A primer on Antitrust laws: from the institutional frameworks to the impact on the corporate world - Part I

Introduction

Antitrust legislation aims to break up monopolies or prevent them from forming in the first place. Its goal is to defend small enterprises from unscrupulous methods while also protecting the general public by assuring better prices through competition. In most countries around the world, laws exist to prohibit or regulate monopolies, often known as cartels. Antitrust regulators play a fundamental role in M&A transactions. One of the main acts that have a direct impact on the transactions is the Clayton Act, 15 U.S.C. 18, which forbids transactions in the United States that "significantly" diminish competition. Similar tests are used in other jurisdictions around the world. Antitrust authorities scrutinize transactions between competitors more closely than other transactions. Furthermore, during the due diligence process, substantial antitrust risks can develop, particularly when sharing competitively sensitive information (CSI) with the merger partner. The client must take efforts to protect the flow of CSI if it is determined that the parties are rivals, even in broad terms. A "contract, combination, or conspiracy" that unduly restrains trade is prohibited. Antitrust issues can have a huge influence on a closing deal and regulatory approval often is the last step before an acquisition can close. Even after any antitrust examination of the acquisition is completed, there is a considerable antitrust risk while the firms are still separate. Finally, when the two companies are completely merged in one, they cannot be held accountable under antitrust rules aimed at illicit agreements between competitors once they have integrated operations.

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Purpose and shortcomings

The purpose of antitrust in regulating M&A activity is to level the playing field for similar businesses in a given industry while also prohibiting them from gaining an unfair advantage over their competitors. They ensure that in an open-market economy, there is fair competition. These rules have evolved in tandem with the market, vigilantly protecting against would-be monopolies and disruptions to the protective ebb and flow of competition. The federal antitrust authorities, the Federal Trade Commission and the United States Department of Justice (the agencies), are still active for business, although the COVID-19 pandemic has caused severe disruption. Most federal employees, like those in many private organizations, are required to work from home (WFH). This reality creates practical challenges to agency staff's ability to carry out their duties. The authorities announced various modifications to merger review and investigation processes to help relieve these issues; like allowing only electronic submission of HSR filings and asking that parties add 30 days to timing agreements for pending or future mergers subject to second requests. Another potential shortcoming of the antitrust in regulating M&A activity is the political sphere as it could be used as a weapon to promote political and economic interests. To avoid this issue several norms against direct political influence are being made. The purpose is to emphasize the separation of power between the independent authorities like The Competitions and Markets Authorities in the UK or the department of justice in the US and the parliament. These independent authorities should have their own target not correlated with a potential political and parliamentary aim. Finally, a wider separation of power between these two entities will discourage enforcement decisions that would indulge special interest protectionism or reflect regulatory capture.

Comparative Analysis of antitrust laws across US, UK and Europe

Firstly, time and attention will be devoted to a comparative study of the different institutional frameworks underlying antitrust enforcement across the US, UK and Europe. Secondly, the reader will be provided with some insights into the provisions and legal tricks most used by corporations intent on securing regulatory approval and on sharing risks in their M&A deal. Thirdly, a final outlook of the future of regulation in the corporate world will be given.

The United States of America

Arguably, the oldest and the most characteristic institutional framework and ruling legal thinking concerning antitrust laws was elaborated in the US at the end of the 19th century with the Sherman Antitrust Act of 1890. It was largely in response to concerns about the harmful effects on the economy and society of large new concentrations of economic wealth in trusts (such as Standard Oil) and industry-dominating companies (such as US Steel and railroads), which played a key role in the late nineteenth century's rapid growth of the American economy. These major commercial interests were represented as monopolistic, harming small enterprises and ordinary residents. However, this statute was deemed to be still very limited in its scope and applicability so that, less than twenty-four years later, two new federal antitrust statutes were introduced: the Federal Trade Commission Act of 1914 and the Clayton Antitrust Act of 1914. These expanded further the scope of antitrust regulation to areas like price fixing and bid rigging, and empowered the FTC (Federal Trade Commission), a newly created federal agency, and the DOJ with an enforcement role. Ever since those years amendments were

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carried out to the Clayton Act, but it was mainly as a result of case law and final decisions taken by the Supreme Court that additional clarifications and specifications regarding the applicability of takeover laws were provided.

How does the FTC's antitrust enforcement function in tandem with the DOJ's Antitrust Division? Although the two agencies' authority overlap in various ways, they complement each other in practice. The agencies have established competence in specific sectors or areas through time. The Federal Trade Commission, for example, focuses much of its efforts on sectors of the economy with substantial consumer expenditure, such as healthcare, pharmaceuticals, professional services, food, energy, and some high-tech businesses like computer technology and internet services. To minimize duplicating efforts, the authorities speak with one another before starting an inquiry.

