Three Key Issues for Managing Discovery in Global Merger Investigations

Coordinating Multijurisdictional Antitrust Reviews in Light of New Developments in UK and EU Merger Control Investigations

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Key Points

- **Competition Authorities in the UK and EU increasingly require merging parties produce internal documents as a part of their merger control reviews.**
- **Coordinating document discovery across multiple jurisdictions presents significant challenges for merging parties.**
- **Companies have practical steps they can take to manage these discovery burdens and safeguard privileged communications and personal data.**

For counsel charged with securing antitrust clearances in multijurisdictional transactions, the conventional wisdom long has held that U.S., UK, and European regulators follow different paths for investigating the same M&A deal. In the U.S., the Department of Justice's Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") rely heavily on gathering ordinary-course internal documents and data from the transaction parties and other industry participants, often amassing millions of pages of records in "Second Request" investigations of strategic transactions. The UK and European Union processes, in contrast, historically have placed greater emphasis on detailed written submissions from the parties and other industry participants, while issuing comparatively few requests for ordinary-course company documents.

These conventions are changing. In recent years, both the Competition and Markets Authority of the UK ("CMA") and the Directorate General for Competition of the European Commission ("EC") have placed greater emphasis on evaluating internal documents and data to aid their analysis of strategic transactions. Both Agencies have called on transaction parties (and third parties) to provide more of these materials during the merger review process. In certain complex cases, the CMA and EC have made "Second Request-like" requests for information, requiring the merger parties to apply agreed-upon search terms against the parties' email and other electronic data systems, capturing hundreds of thousands, even millions of documents in the process.[2]

The Agencies' shift towards collecting more internal documents in complex merger investigations creates meaningful practical challenges for merger parties pursuing global transactions. Indeed, as the

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[2] The CMA and EC both are developing (and presumably soon will issue) guidance for merger parties regarding their approach to gathering internal documents in merger investigations (the CMA and EC "Guidelines"). The CMA issued its draft guidelines ("Guidance on Requests for Internal Documents in Merger Investigations") for comment on March 28, 2018, and the public comment period closed on April 25, 2018. In parallel, the EC has discussed with certain stakeholders potential guidelines for best practices on requests for internal documents under the EU Merger Regulation, but at the time of this writing, the EC has not issued a draft for public comment.

UK's scheduled March 2019 exit from the EU approaches (with no withdrawal agreement in place at the time of this writing), merger parties in strategic deals face the very real prospect of being subject to parallel, overlapping, but separate demands for internal documents from the U.S., UK, and EU regulators.[3]

Against that backdrop, counsel advising clients regarding the regulatory review process in strategic global transactions should confront three key issues in forming their antitrust/regulatory strategy:

1. Coordinating the timing and scope of global merger discovery.

2. Managing the search and production of discovery materials across the Agencies.

3. Addressing attorney-client privilege protections and data privacy safeguards across jurisdictions.

This note analyzes these issues and provides some practical takeaways for practitioners in this area.

The Context: Key Differences in U.S., UK, and EU Merger Investigation Procedures

It is beyond the reach of this note to compare fully the U.S., UK, and EU merger investigation regimes. To put the challenges confronting counsel navigating a global merger investigation in context, however, we highlight a few key differences between the three regimes.

The **U.S.** merger review process places great emphasis on the parties' internal documents and data. This begins when the parties file the initial merger notification form required under the Hart-Scott-Rodino Act ("HSR"). The HSR filing form itself is quite basic. It runs about 10 pages long and requires the filing person to provide some information about itself and the transaction structure, but it does not call on the filing party to prepare substantive descriptions of markets, competition, market shares, or related issues. Instead, the HSR form gets at these topics through documents. Specifically, Items 4(c) and 4(d) of the HSR form require the filing person to submit copies of any documents that were prepared by or for the parties' officers or directors "for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets," as well as certain related materials (so-called "4(c)/(d) documents").[4]

The U.S. emphasis on documents and data carries forward in the review process. During the initial HSR waiting period, for example, if the reviewing Agency (FTC or DOJ) decides to investigate a transaction, the Agency typically will issue a "Voluntary Access Letter" ("VAL") for documents and data to the parties. The VAL asks the parties to produce copies of key business strategy documents, market share reports, win/loss data, customer contacts, and other materials critical for the Agency to understand the competitive significance of the transaction. Should the Agency continue its investigation beyond the initial HSR waiting period, the Agency will issue a so-called "Second Request" for documents and data.[5] The Second Request is a massive undertaking, demanding that the parties provide essentially all

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[3] Should the UK and EU reach a withdrawal agreement, and should that agreement govern merger control issues, then the EU's jurisdiction to review the impact of mergers relating to the UK would extend until December 2020, subject to any extension of the transition period.

