Businesses are witnessing a surge in competition and antitrust scrutiny by different national and international authorities.

While regulatory investigations slowed down considerably during the pandemic, they have since picked up pace. Regulators in the United States, the United Kingdom and Europe are expanding the size and scope of their investigations, taking a more proactive approach to merger control and competitive intervention. Industries and deals that historically faced little scrutiny, as well as emergent areas, are now seeing enhanced regulator focus. Regulator demands have also widened; companies are often asked to analyze vast amounts of data and provide accurate responses in a timely manner, failing which they face monetary or civil penalties.

Political and policy shifts are contributing to significant changes emerging in the regulatory landscape. Following the U.S. administration change in 2021, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have taken a more active approach to mergers and consolidation. They are adopting a harder line on issues such as vertical mergers and platform concentration, issues that rarely raised red flags in the past.

In the U.K., the Competition and Markets Authority (CMA) has gained more power to launch its own investigations after Britain’s exit from the European Union. The U.K. is also planning to introduce sweeping measures encompassing digital markets and consumers in its scrutiny of businesses.

Additionally, digital reforms are on the horizon in Europe, where the European Commission (EC) has been taking a tougher position on antitrust issues, particularly, as widely reported, on “Big Tech”. Other industries are also coming under increased scrutiny.

There is greater collaboration and coordination between antitrust and merger control agencies in different regions, which increases complexities for companies seeking to comply with regulatory requirements across multiple jurisdictions.

At the same time, changing business practices are creating fresh challenges in how companies tackle queries from regulators around the world. For example, while dawn raids have increased significantly in the past two years, the widespread adoption of hybrid or remote working arrangements in the aftermath of the pandemic requires fresh thinking about how such raids must be handled, both for regulators and businesses. Another significant challenge for both authorities and 2 companies is that an increasing amount of relevant, electronically stored information is no longer hosted by companies themselves but has been transferred to cloud service providers. These providers now play significant roles in data gathering procedures for raids or internal investigations.

This rapidly changing environment creates more uncertainty for businesses and potentially longer lead times to complete deals. Against this backdrop, it is more important than ever that companies equip themselves with sufficient knowledge of the right tools...
and protocols to handle regulatory requirements.

**Widening net of antitrust scrutiny**

On both sides of the Atlantic, regulators are taking a more expansive approach to antitrust across various sectors and deal types.

Under President Joseph R. Biden’s administration, the DOJ and the FTC have shown renewed focus on merger law, which was previously seen as less concerning from a regulatory standpoint.

Vertical mergers, in which two or more companies that provide different functions merge to increase synergies and ramp up operations, have come under fresh scrutiny both in the U.S. and the U.K. Such deals were seen as potentially pro-competitive in that they could improve operational efficiency, reduce production costs and lower end-customer prices. But that thinking has changed, and in 2021, U.S. regulators revoked earlier guidelines on vertical mergers.[1]

Further, the DOJ and the FTC issued revised draft merger guidelines for public comment in July 2023, which indicate a deepened focus on previously ancillary investigative topics like market entrenchment, multi-sided platform competition and competitor coordination risk. These stricter draft guidelines would likely lead to an increase in the number of transactions that will come under antitrust purview. The EC has also stepped up its scrutiny of mergers, and updated guidelines from the U.K.’s CMA no longer indicate that most vertical mergers are viewed as benign from a competition perspective.[2]

Another challenge facing companies is that in an increasing number of cases, agencies are no longer satisfied with divestitures to ensure certain deals go through. U.S. regulators have shown greater appetite for taking merger challenges to court or administrative tribunal even though they have met with little success in the outcomes so far. In late 2022, U.S. Assistant Attorney General for Antitrust Jonathan Kanter noted that the DOJ was on track to litigate more merger trials that year (2022) than in any other fiscal year on record.[3]

Antitrust scrutiny is also set to expand well beyond dealmaking. In the U.K., the Digital Markets, Competition and Consumers Bill was introduced to the parliament in 2023 and is expected to come into force in 2024.[4] The bill will confer even broader powers on the CMA, whose authority had already been bolstered after Brexit.

