PUBLIC AFFAIRS

Courting reputation

Companies navigating Europe's regulatory landscape should aim for more than just a legal victory, say Brunswick's PHILIPPE BLANCHARD and LINUS TURNER

No industry, it seems, is beyond the reach of European regulators. Many of the high-profile regulatory cases emerging from the EU stem from its competition policies – an area covered by more than 1,300 pages of legislation governing cartels, antitrust, state aid (including taxation) and mergers.

By their nature, these competition cases tend to involve some of the world's largest and most recognizable organizations. These names alone attract plenty of attention. But so does the public manner in which the European Commission, the executive body of the European Union, enforces its decisions. The Commission posts press releases in multiple languages on its website, and tweets links to them to its 600,000-plus followers.

And then there are the headline-grabbing punishments. Between 1990 and mid-2016, cartel investigations – only one of the categories of competition law – had resulted in more than €25.8 billion ($28.9 billion) in fines. A number of mergers have been blocked, including airline carrier Ryanair's attempt to buy rival Aer Lingus, while other mergers have been cleared only when significant divestments have been agreed.

Companies have even had to change their products: in the long-running cases against Microsoft, the company was forced to release versions of its Windows operating system without Windows Media Player installed and offer consumers a choice of internet browsers, as the Commission claimed the software was stifling competition. Other cases have affected how soccer fans watch the English Premier League, German Bundesliga and UEFA Champions League.

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> **FALK SCHÖNING**
> **Partner,**
> **Hogan Lovells**

IN THIS ENVIRONMENT, companies that find themselves in the crosshairs of regulators have to manage the inevitable exposure. Businesses that explain their position clearly and defend their actions are able to tell their side of the story to regulators, investors, employees and customers.

"Communications is crucial in any high-visibility competition matter, whether merger control, cartel, dominance or state aid," says Antoine Winckler, a Partner in the Brussels office of law firm Cleary Gottlieb Steen & Hamilton. "Specialist advisers – financial, legal or economic – tend to lose sight of the big picture. A communications strategy can help companies unify their tactics."

Even the most effective communications strategy is unlikely to alter the substance of a ruling, but it will shape how a business fares in the court of public opinion, while also laying the groundwork for a company to move forward once an investigation is concluded.

This is true even for corporations confident that regulatory proceedings will bring a favorable outcome; those that focus solely on the courtroom may win the case, but lose the trust of their stakeholders in the process.

Mergers and acquisitions highlight just how complicated the landscape can be. Once the Commission has been notified about a proposed deal, the two-phase approval process can drag on for as long as seven months.

ILLUSTRATION: HANNA BARCZYK

To help satisfy regulators' antitrust concerns – and speed up the approval process – businesses may offer voluntary concessions, such as a divestment. The Commission itself can also impose concessions on the company: UPS's $6.9 billion bid for TNT Express and the proposed NYSE Euronext and Deutsche Börse merger were abandoned because of the prospect of value-destroying conditions.

When working to get regulatory approval, businesses should consider how all stakeholders – not simply regulators – will react. Winckler says that "in complex mergers, regulatory investigations affect a wide range of players: stock markets, management, trade unions, civil service, customers and competitors." Each will have their own set of questions and concerns. Investors will want to know how concessions affect the deal; employees may fear for their jobs.

Most mergers today have an international element, adding to the complexity. Falk Schöning, Partner at law firm Hogan Lovells, says, "It is rare for large merger control proceedings to only have one regulator in charge. And these regulators regularly exchange their views on a case." Companies need to communicate with discipline and caution, understanding that "any statement they make in one market can affect an investigation in a different part of the world."

> "Cases can quickly become defined in the public sphere by moral questions, as opposed to legal ones"

COMPANIES MAY BE WARY of saying anything at all, especially to regulators. While silence may be an option, it is seldom a good one according to Schöning. "One rule holds true for dealing with almost all authorities: be firm, but be transparent. Regulators need to hear directly from the parties before learning from the press."

In regulatory proceedings, businesses often find themselves at a disadvantage from the outset. Outlining the legality of their tax structure or explaining the nuances of their business model are certainly important, but they make a much less compelling narrative than the one with which regulators are armed: standing up for the rights of individuals and consumers. Cases can quickly become defined in the public sphere by moral questions, as opposed to legal ones.

Companies need to be prepared and on the front foot. It may take the European Commission years to arrive at a verdict – their recent investigation into collusion among truck manufacturers, which resulted in a record fine of €2.9 billion ($3.2 billion), went on for more than five and a half years – but employees, customers and investors are likely to make up their minds much sooner.

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HOW BAD IS IT REALLY?

There's a disconnect between perception and reality in regulatory proceedings, according to Norton Rose Fulbright's *2016 Litigation Trends Annual Survey*. Speaking with corporate counsel across North America, Europe and Asia, Norton Rose Fulbright found no increase in the number of regulatory proceedings among the companies they surveyed. Yet 97 percent of respondents felt regulators had become increasingly interventionist over the last 12 months. And this perception had real consequences: 25 percent of lawyers said they were spending more time on regulatory matters than a year ago.

There are a number of plausible explanations for this gap. Given the media coverage that regulatory cases garner, respondents may be succumbing to the "availability heuristic." According to psychologists Amos Tversky and Daniel Kahneman, this is where we "judge the frequency of events in the world by the ease with which examples come to mind." Giving a different example of the availability heuristic, Kahneman cited a study where "deaths by accidents were judged to be more than 300 times more likely than deaths by diabetes," when in reality, diabetes was four times more likely to be a cause of death.

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Respondents who perceived regulators to be more interventionist in last 12 months

0 PERCENT
Increase in regulatory proceedings brought against respondents' companies

Another explanation could be the increasing complexity of regulatory proceedings, especially for multinational businesses. A lawyer's regulatory caseload may not be increasing, but the work needed to prepare for regulators, or avoid them altogether, very well might be – especially given how high the stakes are. In the same 2016 survey, corporate counsel agreed that their greatest concern with regulation was the potential impact on their company's reputation.

This is not to suggest corporate counsel around the world view regulation through the same lens, or that they all face the same pressures. Regulatory activity differs by region. Still, a clear trend is emerging: regulatory actions are occupying a larger part of corporate lawyers' minds – and their working days.