[4] Each party to a notifiable transaction in the U.S. prepares its own notification form and files its HSR form separately. The FTC and DOJ maintain the parties' HSR filings and the attachments thereto in strict confidence, even as between the filing parties. The FTC's official Guide for preparing an HSR Filing include a description of what documents qualify as 4(c)/(d) materials; *see https://www.ftc.gov/enforcement/premerger-notification-program/form-instructions.*

[5] HSR filings trigger an initial 30-day waiting period (15 days in the case of certain cash tender offers and bankruptcy proceedings). After the initial waiting period lapses, the parties are free to proceed with their transaction unless a U.S. Agency has issued a "Second Request." Parties also may elect to withdraw and

company documents and data from relevant "custodians" and "central files" regarding competition, competitors, and customers to the reviewing Agency.[6] Responding to a Second Request can take several months to complete and often requires sorting through several terabytes of Company data and documents, in addition to providing written responses to the reviewing Agency's "interrogatory"-style requests.[7] There is more to a merger investigation than documents, of course—the reviewing Agency typically will meet with the parties, interview (and in some cases depose) company personnel, interview third parties, and so on. Gathering the merging parties' internal documents, however, has long stood as the cornerstone of the U.S. investigation process.

Both the **UK and EU** processes historically have put far greater emphasis on written submissions from the parties as part of their merger review process, though that emphasis is shifting.

In the **UK**, merger notifications are (quasi) voluntary.[8] Parties that elect to notify the CMA of their transaction first file a "case team allocation request." The parties then undertake pre-notification discussions with the designated CMA case team to try to reach some consensus around the scope of information the CMA expects the parties to provide in the final version of the parties' Merger Notice (the "pre-notification" consultation process). Unlike the bare-bones HSR filing in the U.S., the CMA's Merger Notice template calls for the parties to provide written descriptions of the transaction, their businesses, and a variety of facts relevant to the competitive analysis. (The precise level of detail the CMA requires often depends on the complexity of the transaction and the CMA's familiarity with the industry in question.[9]) Parties typically submit drafts of their Merger Notice to the CMA for feedback during the pre-notification consultation period. In complex cases, the pre-notification consultation process can take several weeks or even months, and the draft filing can be quite lengthy—often 100 pages or more.[10]

In addition to substantive narrative descriptions of markets and competition, the parties typically also submit certain internal documents with their Merger Notice.[11] More recently, the CMA has begun

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refile their HSR notification prior to the end of the initial waiting period, effectively triggering a second initial waiting period before (and hopefully in lieu of) receiving a Second Request.

6 The U.S. Agencies have published a sample Second Request, available at *https://www.ftc.gov/system/files/attachments/merger-review/guide3.pdf*. "Custodian" is a term of art; in this context, it generally means an individual within the scope of control of the Party whose files will be searched for responsive documents and data.

7 A Second Request suspends the HSR waiting period. Once the transaction parties certify that they have substantially complied with the Second Request, a new 30-day waiting period commences (20 days in the case of certain cash tender offers and bankruptcy proceedings), at the end of which the reviewing Agency must either clear the deal or seek a court order to block the transaction. Transaction parties may agree to extend these deadlines.

8 Merger parties are not legally required to notify the CMA of a transaction over which the Agency has jurisdiction; however, the CMA can require merging parties that do not voluntarily notify their transaction to provide the information set out in its template Merger Notice. To avoid being "called in" by the CMA unexpectedly, parties to strategic transactions that exceed the UK's jurisdictional thresholds often proactively engage with the CMA, either to file a notification, or to brief the CMA on why the parties believe the Agency ought not to open an investigation.

9 The CMA has published a guide to making a merger notification filing, *available at https://www.gov.uk/guidance/mergers-how-to-notify-the-cma-of-a-merger*.

10 If the parties do not elect to notify the CMA of the transaction, but the CMA undertakes an investigation of its own accord, the CMA will require the parties to provide these same types of information and documents as part of its investigation process.

