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REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
OCT-DEC 2019 ISSUE

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Published by Financier Worldwide Ltd
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PERSPECTIVES

HOW CORPORATIONS CAN NAVIGATE DATA DISCOVERY CHALLENGES AMID RISING ANTITRUST ENFORCEMENT

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Earlier this year, the European Commission (EC) handed down an unprecedented €110m fine to a technology giant for providing misleading information during its 2014 acquisition of another major technology company. Despite the fact that the misinformation was provided in error, the EC was firm in its expectation that merging parties provide complete and accurate information during the proceedings. EU competition commissioner Margrethe Vestager commented that the decision was "a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information".

Cases like the above exemplify the heightened scrutiny among EU competition and antitrust authorities on data issues and disclosure obligations during merger clearance proceedings. Alongside that increase in activity has been an expansion of the breadth and scope of Competition Commission requests for information, with the EC's intervention rate in merger clearance increasing to 30 percent in the last three years.

We have also recognised a growing similarity between heightened EU merger clearance phase II investigations and those of US second request matters. These matters are particularly challenging for corporations, as they often involve large volumes of data and short time frames for completing data review. From the EC's Directorate-General Comp (DG Comp) draft guidelines on merger exercises to the UK Competition and Market Authority (CMA) best practice guideline outlining expectations for how merging parties should respond to document requests, recent publications from the authorities signal that the trend in increased antitrust oversight is likely to continue.

The CMA guidance stated that it "may request any potentially relevant document", although it would consider proportionality when determining the appropriate scope and nature of the request. Notwithstanding the consideration given to proportionality, defining the scope in such an expansive manner will likely result in larger data collection and document review exercises, which could range across emails, studies, presentations, spreadsheets, surveys, handwritten notes, etc. These recent publications, albeit DG Comp's is still under draft review, demonstrate the concerted effort and focus by European authorities to standardise disclosure processes and requests for information.

Implications to consider with increased antitrust enforcement

Corporations engaging in M&A activity must begin to understand this new landscape and prepare their data discovery processes accordingly. A few of the key implications and considerations arising out of this new landscape are discussed below.

Cross-border challenges. More than ever before, competition authorities are working in concert and sharing disclosure information between agencies. This increases the complexity for corporations and their legal teams, as it creates a need for the collection and review of large data volumes, potentially in multiple countries, in addition to a cohesive document review and disclosure strategy for responding to multiple regulators.

This is a particular challenge in multijurisdictional cases involving regions with varying definitions on what is considered relevant and what may be withheld as privileged. For example, in 2018 the EC issued a working paper which defined privilege, and it expressly confirmed that communications to and from in-house lawyers do not qualify as privileged. This definition may be problematic when merging companies are also responding in other jurisdictions that have a broader definition of privilege. The EC also stated that information obtained from another competition authority can be used as evidence regardless of the scope of privilege in the other jurisdiction. This potential for waiver and exchange between regulators highlights the critical need for a cohesive review strategy – for transactions that must be approved by the EC as well as authorities in the US, such as the Federal Trade Commission (FTC) and Department of Justice (DOJ) in their phase II investigations, or jurisdictions in Asia.

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The increased requirement for internal records as part of phase II investigations are also requiring companies to consider where 'all' relevant data of company employees is stored and how it can be collected. The countries in which relevant employee data is located will impact data privacy and data transfer considerations.

Increased data volumes and technology use. Even if the data identified for collection and review is located within only one country, counsel will still

encounter challenges around balancing review and production of massive amounts of data in a limited time frame. One of the most effective ways to approach these challenges is through collaboration with outside experts that can advise on the use of artificial intelligence (AI) and other analytic tools that reduce and target the relevant population of data identified for review. Moreover, regulators themselves are now using these tools to help cull down disclosure populations and prioritise their reviews during merger investigations.

In one recent antitrust matter involving a large life sciences corporation, counsel were performing a large-volume document review exercise in response to information requests received from DG Comp, the DOJ and the Canadian Competition Bureau. Due to the multijurisdictional aspects of this merger, the corporation needed to process massive volumes of data in several countries and conduct review in multiple languages while also ensuring compliance with jurisdictional data privacy restrictions. By partnering with technology experts, the corporation successfully implemented a robust and concerted global review strategy that leveraged AI and other analytic technology. This not only ensured compliance with several tight deadlines but also reduced costs as the technology accurately removed significant volumes of non-responsive material from the review population.

Consumer data as a commodity. Also of note is the EC and other competition authorities' increased focus on Big Data and digital technology firms, which will lead to new data considerations and challenges – particularly where data is itself at the crux of the competition issue, as this will require authorities to conduct in-depth investigations to assess the value of a company's user data, its potential licence of that data to third parties, and the follow-on impact to consumers.

One recent example of this is the February 2019 decision by the Bundeskartellamt, Germany's Federal Cartel Office (FCO), to restrict a major social media company from collecting and using consumer data. The case is not final, and while it is an abuse of dominance case rather than an antitrust matter, it illustrates the growing trend of data to be at the forefront of certain competition matters. It also serves as an illustration for how requests for information may soon require review and analysis of the underlying consumer data itself. This could lead to further expansions in already large data volumes, the requirement to collect and review non-standard data types and systems, and most importantly, the need for client and counsel to delicately balance the requirements to comply with both data privacy laws and regulator demands.

Security and data integration. Consumer data will also more regularly be considered from a remedy perspective, with authorities determining that certain user data needs to be relocated or deleted before a merger takes place. This requires merging companies to conduct extensive data remediation

exercises with their IT teams, or develop robust plans for integrating or 'hiving off' data systems when instructed by competition authorities to do so. This will also require counsel to obtain a clear understanding of where data resides, how it interacts among systems and how it can be removed or deleted as required. In a similar vein, companies engaged post-merger will also need to address information security when integrating different data systems to ensure data remains protected and is transferred in an appropriate, and defensible manner.

Ultimately, corporations need to be prepared for a marked increase in the EC's scope and scrutiny over anti-competitive and antitrust issues. This makes it even more crucial for corporations to partner with counsel and technology experts who not only understand regulator expectations, but also understand best practices and have innovative solutions for addressing the complex data challenges that have become all too common in antitrust enforcement exercises. CD

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