An agency inquiry may be triggered by premerger notification filings, information collected from consumers or companies, legislative inquiries, or articles on consumer or economic topics. To protect both the inquiry and the persons and corporations involved, these investigations are usually closed to the public. If the agency believes that a person or corporation has broken the law, or that a planned merger may have broken the law, the agency may engage into a consent order with the firm to try to secure voluntary compliance. A firm that signs a consent order does not have to admit that it broke the law; instead, it must agree to discontinue the disputed behaviors detailed in the complaint or take specific actions to rectify the anticompetitive features of its planned merger.

If a consent agreement cannot be achieved, the investigation's choices will be determined by whatever agency is conducting it. There is just one choice for the DOJ: sue in federal court for an injunction to prohibit the detrimental conduct or (in the event of hard-core per se unlawful activities) for a criminal conviction. Unlike the DOJ, the FTC has two options: it can sue in federal court for injunctive relief or file an administrative complaint. The FTC has the authority to report evidence of criminal antitrust offenses to the Department of Justice. Only the Department of Justice has the authority to seek criminal penalties. In other areas, including airlines, banks, railroads, and telephones, the DOJ has sole antitrust authority. Antitrust rules do not apply to all aspects of business activity in the United States. Antitrust law, for example, provides immunities for federally specified activities (for example, certain aspects of the insurance business and certain agricultural cooperative activity); exempts certain federal government monopolies (such as the US Postal Service). Furthermore, activities that are permitted by a clearly established state regulatory policy and are actively supervised by the state are exempted.

Nowadays, the US competition law is getting more stringent especially due to the stance taken on these issues by the Biden administration which is appointing progressive antitrust scholars to key advisory and leadership roles, such as Senator Amy Klobuchar who is campaigning to ease legal standards for challenging mergers. The healthcare sector, whose importance was once again reaffirmed throughout the pandemic, and the technology one are expected to be the most closely scrutinized by US watchdogs in the coming years.

The United Kingdom

In the British jurisdiction, competition law is definitely more recent with respect to the American one. In fact, until 1948, the United Kingdom's competition law was entirely based on common law, that is, case law established by judges. The Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 was the UK's first competition law statute and was deeply influenced by the US Sherman Antitrust Act of 1890 and the

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Clayton Act 1914. However, nowadays when referring to UK-based competition law the two most relevant pieces of legislation are the following:

- the Competition Act of 1998
- the Enterprise Act of 2002

The Competition and Markets Authority (CMA) is empowered under these statutes to investigate and take action. Large penalties for firms, disqualification of directors, and even prison time or fines for persons implicated in cartel activities are possible consequences. Customers and rival companies may be able to bring a lawsuit against you or your company. The scope of these statutes extends, like all competition legislation, to three main tasks:

1. putting an end to agreements or practices that limit free trade and competition between businesses (cartel suppression)
2. prohibiting abusive behavior by a market-dominant corporation (predatory pricing, price gouging, etc.)
3. investigating M&A deals of large corporations, including potential joint ventures that could potentially harm the competitive process in the market

However, if a company's actions have a cross-border impact, the European Commission has jurisdiction to address the issue, and only EU law would apply. Anyways, section 60 of the Competition Act 1998 stipulates that UK laws must be administered in accordance with European law. But Brexit happened, and according to the prevailing opinion among scholars it will lead to a complexification of issues. In fact, the bottom line of this historical change is that enterprises doing business in the UK and the EU now face parallel regulatory regimes, with the UK Competition and Markets Authority and the European Commission both able to examine (possibly similar) transactions and behavior. According to legal experts in this field, this is expected to lengthen significantly the time requested for the completion of a deal.

The European Union

The European Union's competition legislation was passed in 1957 as part of the Treaty of Rome, nearly 70 years after the US Sherman Act. The tradition of competition law in Europe, on the other hand, can be traced back to the 19th century in nations such as Germany and France.

The Treaty established the European Economic Community (EEC) and set the institutional foundation for EU competition law as it is known today: rules forbidding anti-competitive agreements under Article 101 of the TFEU (Treaty on the Functioning of the European Union) and regulations against the misuse of a dominating position under Article 102. In contrast to the United States, given the largely cartelized European economy at the time, the treaty discussions focused more on cartels than unilateral conduct. The Treaty empowers the Commission to enforce these standards, and it has a range of investigative authorities to do so (e.g. written requests for information, inspections at business and non-business premises, etc.). Fines may be imposed by the Commission on companies that break EU antitrust regulations.