11 The parties' initial production often covers the following main categories: (1) the documents bringing about the transactions (*e.g.*, share purchase agreement, memorandum of understanding, heads of terms, etc.); (2) the parties' most recent annual report and accounts; (3) the parties' most recent business plans; and (4) documents that have been prepared by or for the board of directors or equivalent body and which set out (a) the rationale/investment case for the transaction or analyse the transaction (e.g., integration

requesting documents during the pre-notification consultation process that historically they would not seek until a Phase 2 investigation. These include requests for the parties' internal correspondence (i.e., e-mails) in relation to the market, products, specified customers and competitors, and other topics. The CMA's requests for internal documents have also begun reaching back further in time, in some cases requiring the parties to search for materials created over the past three to five years.

Once the parties complete the pre-notification consultation, they formally submit their Merger Notice and commence the Phase 1 investigation period.[12] The CMA may request additional information from the parties at it goes through Phase 1 and, if necessary, Phase 2 of its merger investigation. When the CMA requests information from the parties, it typically calls for the parties to provide detailed written responses to its questions. The CMA increasingly has also called on the parties to provide internal business documents during its Phase 1 and Phase 2 investigations. These information requests can have a meaningful impact on deal timing, since the CMA can suspend its investigation while the parties comply with requests for information and documents during the course of an investigation. The CMA also has the power to fine merging parties for failing to provide the required information or documents within the time period specified by the CMA for a response.

The **EU** merger review process served as a model for several aspects of the current UK merger regime, so unsurprisingly, certain elements of the EC's procedures match the CMA's. Parties that are required to file a notification with the EC first file a case team allocation request. The parties then undertake pre-notification consultation discussions with EC Staff, during which time the parties typically will submit a draft notification form for discussion proposes. During pre-notification, particularly in complex cases, EC Staff may submit one or more questionnaires to the parties that require detailed written responses and analyses from the parties before they can proceed towards filing. In addition, parties traditionally have provided certain internal documents (similar to those required by the CMA, described above) as part of the initial filing. After the EC formally accepts a filing and the accompanying documents, EC Staff may ask for additional questionnaire responses from the parties at both Phase 1 and (if applicable) Phase 2 of its review.[13]

As with the UK, the EC information requests historically have called for written responses and data; however, increasingly EC Staff has also called for internal documents to aid its analysis, including during the pre-notification consultation period. The EC's information requests can be quite substantial: in several recent matters, the EC's information requests required the parties to produce hundreds of thousands and in some cases millions of internal documents during the merger review process.[14] Like

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plans, financial forecasts, and information memoranda) and (b) reports, studies, presentations or similar prepared in the two to three years prior to the merger discussing the market conditions, competitors, competitive dynamics in relation to products or services where the merging parties have overlapping business activities.

12 Phase 1 of a CMA investigation lasts for 40 working days, though the CMA can "stop the clock" on that review period by issuing information requests. Should the CMA decide to continue an investigation into Phase 2, it extends the review period by an additional 24 weeks, with the possibility of a further eight week extension.

13 An EC merger notification filing triggers a standstill period of 25 working days (35 working days if the matter involves a Member State referral or if the transaction parties offer commitments to resolve concerns about the transaction). Should the EC extend the investigation into Phase 2, the standstill obligation runs an additional 90 working days (105 working days where the transaction parties offer commitments).

14 *See, e.g., "*Mergers: Commission clears ArcelorMittal's acquisition of Ilva, subject to conditions," European Commission Press Release 7 May 2018, *available at http://europa.eu/rapid/press-release_IP-18-3721_en.htm* ("As part of its in-depth investigation, the Commission reviewed more than 800,000 internal documents and took into account feedback from over 200 customers"); *see also* "Mergers: Commission clears Bayer's acquisition of Monsanto, subject to conditions," European Commission Press Release 21 March 2018, *available at http://europa.eu/rapid/press-release_IP-18-2282_en.htm* ("As part of its in-depth investigation, the Commission has…reviewed 2.7 million internal documents").

the CMA, the EC takes parties' compliance with its information requests quite seriously. The EC can suspend the waiting period pending timely responses to its information requests, and in some instances, the EC has fined parties for failing to provide what the EC deemed accurate and complete responses.[15]

