COLLECTIVE INTELLIGENCE

How to Get the Right Deals Done:

Insights for Business Leaders From Brunswick's Antitrust Experts Following a Recent Merger Control Event in London

Claire Thomas-Daoulas, Stuart Hudson and Andrea Gomes da Silva
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On January 16, Brunswick hosted a breakfast event in London, bringing together industry experts to discuss what to expect from UK merger control in 2024, and the impact of antitrust on the global business landscape.

After the event, Brunswick Senior Advisor Andrea Gomes da Silva and Partner Stuart Hudson, who both held positions in the UK Competition and Markets Authority (CMA), spoke with Partner Claire Thomas-Daoulas about what to expect from UK merger control in 2024. Their conversation touched on the balance between consumer protection and economic growth, as well as the CMA's influence on international transactions. Especially in the current climate, where uncertainty affects business leaders, investors and dealmakers, impacting negotiation on break fees and outside dates.

What is the key point you took away from Brunswick's antitrust event last week? How is the debate among the dealmaking community evolving?

Andrea Gomes da Silva [AGDS]: I was struck by what a central role antitrust has assumed in the policy debate about how to influence investment and devise industrial strategy. That debate drives real discussions and decisions in boardrooms.

Stuart Hudson [SH]: The point that has stuck with me is how varied the experiences of dealmakers is. All the senior bankers and lawyers we've spoken to have seen situations where management teams have decided against doing a deal because of concerns over the likelihood of antitrust approval, whether that's in the UK, the EU or US. But there have also been plenty of cases where dealmakers have been positively surprised, with deals getting through at a very early stage or without any formal investigation at all. This points to the uncertainty that businesses face and the need to look beyond headline media narratives about what's going on at the various antitrust authorities.

We heard from dealmakers in the UK, and practitioners from the US, the EU and Asia. One theme I found particularly interesting in the discussion was that there seems to be a genuine divergence between international regulators on the harmfulness of mergers. Is that your view as well? Where do their considerations differ?

AGDS: One of our panelists made the point very well: There is no divine right to merge. All regulators aim to strike the right balance between the business imperatives that drive a potential deal and the risk a deal could pose to consumers. If there is a legal doubt in an agency's mind, the question is why the consumer should bear the risk of, for example, a remedy that does not restore the competition lost as a result of the merger. This is an important concept for companies to understand. Agencies are working hard to fulfill their statutory duties with limited resources. Companies tend to be overconfident about outcomes – and agencies are worried about information asymmetry, as it is virtually impossible for them to test all evidence.

SH: I think each agency is learning from its own history. There's certainly a feeling among leaders of the US and UK agencies that there was a period when they underenforced and that this has had to be rectified. I don't think the European Commission (EC) feels this in quite the same way but, even so, its leaders are outward-looking and engaged in these wider debates. It's also important to remember that antitrust authorities aren't static, and they aren't monolithic. There are going to be different views *within* them as well as between them, and their thinking is evolving over time, especially in digital markets.

One of our panels looked at the hallmarks of a regulatory regime. It was not clear to me that any particular regime was found to be close to perfect, but were there any aspects of that discussion that you think are worth keeping in mind for the UK?

AGDS: It was clear from all the discussions that there is a desire for predictability, stability and transparency in regulatory regimes. Interestingly, the UK is one of the most transparent regimes, with the CMA issuing regular guidance, working papers setting out their interim analysis and lengthy, reasoned provision and final decisions. And yet, we are hearing a lot of dissatisfaction from businesses about their interactions with the CMA, who find that the CMA is not transparent enough, particularly in remedy negotiations – criticism that the CMA has responded to with its recently published draft guidance on the Phase 2 merger process.

SH: There's a big desire from companies and their investors both for predictability and for consistency. They want regulators to have a well-communicated approach that they stick to over time; and they want consistency across the various different authorities in a given jurisdiction, so that for example, you don't have the finance minister saying one thing and the financial regulator demanding something different. However, it also became clear that there can be a tension between these two things. Ministers and regulators are more likely to be consistent if they're all under the same political control, but if that happens there's also likely to be more unpredictability, because political priorities can change very quickly.

AGDS: The role of courts is another aspect where the intersection with policy is worth considering. This is an area where the UK has been criticized, because of what some have called a lack of genuine judicial scrutiny. Yet appeals to the Competition Appeal Tribunal are heard in a matter of a few months (in contrast to the EU, where the appeals process takes years), and the CMA is able to reflect evolving policy priorities and signal that it is doing so through its guidance. In contrast, the US agencies need to persuade a court to block a merger, which mean that changes in policy can take longer and are ultimately not in the domain of the agency, so there can be a disconnect between an agency's espoused policy and what is reflected in case outcomes.

Considering everything that was discussed, what is the one piece of advice you would give to companies looking to do deals in the UK?

AGDS: Don't be an ostrich! The additional complexity and time it takes to navigate multiple processes will not be welcome, but considering antitrust risk early in your decision making and planning ahead is the best way to maximise the chances of clearance.

SH: My suggestion follows on from Andrea's. It's so easy to make wrong assumptions about what is motivating politicians or regulators. Try to put yourself in their shoes, because if you can understand what's driving them, you're more likely to be able to predict their behavior, update your strategy accordingly and get to the right outcome.

To continue the conversation

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Claire is a Partner in Brunswick's Paris and Brussels offices. She is a founding member of Brunswick's global competition & antitrust team and a core member of the global Tech, Media and Telecoms team. She has significant experience working on tech issues, M&A situations and litigation projects.

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Stuart is a Partner at Brunswick specialising in M&A, regulation and public policy. Stuart previously served at the CMA as Senior Director of Strategy, a member of the Executive Committee and an advisor to the Board. During the global financial crisis he was appointed Special Adviser to Prime Minister Gordon Brown.

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Andrea is a Senior Advisor at Brunswick. She is a highly experienced senior executive, board member and competition practitioner with 25 years' experience assessing cutting-edge competition issues in both the private and public sectors. Prior to joining Brunswick, Andrea was a member of the CMA Board and, as Executive Director, was responsible for delivery of the CMA's markets and mergers work.