Unlike existing regulation, the new digital powers will enable the CMA’s new Digital Markets Unit to impose regulations on certain individual digital companies without prior evidence of a breach in competition laws. The rules will put the spotlight on Big Tech in particular, as it will apply to businesses with a global turnover of more than £25 billion, or a U.K. turnover exceeding £1 billion.

Furthermore, agencies worldwide are taking a tougher stance on noncompete or no-poaching agreements between companies and their employees, alleging that they are anticompetitive and put a cap on wages. Again, while enforcement agencies have seen mixed results in U.S. courts, they continue to prioritize enforcement for areas they see as harming consumers or workers.

Another notable change in antitrust regulation is that agencies in different jurisdictions are talking more to each other and demanding waiver letters from merging parties, leading to increased cooperation between them with a focus on the latest tools and techniques to handle new data volumes and data sources in investigations.

However, at times new antitrust regulation also results in companies handling requests from multiple regulators on the same deal or subject of scrutiny. Post-Brexit, some businesses have faced double the scrutiny they did previously, with investigations both by the CMA and the EC. There is also no guarantee that inquiries in different jurisdictions will yield the same outcomes, and there has been a small increase in merging parties closing in certain jurisdictions or industries, while awaiting regulatory approval in others.

**Dawn raids and hybrid work**

Antitrust authorities had suspended surprise inspections of company premises for more than a year during the COVID-19 pandemic, as lockdowns and work-from-home directives made them more challenging for staff to carry out. Since then, however, dawn raids have ramped up.

According to an analysis published by White & Case, citing LexisPSL and publicly available data, there were 64 dawn raids across Europe in 2022, up from 26 in 2020.[5] There had been 54 such raids as of early November 2023, with the report noting that the fourth quarter "looks active."
Dawn raids have made a comeback in several sectors. For example, the U.K.'s CMA and European authorities coordinated surprise inspections on the premises of several companies in the automotive sector in 2022.\[6\]

The aftermath of the pandemic has also brought new challenges for businesses dealing with unannounced inspections. The corporate landscape is witnessing a transformation in workplace dynamics, and the growing popularity of hybrid and remote work arrangements adds a new dimension to dawn raids. The shift increases the possibility of regulators turning up at the private residences of employees they wish to question, or whose work-related documents they want to inspect.

With the adoption of remote working policies and with technology being at the heart of the investigative approach, it is no surprise that regulators are adopting a hybrid approach to launching dawn raids, including the possibility of performing raids remotely.

A hybrid dawn raid approach may see a regulator attending the premises of a company to launch an investigation, with the expectation that key personnel and data relevant to the investigation are not available in the office. Key data for a regulator, including communication data like emails and instant messages and structured data such as pricing information, is typically stored in the cloud. This means arriving at a company's premises to collect this data may or may not be fruitful.

Instead, regulators might augment their physical presence with simultaneous subpoenas or other demands to senior IT team members for cloud-based systems.

**Areas of focus**

Regulators in the U.S., Europe and the U.K. have all launched investigations in a bid to curb the dominance of large players in both established and nascent technical industries. Additionally, agencies are aggressively challenging or investigating acquisitions of even smaller companies, arguing in some cases that the deal would harm future innovations. There has also been an increase in regulatory activity related to cartel and anti-competitive investigations.

But while technology firms are often under the media glare, other sectors have also felt the heat.

Recently, fashion companies have faced scrutiny. The EC said in April 2023 that it has launched a series of unannounced inspections of the premises of unnamed fashion houses across several member states, citing concerns that “they may have violated EU antitrust rules that prohibit cartels and restrictive business practices including certain horizontal and vertical restrictions.”\[7\]

The transportation sector is also in focus, with EU competition regulators taking a tougher stance on airlines looking to merge or partner. According to news reports, regulators may go beyond typical requests of asking airlines to give up take-off and landing slots to rivals, and instead seek other concessions for a deal to go through, such as forced divestitures or fare competition agreements.\[8\]

In the U.S., as widely reported, the banking industry may come under renewed pressure, as top DOJ officials are weighing plans to expand the scope of the agency’s bank merger review process. That could likely complicate matters of consolidation in an industry grappling with the aftermath of the crisis sparked by the collapse of several U.S. banks in 2023.

