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# In The Know

## Competition Law's Season of Uncertainty

**▶ New laws, new regulators and a new wave of nationalism is roiling the global competition waters. Tim Cornell and Sharis Pozen, leaders of Clifford Chance's U.S. and Global Antitrust groups respectively, discuss the challenges of multijurisdictional merger review, snowballing investigations and other hot-button issues in the global antitrust arena.**

**CCBJ: Let's start with multijurisdictional merger review. What are the key issues and some trends you are seeing?**

**Sharis Pozen:** When I was at General Electric, I worked on a number of large global mergers – some touching more than 20 jurisdictions. In these types of deals, the coordination and consistency of messaging across jurisdictions is critical and includes a component that I call "hygiene." Parties need the best hygiene possible right from the beginning. For instance, establishing clear lines for information processing on both sides of a deal to avoid sharing competitively sensitive data or information. That can be hard when you're working across 20 or 30 jurisdictions. You also need to be conscious of gun-jumping and make sure that the information within your filings is accurate.

Another issue at the forefront is remedies. There is a good amount of buzz around antitrust generally, and specifically as to whether antitrust authorities in the West have been weak on remedies and enforcement-minded enough. The thinking is that the antitrust agencies have let too many deals clear, and this has allowed undue concentrations in certain industries. That's caused many agencies around the world, particularly in the U.S. and Europe, to more closely scrutinize deals and remedies.

**Tim Cornell:** I would add foreign investment status as another emerging issue for companies operating across borders. It's not just U.S law, but statutes in other nations as well are becoming stumbling blocks and creating an uncertain environment.

Another noteworthy trend is the shuffling within agencies: who's in charge, and what type of guidance will prevail? The U.S. Department of Justice has had some

churn, and it took a while to get the Federal Trade Commission in place. Argentina continues to promise a suspensory merger regime, but it's still months away. Margrethe Vestager is likely to retire soon, which could lead to more- or less-aggressive EU merger control, and China's authorities have consolidated. So, we are looking at the possibility of significant change in the regulatory landscape, but we don't yet know exactly where things are headed.

**Competition law has become more nuanced: more business practices are regarded as potentially problematic; there is growing complexity in assessing compliance; and companies are facing greater-than-ever financial and reputational risks for breaching the law. Would you say that's a fair assessment?**

**Cornell:** You're spot on. Not only is competition regulation becoming more nuanced, but transparency from the regulators is not as good as one might hope. Currently, the DOJ appears to be taking the lead as the primary enforcer regarding corporate conduct issues, and they appear willing to take some risks and test boundaries. That leads to uncertainty and unclear guidance, particularly when companies are developing compliance training. The bedrock issues remain the same, but it gets murky around the edges, and the fact that management of U.S. and EU agencies may be changing in the next six months only increases the uncertainty.

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In the U.S., we are experiencing a bit of an enforcement mismatch between the regulators. In the Qualcomm case, for example, the FTC filed a complaint and the DOJ filed a brief, but the two didn't necessarily match up in terms of priorities. And the subsequent public debate between FTC Commissioners exacerbates the issue. In addition, the speeches coming out of both agencies, while aligned on most topics, are misaligned on some, such as standard essential patents. Finally, you have political agendas and concerns over issues like integration of labor that complicate the compliance picture.

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**—TIM CORNELL**

**Pozen:** When facing an uncertain environment, it's important for companies to get back to first principles: get a board-approved compliance policy with all of the basics, and establish a rigorous process around training and accountability. The key is knowing your business and identifying where your risks lie.

Some business models have inherent antitrust

risks, which is hard for business people to understand. They think that compliance is only about changing the business practice. It's not. It's about mitigating risk because the company has a high market share, or because it operates in specific markets where you have to be more mindful and cautious. Marketing and sales people operating on the front lines need to have a firm grasp on these issues.

**Let's talk about some of the trends you are seeing in enforcement investigations.**

**Cornell:** We've seen a sustained trend toward convergence of criminal matters for a long time, but in the past year, the DOJ has worked especially hard with the Organization for Economic Co-operation and Development (OECD) and other organizations to harmonize due process in the criminal context. Cartel behavior has caused business problems for decades, and the authorities are focused on eliminating it.

**Sharis Pozen** is the co-head of the global antitrust practice at Clifford Chance. Over the course of her career, she has held senior positions at GE, the U.S. Department of Justice and the U.S. Federal Trade Commission. Reach her at sharis.pozen@cliffordchance.com.

In the U.S., for instance, we had years when antitrust investigations came one after the other and resulted in high fines. Auto parts is a good example, where regulators started with one part of the car and ended up going from part to part around the automobile. While it may not be safe to say that the DOJ is specifically focused on increasing investigations, it is very clear that the global trend continues to be on the rise.

