Collective Intelligence

Unpredictable to Hostile: Antitrust in the EU, US and UK

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Brunswick Regulatory and Public Affairs

June 2022

BRUNSWICK

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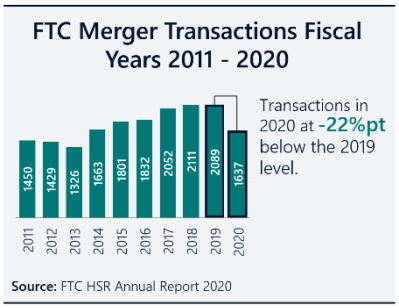
The senior advisors and leaders of Brunswick's Regulatory and Public Affairs practices in London, Washington, DC, and Brussels discuss the current complex environment for mergers and acquisitions. Change is coming, they say, but the outcome of that change is uncertain. Deals can still be done. But those that raise potential issues need to be carefully prepared.

Sir Jonathan Faull and John Davies both formerly worked at the European Commission's Directorate-General for Competition, Sir Jonathan as Director for Competition Policy and Deputy Director General, and John as a case officer. Terry Calvani was Commissioner of the US Federal Trade Commission from 1983 to 1990, serving as its head in 1984 to 1985

What is the current antitrust environment like for dealmakers?

John Davies, London: It is the most unpredictable that we've seen for 30 or more years, since the advent of European merger regulation – when people did not really know what Europe controlling mergers meant. Europe worked through years of uncertainty to more predictability, and then other non-European countries developed their own merger control laws. Gradually, we worked toward a desire for convergence. But I don't think the leading authorities any longer feel that convergence is important. Recent examples of divergent outcomes between the UK and Europe – such as the Konecranes-Cargotec merger – are not helping overall predictability.



There has been a significant chilling effect on the willingness of corporates to engage with any kind of regulatory risk. Lina Khan, the head of the US Federal Trade Commission (FTC), has talked about preventing "facially illegal" deals. That term never existed before. So, I think the environment is edging from unpredictable to hostile.

Terry Calvani, DC: That is true in the US. It has been reported that Second Requests (Phase II) are being issued more routinely and in the absence of staff recommendation. The requests themselves are often larger. Parties often receive "close at your own risk" letters indicating that the FTC may challenge the deal after the expiration of the review period and consummation. The leadership has indicated that consent orders may contain "prior approval" clauses that will require affirmative approval of future deals by the agency.

On the convergence point, at the close of the International Competition Network Plenary, Andreas Mundt [president of the German Federal Cartel Office] observed that the US was moving closer to Europe in its merger policies. Whether this evidences more convergence between the US and Europe remains to be seen.

Jonathan Faull, Brussels: There is a strong sense in the US that the previous regime was harmful and there is a need for a major correction. The Americans are reaching out for theories on how to do it. They have said things like, "if we can't persuade the courts to follow us on this, we will have to propose legislation to change the rules." In Europe, though, the approach appears to be to test the boundaries of the existing law rather than to seek legislative change.

What do companies need to think about before pursuing M&A?

JF: The only thing they used to have to worry about was, "is this a competitor and will I have too big a share of the market if I buy it?" Now, the analysis is much more complicated. You must worry about half a dozen jurisdictions around the world speaking different languages. And in your home country, particularly in America, you have to answer questions from stakeholders you might only be dimly aware of. People want to know what the merger means for your green agenda, your social agenda, the war in Ukraine.

JD: The FTC is now asking questions about issues like job losses. It's not something lawyers are used to doing. Pulling all these bits together is inconsistent with the purist antitrust approach which the US was so proud of. But that's all gone now.

Companies will have to be brave enough to say, "We are prepared to go to court to complete a merger." The current prevailing judicial standards between the US and the EU are not supportive of what the agencies want to do. CEOs and their advisors who want to complete a merger are going to have put on their tin hats and be prepared to fight.

JF: A company out in California that barely understands Washington now finds it must deal with Brussels. Any lawyer would have told them they don't have to worry about Brussels because their target has no activity in Europe. But today, it turns out, they do.

JD: In big cross-border cases, we are seeing the waterbed effect. If you try to fix something in China, you might end up angering the Americans. The Europeans say yes to one set of remedies, but then the UK authorities say no.

Antitrust as a political tool

JF: Where legislation is difficult to pass, recourse to antitrust law is likely to be more frequent. In addition, antitrust law is increasingly used to pursue public policy goals beyond competition in the strict sense.

JD: We saw this recently in the UK, where the government failed to bring forward its new digital legislation. Instead of waiting, the Competition and Markets Authority just said, "We're going to get on with it anyway and try to do a lot of these things with our existing powers." They don't need any new legislation.

TC: Unlike many other jurisdictions, the US courts play a very important role in insuring that the government's cases are consistent with the law. The US Department of Justice, for example, stands simply as a party-plaintiff in federal antitrust cases. There is pending legislation that would permit both the FTC and DOJ to skip the courthouse by empowering them to issue orders blocking mergers, and divest the US Supreme Court of its appellate jurisdiction over antitrust cases.

JF: We live in an era where governments pursue public policy goals by regulating companies. We can't fight a war with Russia because of the nuclear threat, so we impose sanctions and turn companies into instruments of foreign policy, just as they have become instruments of environmental policy, social policy and lots of other policies. It's much easier to get companies to act by cajoling, enforcing and above all – by using antitrust. You can really get companies to behave differently by threatening them with your executive power.

Protecting deals from new threats

JD: From the target's perspective you need a lot more reassurance that the deal is going to be approved. You need to understand your potential acquirer's commercial strategy in gruesome detail, and ensure you have a whole raft of protections in case the deal doesn't happen. You have to say, "Right now, the FTC is really unpredictable, so I'm not prepared to dance with you unless you're prepared to put X billion on the table as the price I get if you don't get it through."

You also need to be ready for commercial opponents to the deal going public. Corporate rivals used to oppose deals behind the scenes, because they worried that if they threw bricks at each other it would lead to mutually assured destruction. Not anymore. You need to be prepared to deal with very public opposition.

Since this discussion, Brunswick has further strengthened its regulatory team with the addition of Andrea Gomes da Silva.

To continue the conversation with our Regulatory and Public Affairs Practice:

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