The CMA's and the EC's increased use of internal document requests during the pre-notification consultation period raises an important procedural timing question: when a merger party receives a request for internal documents from the CMA or the EC during the pre-notification consultation phase, must the party comply with the request before the Agency will accept the party's notification filing as "complete" and start the Phase 1 waiting period? Conceptually, the two exercises seem separate; however, in practice Agency Staff may be very reluctant to accept a filing as complete (and thus "start the clock" on Phase 1 of their review) while they have significant information requests outstanding.[16]

Ironically, this timing issue potentially creates the most challenges for deals with the fewest substantive issues:

- In a transaction where the parties realistically expect they will have to go through a "Phase 2" review with the CMA or the EC anyway, a pre-notification information request may present less of an impact on timing. The parties know that the reviewing Agency is going to want to see a large volume of documents anyway, so getting the process started before Phase 1 even starts does not really change things. (If anything, early discovery may provide both the parties and the reviewing Agency with a clearer sightline towards what it will take to complete the merger review over the course of the transaction.)

- For deals where it is not clear that the transaction will go to Phase 2, however, receiving a major information request pre-filing can throw the parties' timing strategy into disarray. In the UK, it almost certainly means that the parties cannot file their notification until they complete their responses to the CMA's document requests. In the EC, while the parties technically could file and start the Phase 1 clock without responding fully to the document request, doing so runs a risk that the EC will take the position that it cannot recommend clearance in Phase 1 until it sees the requested documents, or it has a chance to properly review them. This effectively would force the parties either to reply to the EC's information request before starting Phase 1, or to file and start Phase 1, respond to the EC's document requests as fast as possible, and take the risk that the EC might push the matter into Phase 2 pending responses to its information requests.

These are difficult choices. A party that receives a substantial request for documents during pre-notification therefore should consider addressing this issue with Agency Staff directly and seeking clarity around which of the information requests (if any) functionally stand as pre-conditions to Staff accepting a filing as complete. Prioritizing particular topics, particular file types (e.g., business strategy documents), or particular individuals whose files are to be searched may help streamline this process, as well.

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15 *See, e.g.*, "Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover," European Commission Press Release 18 May 2017, *available at* http://europa.eu/rapid/press-release_IP-17-1369_en.htm. (describing fine).

16 The answer to this question likely varies by jurisdiction, as well. At the EC (which uses a defined notification form), a clearer distinction exists between the information required to make notification complete, on the one hand, and information required to aid the EC's investigation of the notified merger, on the other. In the UK, in contrast, the CMA determines what information is required to make a notification "complete," leaving more room for the Agency to say it needs the requested internal documents before it will start the clock on Phase 1.

The Practical Considerations: Managing Discovery in Global M&A Investigations

Managing substantial requests for internal documents in any one jurisdiction is challenging enough. Managing a global merger investigation with dueling information requests across multiple jurisdictions elevates those challenges substantially.[17] Counsel undertaking such projects will need to develop and implement strategies around the following key considerations in managing a global merger investigation:

1. Coordinating the Timing and Scope of Information Requests

As a starting point, the U.S., UK, and EU merger investigation processes often are asynchronous. Because of the differences described above in the mechanics for filing a U.S. HSR versus a CMA merger notice or EC Form CO, parties in a strategic global transaction may receive a Second Request from a U.S. Agency before the parties have completed the pre-notification consultation stage with the CMA or EC. Conversely, parties might receive a request for internal documents from the CMA or EC during the early days of the pre-notification consultation process—including a list of specific terms and custodians the Agency wants the transactions parties to search—long before the parties reach the stage where they might receive a Second Request from a U.S. Agency.

These timing differences made less of an impact historically: the U.S. focus on documents and the CMA or EC focus on written questionnaires meant the work could proceed roughly in parallel. The challenges confronting counsel increase substantially, however, in a world where multiple Agencies may request substantial productions of internal documents from the transaction parties. In such cases, the responding party may confront Agencies that are investigating the same core substantive issues but phrasing their requests in different ways, covering different time-periods or data sets, proposing different search methodologies, and so on. This in turn creates a real risk of duplicated efforts, expensive inefficiencies, and frustrated company leadership.

The key for counsel managing these projects is communication and coordination. In particular:

- Identify which jurisdictions will require merger notification as early as possible. This helps identify situations where you may have overlapping document-driven investigations.