Another hot topic of regulatory contention is sustainability. Amid concerns that alliances formed to achieve climate goals may drive up energy prices, green coalitions in the corporate world have suffered a setback as companies fear breaching antitrust laws.

In the U.S., political pressure is ramping up on antitrust authorities to take a stance on such initiatives. The EC, however, recently relaxed antitrust guidelines for companies that team up on green goals.\[9\] According to the updated guidelines, the EU will create a “safe harbor” from prosecution for companies that enter standardization agreements on sustainability, provided they do not make up more than one-fifth of a given market and do not exchange commercially sensitive information unless necessary or prevent other companies from joining the agreement.

**What companies can do**

The expanding scope of regulatory scrutiny and shifting office dynamics make it paramount for companies to adopt optimal measures to ensure compliance while minimizing the impact on operations and balance sheets. This is especially true for companies with operations in multiple jurisdictions that are looking to engage in dealmaking.
Companies must review whether their current guidelines and training programs for dawn raids and competition inquiries are robust and up-to-date, reflecting recent and anticipated changes in the regulatory landscape. For example, businesses offering hybrid or remote work arrangements to employees must ensure the right protocols are in place for handling a dawn raid, including establishing a list of contacts made up of senior staff members, IT contacts and legal staff who can be reached quickly in the event of a surprise inspection.

Businesses must also put in place guidelines for employees in the event of a dawn raid at their residences. Employees should be given appropriate training in the correct responses — such as differentiating between work and home laptops or electronic devices — and made aware of their legal rights, such as the right to privacy.

Companies also will benefit from a renewed focus on processes and procedures surrounding information risk, data management, electronic discovery (eDiscovery) and regulatory inquiries. Many company handbooks, including legal hold policies and eDiscovery procedures, are not regularly updated to keep pace with changes in technology and the different data locations (e.g., the cloud). Best practices in these areas are available from forensic technology professionals in the field.

In most cases, it is advisable for companies approached by regulators for antitrust scrutiny to seek legal counsel and speak to forensic technology professionals to ensure they are following the right procedures, protecting their legal rights and tracking any IT-related processes the regulator may conduct.

**Growing use of AI**

One of the biggest challenges for companies today in complying with regulatory requests is making sure they respond with accurate information in a timely manner. This is due to the vast amounts of data that must be parsed, analyzed and summarized in such cases.

Companies now hold greater volumes of data than ever before, with that data spread over many more systems, both on-premise and in the cloud. Employees are regularly saving documents to desktops, cloud-based storage such as Sharepoint and in email attachments. Correspondence between employees is now more varied, with many companies implementing collaboration tools for instant messaging and bring-your-own-device policies for mobile devices, meaning there is potential for communication over SMS and WhatsApp. Collecting, searching, reviewing and producing relevant data is a challenge when responding to regulatory demands. Another trend to observe is that telephone calls and voice messages add to the scope of an investigation, especially in the antitrust space.

Regulators are increasing the penalties levied, and companies that fail to respond in time may face charges of obstruction and hefty fines. In many instances involving large data requests, company lawyers negotiate with competition regulators to prioritize delivering a subset of information deemed the most important.

These challenges are creating a growing demand for artificial intelligence (AI)-powered tools that can analyze and review large amounts of information in shorter timeframes than humanly possible. AI can streamline data analysis by automating data preparation, aiding data visualization, identifying and summarizing key documents, and performing other labor-intensive tasks such as initial document review. As with all current AI developments, the technology should be used to help humans prioritize and streamline processes, not replace them. Like any new advancement in legal or regulatory technology, the technology should be harnessed by experienced experts, with results then quality-checked by them.

**In conclusion**

As we have seen, antitrust regulatory agencies in the U.S., Europe and the U.K. are broadening the scale and scope of their investigations, releasing guidance and measures that will enhance their regulatory powers in the coming years. It is imperative for companies to review and update their compliance policies and protocols in order to minimize legal risks and mitigate potential penalties.

Further, the data landscape has shifted drastically in the years following the pandemic, as have remote work arrangements. Companies should ensure that their policies and plans for responding to regulatory enquiries take into account the new data normal.
Endnotes


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