has allowed it to call in a range of deals for review, even where the relevant target has limited or no local turnover.** Relatedly, the DMCC is expected to give the CMA a new ability to call in deals where one party has a greater than 33% share of any market and significant local turnover, irrespective of whether the transacting parties have any competitive overlap.
  - **The US agencies can challenge deals after expiry of the Hart-Scott-Rodino Act (HSR) waiting period and non-HSR reportable deals.** HSR reportable deals must observe a waiting period during which the parties must not close. However, waiting period expiry does not equate to a "clearance" preempting the US antitrust laws. While relatively rare, the FTC and DOJ can and do investigate and challenge closed deals where the waiting period has expired as well as non-HSR reportable deals.

– **Parties should prepare for the prospect of a lengthy review and the need for effective pre-close compliance measures.**
  - **Multi-jurisdictional review may thwart parties' ability to "have their day in court."** As noted above, US antitrust authorities do not have a unilateral power to block deals and must typically go to an independent court to seek to block a deal. Merging parties have capitalized on this procedural requirement and prevailed in a number of recent litigations against the DOJ and FTC. For transactions that are subject to review in other jurisdictions, however, it may be more difficult to obtain prompt judicial review in the US because the pendency of other competition reviews may effectively render US judicial review moot.
  - **Initial notification procedures are becoming more burdensome even in the absence of potential competitive harm.** The FTC has recently proposed extensive changes to the HSR form which would obligate filing

parties to provide substantially more documents and information upfront—resembling or exceeding the requirements in other jurisdictions, including the EU (see our previous client updates here and here). In the EU, the scope of internal documents that need to be submitted is wide and the EC can stop the review clock each time it requests information, resulting in delays that can last for several months.

- **Heightened risk that deals raising concerns will proceed to litigation.** In the US, the FTC and DOJ have litigated several merger cases in recent years, including those relating to alleged non-horizontal theories of harm. The agencies have lost a number of these challenges, and it is possible that the agencies will be somewhat more conservative in choosing the cases they will challenge in court. In the UK and EU, it is difficult to overturn a Phase 2 decision as the respective courts have acknowledged the wide discretion granted to the CMA and the EC to conduct investigations and reach decisions. The UK does, however, have a specialist antitrust court, the Competition Appeal Tribunal, that hears challenges of CMA decisions. Where there are potential substantive issues, companies should carefully consider whether a commitment to litigate should be incorporated in transaction documents.
- **Closing before reviews are complete can result in significant penalties, particularly outside the US.** The EC and CMA have stepped up enforcement actions against, amongst other things, gun jumping (i.e., closing a deal or part thereof without prior clearance). In *Illumina/GRAIL*, the EC imposed a €432 million fine on Illumina, its largest ever gun-jumping fine (see our previous client update). In *Meta/Giphy*, the CMA fined Meta £50 million in 2021 for allegedly breaching an interim enforcement order during its merger inquiry.

In light of the aggressive antitrust environment and the multitude of merger control regimes worldwide, as well as the proliferation of non-antitrust regulatory regimes, dealmakers contemplating cross-border deals should consider the issues discussed in this client update at an early stage. Proactive engagement with antitrust counsel can lead to a sound regulatory strategy that seeks to navigate the complexities of dealing with novel theories of harm and multiple regulators.

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