- If the parties anticipate meaningful risk of antitrust investigation (Second Request or equivalent), assemble the core documents that will help drive the parties' discussions with the Agencies about the appropriate scope of an information request. This includes **Organizational charts** to identify custodians, a "**data map**" to identify critical sources of company documents and data; and core **strategy documents** (Annual Operating Plans, Quarterly Business Reviews, Monthly Marketing Reports, product roadmaps, etc.) to identify key business terms and concepts that will inform the company's views on the appropriate scope of search.

- Engage with the U.S., UK, and/or EU authorities early on. That does not mean conceding that the transaction warrants investigation or that the Agencies might need a substantial document production to complete their review. Often times, it simply means giving each Agency a list of which other Agencies are reviewing the transaction and then (when appropriate) facilitating company waivers that enable the Agencies to communicate with one another.

- When you get an information request from an Agency, give careful thought about whether to share that request with the other investigating Agencies. Parties often are reluctant to "cross-

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[17] At the time of this writing, the UK will exit the European Union on March 29, 2019 (the "Exit Date"). Currently the UK and EU have not reached an agreement addressing merger control processes beyond the Exit Date. In the event the Exit Date passes without a deal, the EC will no longer hold jurisdiction to review the effect of mergers within the UK, and the CMA will undertake those merger reviews. In the event the UK and EU enter into a withdrawal arrangement, there will be a transition period during which the status quo continues through the end of 2020.

pollenate" investigations for fear of getting one Agency interested in an investigation they otherwise might not have pursued. If early discussions suggest that multiple Agencies are interested in the same or similar issues, however, then sharing (or at least describing) one Agency's document request with the other Agency may create opportunities to generate some alignment around what the parties are expected to search for, or at least identify the biggest points of divergence. Even identifying little points of departure can make a big difference. For example, if a U.S. Agency requests documents relating back to 2016, and the EC case team says they generally are thinking about the requests the same way but warn they likely will want to see documents back to 2015, the parties may be able to adjust their data collection strategy and avoid unnecessary costs associated with conducting multiple searches for documents.

- When one Agency's information request follows another's, work with the second Agency where possible to accept the same data sources as the first Agency (common custodians, common database reports, etc.). While this may not apply for every custodian or every data source, in some cases the same sources of information will be relevant across jurisdictions on issues like deal rationale, synergies, benefits expected from the deal, alternatives to the deal, and so on. Narrowing the scope of search to common sources where possible can expedite discovery for the second Agency while reducing costs substantially for the responding party.

Communication and coordination only get you so far, and some departure between Agency requests may be inevitable. Different geographies may implicate different products, different customers, and different custodians, and the Agencies may investigate different theories of harm in their review of the transaction. Where there are similarities, however, finding opportunities to drive the Agencies towards "nesting box" information requests (with one Agency's requests fitting within the scope of another's) has the potential to reduce the cost and burden of document searches.

2. Managing Search Methodologies

After addressing the question of, "what is the responding party searching for?" we turn to, "how is the responding party going to search for it?"

The U.S. Agencies' long history of document-driven merger investigations places those Agencies relatively high up the e-discovery "learning curve." Both the DOJ and FTC have extensive experience with things like search algorithms, technology-assisted review (such as predictive coding) ("TAR"), and other search methodologies.

The CMA and EC, while sophisticated investigators, have less experience than their U.S. counterparts with high-volume e-discovery in merger investigations. This is changing, and the Agencies have signaled that they are open to trying things like technology-assisted review. At present, however, the CMA and EC may be more likely than the U.S. Agencies to favor search term-based procedures (e.g., "price AND competition") or similar methodologies.

The prospect that different Agencies might ask a responding party to use different search methodologies to find basically the same thing in overlapping investigations creates potential hazards for merger parties and Agencies alike. Imagine the FTC and EC both decide to seek documents in connection with their reviews of a global merger:

- The FTC issues a Second Request. The responding party negotiates a custodian list with the FTC, collects all the electronic documents maintained by those custodians (the "Collection Set") and then uses predictive coding to identify responsive, non-privileged documents that it will produce to the FTC (the "Production Set").

- In parallel, EC Staff issues a request for internal documents. The request is styled as a custodian list and a list of Boolean search terms that EC Staff wants the responding party to apply against all electronic records maintained by those custodians. (For simplicity, assume the substantive scope of the investigation and the relevant custodian list is the same for the EC and the FTC.)