One specific issue plaguing companies, which circles back to the point about hygiene, is the merger-to-cartel phenomenon. Companies present their transactions to the agencies and come away not only with the merger denied but facing a criminal or civil enforcement investigation based on the information they provided. For example, companies and their employees may unwisely post statements on social media assuming that this activity will not be discovered, but, in fact, social media conversations have now become hard evidence that can drive antitrust cases.

**Investigations are rarely isolated geographically; they can spread quickly and unexpectedly across jurisdictions.**

**—SHARIS POZEN**

**Pozen:** I call it the "snowball" effect. What may start as a small investigation or minor criminal probe can expand in terms of products at issue and geographies. Plus, follow-on class action cases can compound a company's liability. I was at the DOJ when the auto parts matter developed, and even we were astonished by the scope of it.

Any investigation can snowball. Other examples include the "no-poach" cases, whereby businesses agree not to "poach" each other's employees. Outside of certain settings, these

arrangements can be per se illegal. And they've gotten a lot of attention in the U.S., given the DOJ said it will pursue such arrangements criminally if they are entered into after 2016. I know of instances where the agency went back a few years to look at documents produced to the agency during a merger review of a cleared merger. They ran an electronic search through the documents to see if there are any no-poach agreements. That's pretty astonishing.

**What industries are particularly susceptible to antitrust problems?**

**Pozen:** A core of the Clifford Chance Antitrust practice is representing technology companies, which are a major focal point for the agencies. The same goes for financial services, where until six or seven years ago, many of these institutions didn't seem to have a full understanding of antitrust risk. And the pharma industry has been in the crosshairs in the U.S. and the EU for paying to keep generic products off the market.

**Cornell:** We also do a substantial amount of work in the chemical industry, which is particularly prone to antitrust issues. Competition from China is making competition between domestic providers more difficult, which sometimes leads to collusive conduct. Multiple joint ventures between competitors can also facilitate coordinated behavior.

I would add to Sharis' points that, in fintech, you have technology companies working with financial services organizations. Given the bridge between two sectors that are already under close scrutiny, there's heightened potential for new antitrust

issues to arise, and we can see the issues starting to take shape. The FTC, for instance, has established a new task force to look at technology markets for competition problems, and many countries are currently grappling with issues of market definition and remedies.

**Pozen:** And if we look more broadly, in a data-driven, digital world, companies are looking for a competitive edge – for advantages that can enhance productivity, save costs and serve customers better. This cuts across all industries. In my experience, it's rare that a company just wants to box out the competition. That's a short term fix. What they really want is to get from A to B and get there faster, with higher quality, so customers will choose them. I'm not saying that boxing out is never a business strategy, but we shouldn't presume that.

**Cornell:** That's right. The deals we're seeing are more likely to involve companies trying to get into an industry or seeing a strategic area that's likely going to expand, and then using an acquisition as the means to that end.

**Talk about your firm's unique relationships with regulators. Why is this important?**

**Pozen:** After four-and-a-half great years at General Electric, I thought long and hard about the decision to leave and, specifically, to join the Clifford Chance team. At GE, we gave the firm the vast majority of our antitrust work, and for good reason. People think of GE as a U.S. corporation, but 60 percent to 70 percent of its employees and revenues are generated outside the U.S., and this is not unique. So, it was a critical consideration at GE to work with a firm that not only offers leading substantive expertise, but also a one-stop shop globally.

As we've discussed, investigations are rarely isolated geographically; they can spread quickly and unexpectedly across jurisdictions. Companies have a hard time with that, and the stakes only get higher when you consider the potential fallout of a complex, high-dollar, reputation-threatening antitrust investigation. At GE, we really trusted Clifford Chance to guide the company through these situations.

Your question about the regulators is on point. Many of our partners are on a first-name basis with those in charge across the global antitrust agencies. That's not to sound unseemly. What I mean is that these relationships are based on mutual respect, in many cases because the partner actually worked at the respective agency – such as the UK Competition & Markets Authority, the European Commission in Brussels, the SAMR in China. And of course, I worked at the U.S. Federal Trade Commission and the U.S. Department of Justice Antitrust Division before joining the firm.

I saw that dynamic as a client. Having Clifford Chance sitting next to you brings credibility and a distinct intellectual and reputational force to bear on a given issue. When I'm driving to work in Washington, and I'm on a call with my partners, I feel like I have the United Nations on the phone with me.

**Cornell:** That's so true. Another factor is that it's not just about our people, but very much involved with the way we work. We don't think about issues provincially, or just cobble together teams of U.S., EU, UK, French and German antitrust trainees so they can identify the issues in their jurisdictions. Each of our partners has deep provincial knowledge, let's say in the case of U.S. law for our U.S. team, but equally, as an integrated team based worldwide, we have expansive knowledge of how the laws of different jurisdictions work together – or don't, as the case may be – which allows us to view the issues with a global perspective. ■