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MCC INTERVIEW: Davina Garrod / Akin Gump Strauss Hauer & Feld LLP

Patchwork of Rules Defines International M&A

A primer on increased interagency cooperation, dawn raids, and heightened regulatory security

Reforms in the EU and an upsurge in attention by regulators in China and Brazil have contributed to increasingly complex requirements regarding mergers and acquisitions. With her focus on multijurisdictional merger control and behavioral antitrust investigations within and outside of the EU for multinational corporations and financial institutions, ***Davina Garrod*** *of* ***Akin Gump*** *is ideally placed to outline the current international merger control landscape.*

MCC: You're renowned for your encyclopedic knowledge of the laws of competition and merger control in the EU and UK. Of the many reforms in competition law in recent years, what has been the single most important change affecting mergers, acquisitions and other corporate transactions?

Garrod: The most significant development affecting the large financial institutions and corporate clients I represent in cross-border deals is the increase in interagency cooperation throughout the multijurisdictional merger control process. The Department of Justice and the Federal Trade Commission in the U.S. have been cooperating with the European Commission for some years now, but we are seeing increasingly closer communication, earlier engagement, more information sharing and active coordination of global remedies. With the rise of antitrust regulators in China and Brazil in particular, the EC and U.S. authorities are now working with Brazil's competition regulator, the Administrative Council for Economic Defence (CADE), and China's merger control regulator, the Ministry of Commerce of the People's Republic of China (MOFCOM). Increased globalization means more cross-border deals, and the competition authorities around the world are reacting to this. As advisors seeking a smooth and speedy merger review and remedies process, we're thinking globally from the outset of a deal, with a direct read through to the corporate deal mechanics and dynamics, including risk allocation in the deal documentation.

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MCC: Is there a reform that has not occurred that you feel needs to happen?

Garrod: With over 100 jurisdictions enforcing merger control laws, each with different jurisdictional thresholds, filing requirements, processes and timelines, obtaining antitrust clearances for deals is a costly and time-consuming process. The International Competition Network (ICN) has been doing great work to harmonize the patchwork of rules around the world, but more needs to be done.

To give you some examples, some jurisdictions require masses of information, some of which is not actually necessary for antitrust analysis. For example, when you undergo a merger investigation in China, MOFCOM often asks you a lot of additional questions, and those answers are not directly helpful for the merger review. This has caused some people to speculate that MOFCOM is on a fishing expedition for deals in certain industries where the government is keen to get free discovery on Western companies' activities and proposed strategies in Asia. Other jurisdictions, such as South Africa, require multiple forms, which is time-consuming. Some Balkan countries have exhaustive filing and formal notarization requirements, as well as mandated translation of all the documents into the native language. Other jurisdictions, such as the Ukraine, have very low jurisdictional thresholds, which capture every deal where at least one party has just 1 million euros in local revenues/assets. I think it would also be useful to reform some of the parameters of the substantive merger review.

Davina Garrod
Partner and leader of Akin Gump Strauss Hauer & Feld's European competition group.
davina.garrod@akingump.com

MCC: The UK's new competition enforcement regime has been in place for 18 months. What impact has the establishment of the single authority, the Competition and Markets Authority (CMA), had on your clients and your practice?

Garrod: The establishment and evolution of the CMA is a positive development for clients and competition lawyers alike. Housing competition experts and economists with experience in both initial and in-depth investigations within the same organization helps breed a climate of mutual understanding and advances the fulfillment of common goals. The CMA is one of the most transparent competition authorities in the world, with case managers on deals and investigations readily available to talk to you and your clients and with key documents published on the CMA website. Our deals get through the CMA very quickly.

MCC: The CMA, which assumed its role with a bigger budget and more staff, has called its merger function a different kind of enforcement, one which seeks to ensure that the harmful effects of some mergers, such as reduced innovation, are mitigated, prevented or remedied. What does that mean in practical terms for businesses and their counsel?

Garrod: It's probably fair to say that, these days, there is more emphasis on innovation and quality as parameters of competition, in addition to the classic price-rise mantra. It is a welcome development as even more prices and services migrate online. One challenge that all competition authorities face in the digital economy is how to make the pre-existing economic models work in technologically dynamic markets characterized by network effects and disruptive innovation. We engage economists with substantive new economy expertise very early on in technology/TMT deals and investigations so that we can start discussing market definitions, competitive constraints and efficiencies, and what we need from a quantitative perspective to support these arguments.

It's worth noting that under the new UK merger control regime, the Phase I timeline is no longer an administrative timeline but rather a hard-and-fast, 40-working-day period. This is an important development. It enables us to give our clients business certainty as to when an investigation will conclude. It is also important to bear in mind that the CMA's mergers intelligence function is working very effectively, as is the European Competition Network, and the CMA is calling in a lot more deals now. This means that, in practice, the UK merger control regime should probably not be considered voluntary for many deals. We should assume that a high-profile deal with some potential competition issues would very likely be called in if the acquirer decides not to notify the CMA.