In this scenario, the initial data collection process itself should be relatively straightforward—we have hypothesized that the same Collection Set will serve both investigations. Searching that common Collection Set using two different search methodologies in parallel, however, creates some real challenges for all concerned. The predictive coding and search term Production Sets will almost certainly capture different documents. Documents relevant to the EC investigation may show up in the FTC production, but not the EC production, and vice versa. In addition, managing two Production Sets creates logistical burdens and expenses that the company would prefer to avoid.

Counsel managing a global merger review that potentially face this challenge have a few options:

- When possible, consider engaging an e-discovery vendor with capabilities in each of the jurisdictions where counsel expect to be collecting, processing, and producing documents. Even if no other opportunities to coordinate search methodologies exist, using a common vendor across jurisdictions can facilitate efforts like transferring data between investigation response teams, and it lowers the cost and burden of the discovery process.

- Where applicable (and appropriate), consider steering the investigating Agencies to accept the same search methodology. This does not necessarily mean that the responding party will produce the same data sets to all reviewing Agencies—the EC may not want the multiple terabytes of data that are going to the FTC, for example. If both the FTC and EC accept that the responding party may use predictive coding (for example), however, that has the potential to simplify the party's response process and to lower costs accordingly.

- Where one Agency is pursuing broad requests and another is conducting more targeted searches, seek agreements where possible that the targeted searching can be conducted against the responding party's *Production* Set, not its *Collection* Set. Using the example above, that would mean running the EC's search terms against the library of material that the responding party is also producing to the FTC, so that one is a subset of the other. This eliminates the risk of dueling production sets, while also reining in the amount of data going to the Agency conducting a more targeted review. Practically, there may be limited opportunities to pursue this approach. In situations where multiple Agencies are demanding documents at the same time, for example, each Agency may be reticent to go last. In situations where one Agency's information request substantially follows another, however, there may be opportunities to conduct that discovery against the responding party's Production Set for other Agencies.

As with scope of search, coordinating search methodologies may not always be possible due to the timing of requests or other considerations. There also may be times when tactically adopting a single shared search methodology does not make sense—sometimes it is just easier and faster to run two parallel processes. Where applicable, though, organizing this effort can greatly help manage both the cost and the mental wear-and-tear of conducting multiple document reviews and productions.

3. Addressing Attorney-Client Privileges and Data Privacy Issues

a. Privilege

The U.S., UK, and EU apply very different rules when it comes to issues like attorney-client privilege. These differences present serious challenges for counsel coordinating global merger investigations.

The issue arises from the fact that the EU recognizes a much narrower protection for attorney-client communications than does the U.S. or the UK. In particular, the EU only recognizes a "Legal Profession Privilege" ("LPP") for certain communications between a client and its outside, European-qualified counsel. The EU does not recognize a privilege protecting communications between a company and its

in-house counsel in merger investigations.[18] Indeed, the EC often may include in-house counsel on its list of custodians whose files the EC expects the parties to search for internal documents in a merger investigation.

Thus: imagine a merger between two U.S. companies with significant global sales. The acquiring party sought advice from its U.S. law firm on the antitrust risks associated with the transaction. Counsel presented its conclusions as part of a presentation to the Company's board. The Company proceeds to do the deal, the FTC and EC both have jurisdiction to review the transaction, and both Agencies commence investigations. Both Agencies request internal documents, and in particular both request "all documents relating to the transaction presented to the board of directors."

- U.S. law plainly protects Counsel's presentation against discovery under the attorney-client privilege. The only way the FTC could get access to that presentation would be if the Company made the affirmative decision to waive its privilege. The Company would log the communication as a responsive, privileged document in a privilege log, and the Company would disclose the log to the FTC, but that would almost certainly be the end of it.

- Under EU law, however, whether Counsel's presentation is protected from disclosure turns on who prepared it. Under the standards reflected in the EC Guidelines, the presentation only would be protected from disclosure if it was prepared by an outside, EU-qualified lawyer. While to date there is no precedent for the EC pushing this point in merger cases, the EC theoretically could demand production of that record in its investigation.

- If for whatever reason the EC *did* insist on production of this record, then the Company needs to take care in how it responds to that demand. Under U.S. law, if a party holds a privilege but then *voluntarily* discloses the protected communication to a third party, the courts generally will deem that privilege as waived, and the underlying communications as subject to discovery. If the responding party is *compelled* to disclose the record to the EC, however, that party may still claim that the disclosure does not amount to a waiver.