Particularly interesting with respect to mergers and acquisitions is the EU merger control, which has been defined by scholars as the third pillar of the European competition law. It was introduced explicitly in the form of regulation in 2004 with the Council Regulation (EC) No 139/2004. In general, the Commission only looks into major mergers with an EU dimension, which means the merging companies must meet specified turnover

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limits. Smaller mergers with no EU dimension may instead come within the jurisdiction of national competition authorities. A referral system exists that permits the Member States and the Commission to move the matter between themselves, both at the request of the firms concerned and at the request of the Member States. This provides the firms with a one-stop-shop evaluation and allows them to assign the matter to the most suitable authority, accelerating the authorities' approval in very time-sensitive deals.

Any merger having an EU dimension must be reported to the Commission prior to execution. If the merging firms do not operate in the same or related markets, or if they have only very small market shares that do not meet specified market share thresholds, the merger is unlikely to cause significant competition problems; as a result, the merger is reviewed using a simplified procedure that includes a routine check. The Commission conducts a complete investigation if the market share thresholds are exceeded. The investigation process can consist of up to two phases. During the phase I investigation, the Commission has 25 working days after receiving notification to examine the contract. A "state-of-play meeting" is usually conducted at the end of phase I, where the Commission tells the companies of the findings of the phase I inquiry. These latter can provide solutions (i.e., remedies in the form of divestments in certain business areas, legal commitments, etc.) if they are concerned about competition, which extends the phase I deadline by 10 working days. A phase I inquiry can come to two primary conclusions:

- The merger is approved, either unconditionally or subject to agreed-upon remedies;
- or the merger raises competition issues, prompting the Commission to initiate a phase II inquiry.

Phase II entails a more thorough examination of the merger's implications on competition and takes more time. A phase II inquiry often entails obtaining more detailed information, such as internal company records, substantial economic data, and other sources. The Commission keeps the enterprises informed about the procedure on a regular basis. If the Commission considers that the planned merger would likely restrict competition after conducting such a market analysis, it sends a statement of objections (SO) to the parties involved. The Commission has 90 working days from the start of a Phase II investigation to make a final determination on the anticipated transaction's compliance with the EU Merger Regulation. Following the phase II inquiry, the Commission may either:

- Clear the merger without conditions; or
- Approve the merger with conditions; or
- Deny the regulatory approval for safeguarding competition in the Single Market.

Corporations' remedies to solve competition issues

Every deal has its own specifications, and the competition concerns raised by the transaction under scrutiny by the authorities differ quite vastly, however it is realistic to affirm that among the most common types of remedies there are the following ones:

- granting of licensing arrangements to give access to infrastructure (physical and not) and key technology;
- termination of exclusive agreements; and
- divestiture provisions.

It is the parties' duties to come up with potential remedies, but then, for example, in the European case they must be evaluated by the Commission as to whether or not they eliminate a competition concern. Generally speaking,

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remedies are usually defined as either structural or behavioral. Structural remedies are defined as those that result in a lasting alteration in the market's structure (for example, asset or stock divestiture, exclusive distribution agreement termination, or customer vertical linkages severance). Structured remedies are preferred by the Commission because they are quicker to execute and do not need medium or long-term monitoring. Behavioral remedies, on the other hand, entail a promise from the merging parties not to act in a given way in the future, as well as long-term monitoring and reporting duties (for example, criteria to provide equitable access to items).

For the interested reader, it is here being expressed a warm invitation to follow up Part 2 of the article that will be published shortly, where real-life case studies of companies implementing some types of remedies will be discussed and analyzed.

Future Outlook

The outlook for potential developments in future regulation is deemed to be hard from the point of view of the industry leaders. They believe that, in the near future, there will be an increasingly stricter regulatory environment in the M&A field and they are sure that this will lead to more deal activity, not less, over the next 12 months. This is due to the fact that many dealmakers are looking to beat the clock before new, more restrictive regulations or laws are put in place and deals become harder to complete.

In 2021, the trend of heightened transaction scrutiny from the competition and foreign investment regulators continued around the world. In 2022, this trend is likely to continue, if not intensify. In the United States, Biden administration's appointments to senior positions at the Federal Trade Commission (FTC) and the Department of Justice's Antitrust Division, as well as other executive and agency actions (including a number of rule changes and policy statements at the FTC), have signaled a heightened focus on merger review. The increasing monitoring of competition will have important implications for transaction agreements. As the scope of merger scrutiny expands, a broader spectrum of buyers and sellers will need to think more carefully about regulatory approval covenants in their transaction agreements and how these interact with other considerations. These will obviously apply most to transactions that raise competitive sensitivity as traditionally understood, particularly in key industries of focus such as health care, pharma, and technology.

TAGS: antitrust, DOJ, FCA, CMA, regulatory risk, competition law, cartel, monopoly, commission

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