MCC: The EC has had a long-standing focus on the telecommunications sector, with its policy framework guiding its approach. Recently the Commission launched a public consultation involving the telecom framework. Please explain the EC approach to telecoms and the impact it is having.

Garrod: The EC takes a twin approach to telecommunications regulation. The first is a sector-specific regulatory approach, whereby certain markets are regulated and companies, usually incumbents, with significant market power, are subject to specific regulation relating to access, pricing and other obligations. DG Connect – the TMT-focused part of the European Commission – governs this area. Then we have the competition enforcement part of the EC – DG Competition – which has been very busy over the last couple of years investigating TMT mergers, including those between telecommunications operators, at all levels of the value chain.

The public consultation on the EC framework review is a very important initiative, and the EC is taking soundings from incumbent operators, challenger operators, OTT providers, national regulators, consumers and national competition authorities. There is a tension between ensuring markets are competitive on the one hand and encouraging investment and innovation on the other. The ideal outcome, in my mind, is for the EC to continue to reduce the scope and extent of sector-specific regulation to increase incentives for operators to invest in continued roll-out of fiber and NGNs/LTE plus and, ultimately, 5G in the mobile sphere. The EC is very keen to continue to incentivize fiber rollouts and network expansion. Competition law is an important tool for preventing monopoly power and abuse, but it needs to be used on a proportionate basis.

MCC: Europe's antitrust chief has been open in warning telecom executives that their deals can expect heightened security. "I have one interest," she said, "and that is to make sure that European consumers, that being citizens or businesses, can enjoy relatively innovative markets at affordable prices." What impact is the EC's stance having on the global telecom sector?

Garrod: While preventing price increases is no doubt important for European consumers, one also has to think about innovation and investment. If one looks at the major developments in telecoms over the last decade, these have come quickly and have completely changed the landscape. Such innovation would not have happened had operators not had sufficient funding. It is therefore very important that DG Competition is not just focused on whether a merger will give rise to a price increase but also takes into account qualitative factors. I worry that with too much competition law enforcement and scrutiny, investments in network quality and NGNs will take a backseat. This is something that Europe cannot afford to let happen, particularly given how the EU is behind the U.S. and China.

MCC: Dawn raids have long been a key tool in the investigatory kit of EU and national competition regulators. The European Court of Justice recently weighed in on a number of issues related to dawn raids, including using the raids as fishing expeditions. How do you advise clients regarding dawn raids?

Garrod: We have been advising clients on dawn raids for almost 20 years now, and the key is to ensure that clients are fully trained on a regular basis – not only on how to deal with commission or NCA officials on a dawn raid but also how to get their house in order more generally from a compliance perspective. By this I mean ensuring that the client stores privileged communications in a separate and closed-off file, so that when officials conduct a dawn raid, there is no danger of them accessing privileged documents. This way, the client and its advisors can sensibly discuss matters with competition officials and seek protection of privileged material.

In recent years, as online data transfer and storage have become increasingly important, clients also need to be fully trained on what to expect when commission or NCA officials search the client's computer systems for evidence. We package this

expertise and advice in a comprehensive client program and regularly update clients on developments.

MCC: Various reforms, one turned into EU law and one expected to be enacted in the UK, are expected to greatly increase the number of private actions growing out of competition law transgressions and the size of damage awards in such cases. Tell us about what looks, at least on the surface, like a move in the direction of a U.S.-type private attorney general approach.

Garrod: There are no doubt similarities between the latest legislation in this area and the U.S. in terms of measures taken to facilitate private damages actions in the UK and throughout the EU. However, there are some important differences. For example, in the UK there are no U.S.-style treble damages awards available. Secondly, even though the UK has now moved towards an opt-out model, fortunately, the certification proceedings are not expected to be as problematic or as lengthy as class action certification proceedings in the U.S.

From the genesis of this initiative, it was always clear that the UK government and the EU institutions wanted to pick the best aspects of the U.S. regime without taking on those elements that have not worked effectively. So far, I think the UK is striking the right balance, but we're only at the beginning of this journey. It is hoped that more private damages claims will reach trial. Thus far, the vast majority of claims have settled.

MCC: EC Commissioner Margrethe Vestager announced that she intends to launch a market investigation into e-commerce in the EU. She also announced an investigation of geo-blocking of video games, which prevents consumers in one EU member state from buying content from another. What are the implications for the many companies doing business in the digital space?

Garrod: From a consumer perspective, there is no doubt that these initiatives are positive. The e-commerce inquiry aims to identify barriers to accessing goods and services online across borders. Once identified, the idea is that the EC can then set about dismantling or removing these barriers. Geo-blocking is one such area, and many UK consumers, for example, would love to access BBC iPlayer, as well as video games, when traveling around the EU. The EC's competition investigation includes absolute territorial exclusivity in the film and broadcasting area as an important further initiative. It's also worth mentioning that the EC has recently started consulting on potential proposals to regulate online platforms. Companies accessing all technology/digital/online markets need to be aware of these initiatives and what ultimately can ensue from a regulatory perspective. This is the only way they can strategically work with their lawyers on ways to protect themselves from scrutiny, as well as factor these developments into their overall strategic business plans going forward.