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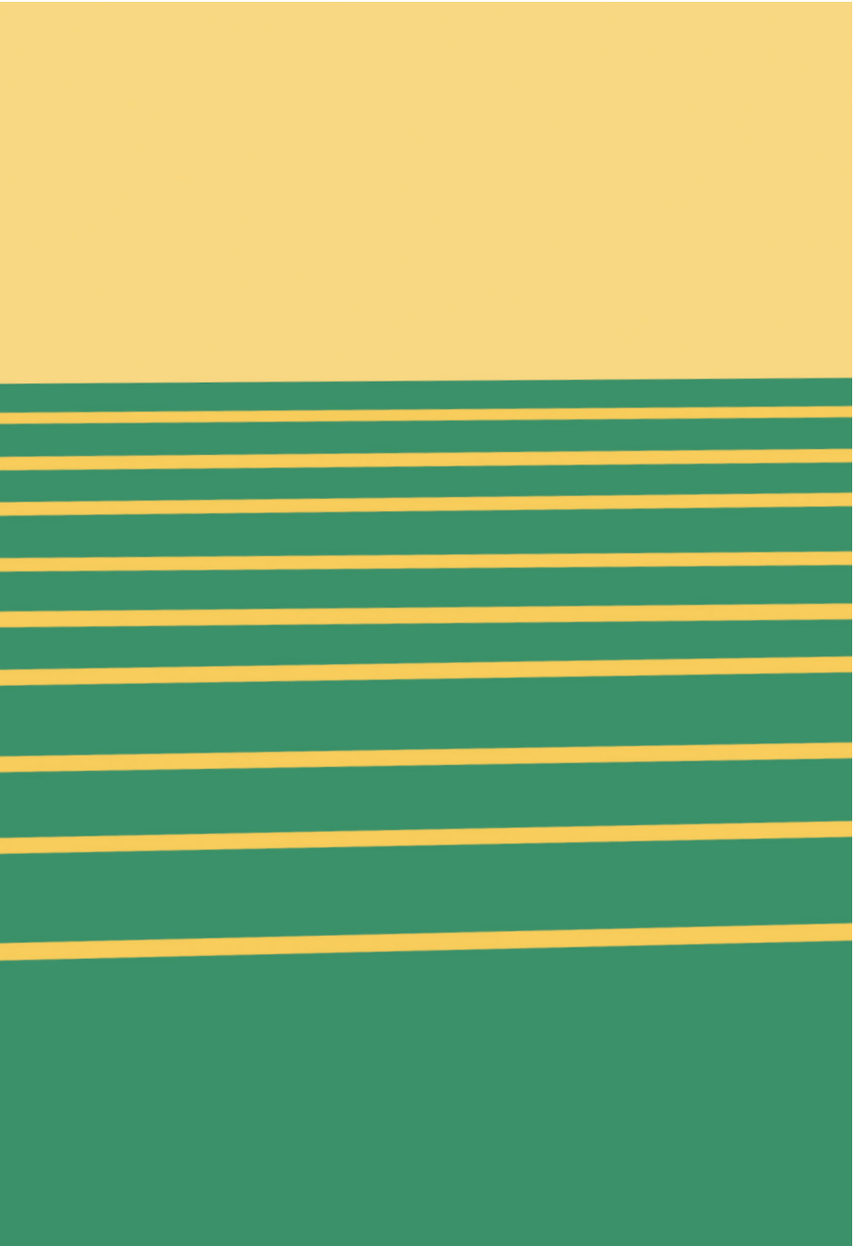
Healthy competition

The In-House Lawyer **spoke to partners from Latham & Watkins about the major antitrust issues that are keeping general counsel on their toes.**

Charles Avery



When discussing the current direction of antitrust regulation, Carles Esteva Mosso, a partner in the competition practice at Latham & Watkins' Brussels office puts it succinctly: 'In Europe, we are seeing an evolution towards more intense merger enforcement.' At a national level, many jurisdictions appear to be keen to occupy a role at the forefront of competition enforcement, with the result being that many are taking steps to strengthen their position. Paris-based Latham partner Mathilde Saltiel describes how 'The French authority likes to flex its muscle and show that it's really at the forefront of anything that can exist in the field. To that extent, it can probably compete with the German authority, and also with the Competition and Markets Authority (CMA), which has also been very aggressive.'

As Saltiel notes, this trend can also be seen in the UK. Following Brexit, the CMA has expanded to become one of the key international regulators with regards to multijurisdictional corporate transactions, and it is clear that companies are now subject to more rigorous requirements. David Little, a partner in Latham's London and Brussels antitrust teams, explains that 'the CMA is at the more active end of the spectrum for global deals. It is also increasingly more "progressive" in some of the substantive theories it is exploring. Beyond the law as it is applied today, there is lively discussion about whether the legal framework should be revised for particular categories of deals – for example by adjusting standards of proof in Phase II merger reviews. Nothing has happened yet, but there appears to be growing support from senior officials to do so.'

The move towards more robust enforcement is not limited to Europe; Kelly Smith Fayne, a Latham antitrust partner in San Francisco, confirms that enforcement is also becoming more intensive across the Atlantic. 'In the US, the major trend came from the change of administration and has two angles: there is a seriously emboldened Federal Trade Commission, and to a certain extent Department of Justice, plus clear instructions from the Biden administration that enforcement should be significantly more rigorous than it has been in the past. There is also an intense bipartisan effort in both the Senate

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and the House of Representatives to issue new antitrust laws. There are six bills pending, so the final direction remains unclear, but it is likely that we will see new antitrust legislation in the next year or so.’

