

MERGER CLEARANCE INVESTIGATIONS

Increased Rigor and Emphasis on Internal Documents

In January 2018 Competition Commissioner Margrethe Vestager took the stage at the GCLC Annual Conference to discuss her vision for fairness and competition policy. Most notable were her points about the role of internal documents in merger clearance investigations.

Her statement, “internal documents can help us make better decisions. They can help us understand the markets, and the companies’ plans for the future,” heralded a new era in the way merger clearance is viewed and handled.

Since that speech, corporations and their external counsel have seen a change in the approach to merger clearance investigations on the pan-European stage by the EU Commission’s Directorate-General for Competition (DG Comp), and national competition authorities in several European jurisdictions. Corporations are being required to disclose hundreds of thousands, and in one extreme case multi-millions, of internal documents as part of the process.

Historically, when two companies have proposed a merger or acquisition, European competition authorities evaluated various economic and market analyses to determine whether the transaction would establish too dominant of a position for the companies in any given market. Now, regulators, particularly DG Comp and competition agencies in the UK, Germany and France, are increasingly interested in the review of contemporaneous internal documents.

Earlier this year, to aide this focus on internal documents, the UK’s Competition and Markets Authority (CMA) published a

best practice guide for requesting and delivering documents as part of a merger clearance investigation. DG Comp is also currently preparing similar guidance, designed to help lawyers understand regulator expectations in this new landscape. While this type of guidance can be useful, many case teams handling merger clearance at the competition authorities still lack the understanding of the scale and complexity of extensive internal document identification, preservation, and review requests.

Some recent Phase II investigations have required companies to produce anywhere from a few hundred thousand documents to more than two million. In one major life sciences European merger that our team at FTI Consulting supported, the client had less than 30 days to respond. Producing high volumes of data in such a short timeframe means that counsel must often turn over documents before they’ve adequately reviewed the content, so they are forced to make blind decisions about the disclosure. An overall increase in merger filings is also causing the volume of work to rise, as is the frequency of examination

by the competition authorities: over the last three years, DG Comp has intervened on almost one in three mergers. Adding to the pressure are expectations from board members, management, and shareholders to rapidly close a deal.

Meeting these regulatory obligations involves an advanced exercise in e-discovery, which often requires support from specialised experts that understand how the process differs from e-discovery in typical litigation. This includes expertise in handling massive volumes of data from varied sources, the application of advanced analytics and predictive coding technologies to reduce both time and cost, and the fulfilment of demands in very short timeframes. The documents that need to be collected may reside in numerous locations across disparate systems and sources. Regulators may require multiple or rolling productions as new information flows in, and the scope may have to adapt as initial disclosures spur additional questions about the merger and how internal parties are viewing it. In addition to navigating all these factors, teams must also be prepared to document their processes and defend them against scrutiny.

At FTI, our global teams have extensive experience in supporting clients through these recent developments in Europe. Our teams have handled over 100 high-pressure, large-scale investigations under the scrutiny of the U.S. regulators, as well as some of the largest productions of internal documents under the DG Comp's new merger clearance regime. Our capabilities for handling a rigorous request during merger clearance, whether pre-notification, or at Phase I or Phase II include:

- Complex data collection, computer forensic, and e-discovery expertise to understand the full scope of data required including where it resides and the fastest, most cost-effective, means for preserving it.

- Awareness of the diversity of data types ranging from communications, documents, financial records, multimedia, legacy systems, archived data, cloud data, foreign language documents, and documents restricted by data privacy laws.
- Familiarity with advanced analytics and Technology Assisted Review (TAR) to strategically apply a wide range of technologies including predictive coding, continuous active learning, global deduplication and visual analytics to reduce the scope of data that needs to be reviewed and produced.
- Expertise in briefing, and negotiating with, regulators about the scope, impact, and complexities of responding to document requests.
- Deep understanding of DG Comp's and regional competition authorities' requirements and approaches to enable effective negotiations about an inquiry's scope, volume, complexity and deadlines.
- Escalation of highly skilled and reliable document reviewers and analytics researchers to complete, around the clock in some cases, a thorough and fast-moving document review within a short time frame.

Many lawyers facing these types of matters may be doing so for the first time. This makes leaning on forensic technology experts with experience in meeting extensive, deadline-driven demands for internal documents more valuable. A clear approach can have a profound impact on both the cost and the outcome of the process. Working with professionals that understand these processes, and the application of a wide range of advanced technologies and workflows is essential. This will ensure the legal team is proceeding with sound guidance, can complete the project defensibly and on time, and secure clearance for the merger to move forward.



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