

Global Trends in Antitrust Enforcement and Litigation

There has been a distinct shift in the scope and breadth of investigations by global competition regulators, as well as an uptick in the number of antitrust related litigations. With an administration change in the US and political shifts in other jurisdictions, the increased focus on regulatory enforcement of competition and antitrust laws, rapidly changing policies, and the growing collaboration of regulatory agencies, the rise of collective actions or mass competition claims is expected to continue throughout 2021. Not only are enforcement agencies considering the business and economic impact of mergers, recent developments suggest they are also assessing the role of competition law in advancing goals relating to labor, environmental and sustainability agreements, and other social and governance issues.

On June 22, a panel of competition/antitrust experts from the US, Canada and Europe discussed the increased scrutiny of cross-border merger activity and competition investigations, how these developments have impacted legal strategy, and the new technology tools employed by parties to deliver efficient and transparent outcomes for clients. The panel also discussed competition litigation and the impact of regulatory investigations on civil claims. The panel included:

- **Tom Bolster**, *Partner, Antitrust Litigation, Hausfeld, London/Paris*
- **Mark Katz**, *Partner, Competition, Antitrust & Foreign Investment Review, Davies Ward Phillips & Vineberg, Toronto*
- **Doug Jasinski**, *Counsel, Antitrust, White & Case, Washington, D.C.*
- **Bishu Solomon Girma**, *Vice President, Client Services, Epiq Global, EMEA*

Cross-Border Collaboration

There has been an increased focus on regulatory enforcement of competition and antitrust laws globally, specifically in the context of cross-border merger enforcement. Antitrust authorities have maintained their tough approach, and cross-border mergers are often subject to foreign investment reviews.

- When transactions are subject to simultaneous investigations, for example, by the Department of Justice (DOJ), the Federal Trade Commission (FTC), the Canadian Competition Bureau (the Bureau), the European Commission, and the Competition and Markets Authority (CMA), the coordination between regulators can impact the legal strategy and approach when responding to merger investigations. While there can be overlap in coordination, the unique laws governing a particular region may alter the course and outcome of the transaction.
- Coordination in merger control is an ever-present and inevitable component of doing international deals. Enforcement agencies have successfully cooperated for many years on merger investigations that affect their jurisdictions. The Competition Bureau, for example, requires parties to disclose which other agencies are reviewing a transaction and will seek waivers to speak with them. The Bureau takes the view that it does not require permission from the merging parties to disclose information to other authorities as this is authorized under the *Competition Act*.
- Parties must also consider the coordination required from a privacy perspective, as the information and nature of the matters are subject to rules and policies governing how and when they may be disclosed. When dealing with cross-border litigation and mergers, there needs to be a consistent approach in the process and in the information being provided.
- Notwithstanding international coordination by the regulators, the outcomes do not necessarily align. For example, in Canada, the Competition Bureau has decided not to oppose transactions that were contested in another jurisdiction because of the availability in Canada of a formal **Efficiencies Defence**, which allows otherwise anti-competitive mergers to be justified on the basis that the likely anti-competitive effects are outweighed by the likely efficiencies resulting from the transaction.

Beyond Mergers

Global enforcement isn't solely exclusive to mergers – there has been continued cooperation between regulators in the investigation of cartels, including in older high-profile cases such as the Air Cargo Case and more recent ones such as the Maritime Car Carrier Case, though the approach and outcomes can vary by jurisdiction.

- To ensure successful coordination in cross-border investigations, the parties need to consider where documents and witnesses are located, both from a practical and jurisdictional perspective, and if waivers will be required.
- The growth of international coordination highlights the benefits of dealing with counsel and service providers who have global presence and capabilities to support these investigations.
- There is a considerable uptick in standalone litigation in the UK, rather than pure follow-on litigation, as well as an increase in competition claims in countries such as France, despite France not being perceived as a disclosure-friendly jurisdiction.
- Competition litigation has been prominent in the US for some time, and a considerable number of antitrust class actions follow on from cartel investigations, not only within the US, but also relying on investigations in other jurisdictions, in an attempt to use that foreign evidence for the purposes of class actions in the US.
- When providing information to enforcement agencies for the purpose of reviewing a merger, information discovered in the context of a merger investigation can lead to other types of investigations.
- Cross-border investigations can also increase the likelihood of civil litigation and antitrust cases by providing claimants with richer and more varied sources of evidence on a cartel to use in domestic litigation, as well as sometimes fueling claims locally.
- The panelists highlighted the importance of maintaining data in complex cross-border investigations and enforcement actions, particularly if there is a likelihood of a similar investigation occurring in another jurisdiction, where parties may consider single sets of data for multiple jurisdictions. While the enforcement may have ended in a particular jurisdiction, it may not have ended globally.

Leveraging Advanced Technologies

Leveraging advanced technology for litigation can manage costs and improve client outcomes. This includes data mapping to preserve information sources, engaging legal hold technology and database archiving. Deploying analytics during early case assessment is crucial to identify potential issues, risks, or themes that support your position, for example using key documents from the merger review to find similar documents present in the expanded litigation dataset.

Please note that the comments provided by the panelists are their own, and do not represent their firms.

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