The main target

One of the biggest areas currently being targeted by regulators is big tech, most notably Google, Apple, Facebook and Amazon. In Europe, this is has most notably taken the form of the Digital Markets Act, proposed in December 2020. As Esteva Mosso notes, ‘the new Digital Market Act will impose new obligations on gatekeepers, as traditional enforcement is perhaps seen as less effective in this area.’

This trend can also be seen at national level, and a number of jurisdictions have introduced new reforms with big tech in mind. Germany is a prime example: ‘Germany is somewhat at forefront of the regulation of big digital platforms’ observes Latham Düsseldorf partner Jan Christoph Höft, adding that ‘with the new Competition Act enacted in January this year, the German legislator for first time has introduced a new tool. The Federal Cartel Office can declare a company’s market position is of paramount importance for competition across markets’. He adds: ‘Once this is established, these companies can be prohibited from self-preferencing and from collecting data from various sources.’

It’s a similar story in the UK, as Little points out: ‘There are currently several ongoing investigations into large tech companies, including the privacy sandbox investigation and mobile ecosystems market study.’

The precise extent to which this global shift towards greater enforcement ought to be keeping GCs awake at night is yet to be seen, but it is clear that the large tech companies are going to have to re-evaluate some of their business ventures. As Esteva Mosso points out, ‘In the DMA there are a number of provisions that would force some digital companies to modify their business models in different ways, for example to grant interoperability much more widely. This Regulation could have a very serious impact on some company’s existing business models.’

This a view generally shared among national regulators, with some jurisdictions already taking significant action to hold these companies to account. In France, Google was recently fined €500m by the competition authority following its failure to negotiate in good faith with news organisations regarding the use of content. Commenting on the decision, Saltiel observes that ‘companies are going to have to question what they are developing. We’ve seen this with the recent decision against Google. As their business model evolves so quickly, they need to understand whether this type of decision that is applied to the business as it looks today will apply to the future of business as well.’

Many of the most widely reported actions against these companies in recent years have taken place in the US. However, the actions taken to regulate the largest companies may have an unintended consequence. In the words of Fayne: ‘With the increased focus on limiting what a certain set of large companies can do, there's potentially an unintended consequence. If you limit the ability of one to expand into the space of another, you may be cutting short or stifling a core competitive threat to the other big players.’

Article 22: more uncertainty

Another element of global enforcement that is currently causing serious concern is the European Commission’s recent guidance on the interpretation of Article 22 of the Merger Regulation. Primarily introduced to address concerns about the technology and pharmaceutical sectors the guidance, published in March 2021, expands the number of circumstances in which referrals can be made and encourages referrals from member states in situations where transactions do not meet national filing thresholds.

As Esteva Mosso notes, these changes ‘put in question legal certainty with regards to notifications to Brussels in a way that we had

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never seen in the past… It used to be very clear when you needed to notify. This was one of the guiding principles behind European merger control. With the new guidance on Article 22 this is no longer the case. A transaction may fall below all the relevant thresholds, and the Commission may still be able to look at your case.'

This is a viewpoint also shared by lawyers across other member states; Höft also notes that 'with this new alternative guidance, uncertainty is raised far more than before'. Moreover, the new guidance is of concern to UK lawyers, despite the country's departure from the European Union. Little summarises the extent of uncertainty caused by the changes: 'A key concern is Article 22 and whether it is the correct mechanism for capturing additional transactions. It is a mechanism that offers little legal certainty to merging parties. It is very is difficult to establish whether your transaction is likely to fall within the scope of the Commission's enquiries. The guidance published does not help much. It confirms that the reforms are not limited to tech and life sciences; it refers to companies with non-representative turnover, but that can be the target or the acquirer. And there is no formal time bar – the Commission reserves the right to intervene via a referral request months after closing. The tool is so wide-ranging and unpredictable, and the implications so profound in terms of unforeseen delay and execution risk. We think it is the wrong tool for the job.'

FDI controls: another thing to worry about

In addition to traditional competition enforcement, a global trend in recent years has seen an increasing number of jurisdictions reforming its rules relating to FDI investment. The UK is a prime example of this, with the National Security and Investment Bill having recently received royal assent. Little summarises the global outlook: 'At a big picture level, it's certainly more of an issue than it was previously, and now a necessary component of any multi-jurisdiction analysis we do for a particular deal. That is a function of increasing interest in FDI in the UK and Europe, but also internationally.'

Moreover, though the European Commission has not established FDI controls, it has allowed for greater communication between member states. 'What we have now that we did not have before is a co-ordination mechanism that allows the Commission to give recommendations to member states on how to apply FDI control, and to share information on FDI control,' observes Esteva Mosso, before concluding: 'M&A will become a more complex business from a regulatory standpoint; you will have to file your merger control notification, your FDI notification and, once the Regulation on foreign subsidies is adopted, your subsidies control notification'.

On the horizon

Looking to the future, one area that may become more significant with regards to competition enforcement is environmental, social and governance (ESG) considerations. There are signs that this is already starting to happen in France, as Saltiel observes: 'The French authority has set priorities for 2021, and one of them is the environment and sustainable development. We don't really know how it is going to prioritise this in reality, because it's difficult. Obviously, it could just decide to devote resources to the industries that are the most threatening to the environment, but I'm not sure it's going to do it this way.' Little adds: 'The CMA has expressed an interest in this area, as has the European Commission and many member states. The European Commission recently held a significant stakeholder consultation on the topic. It's a key area of focus.'

Overall, whatever the fate of the attempts to integrate antitrust with ESG objectives, Saltiel puts it best when she concludes: 'The clients that we represent are asking themselves so many more questions than they used to, because of Article 22, because of FDI and because of the enforcement trends everywhere in Europe. It's very tricky for companies at the moment.' ■