For counsel confronting issues like these in a merger investigation, there are no easy answers. Consider the following guidelines, however:

- If you are working on a transaction where you anticipate an EC investigation, involve EU-qualified external counsel where possible.

- If you identify a situation where your client engaged in privileged communications with its counsel in its home jurisdiction, but where EC rules do not protect those communications from discovery (e.g., the communications between a U.S. company and its U.S. counsel in the example above), consider engaging with the EC case team and explaining why it is appropriate to respect comity principles in your case. When it comes time to produce the corresponding privilege log, clearly indicate situations where you are asserting privilege protections based on the rules of the jurisdiction where the evidence was created. In the example above, that would mean logging the communication as subject to a legal privilege applicable in the Company's home jurisdiction. (While not a formal policy, our experience in practice has been that the EC typically will *not* seek production of records reflecting communications with non-European outside counsel; however, the EC *will* seek the production of communications with in-house counsel.)

- If Staff demands the production of documents that *are* protected from discovery in the jurisdiction where the evidence resides, but that *are not* protected from discovery in the

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[18] *See Akzo Chemicals Ltd v. European Commission*, Case C-550/07-P (September 14, 2010) (holding that internal communications between in-house counsel and their company client are not privileged in European antitrust cases).

jurisdiction of the requesting party, create a clear record that the responding party is being compelled to produce the records—in other words, it is not a voluntary production—and clearly request that the receiving Agency afford the records all available protections against disclosure.[19] In addition, mark the affected materials as "subject to U.S. privilege" when possible, to make tracking those materials easier.[20]

b. Privacy

Separate but equally important is the issue of data privacy. The U.S., UK, and EU all have their own data protection and privacy rules in place, with Europe's General Data Protection Regulation ("GDPR") currently standing as the high watermark in regulating the processing (including the collection and transfer) of personal data.[21] Parties responding to requests for internal documents need to consider these rules at each step of the internal document discovery process, from data collection and review to production to the relevant Agencies. Managing these issues across a global merger investigation requires careful thought and planning.

It is beyond the scope of this note to work through all the intersection points between different jurisdictions' treatment of data privacy and the document discovery process. Counsel should bear in mind the following basic data privacy principles, however, for any cross-border merger investigation:

- When you receive a request for company internal records, **build data privacy protection into your response plan from the outset**. Identify which Agency requests potentially implicate personal data. Identify which custodians will need their records collected, and identify where those records are maintained. Pay particular attention to requests from U.S. and other non-EU Agencies that would require producing records that are maintained in Europe or that relate to European personnel. Gather copies of the Company's data protection policies and notices to employees.

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19 As the FTC recently noted in a blog post by the Agency's General Counsel and Assistant General Counsel, privilege waiver typically depends on a *voluntary* disclosure of the record in question. *See* "U.S. Privilege Following Akzo Nobel vs. European Commission," Alden F. Abbott and Ashley Gum (Oct. 3, 2018), *available at*: *https://www.ftc.gov/news-events/blogs/competition-matters/2018/10/us-privilege-following-akzo-nobel-v-european* ("In fact, most modern authorities take the view that disclosure must be voluntary to effect a waiver. Accordingly, a target seeking to defend its privilege after a compelled foreign disclosure could argue that the disclosure was "involuntary," and thus should not result in waiver. After all, European authorities would likely receive the disclosed materials either through seizure in a raid or by administrative order under threat of sanctions or other legal repercussions. In such cases (which in practice might represent all cases), the privilege holder could credibly claim that it did not intend to disclose its communications, but in fact vigorously opposed the disclosure.").

20 The following language in DOJ's standard waiver form suggests that the Agency will not treat EC productions as a voluntary waiver of U.S. privileges: "DOJ will not seek from the European Commission information that is protected by U.S. legal privilege. To the extent possible, [the Company] will clearly identify to the European Commission information that would be subject to U.S. legal privilege. If the DOJ receives information from the European Commission that [the Company] claims as privileged in the U.S., it is understood that the DOJ will treat such information as inadvertently produced privileged information."

21 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (*https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN*). In the EU, GDPR defines as "personal data" any information that relates to an identified (or identifiable) person. The identifiable person is a "data subject." The party determining the purposes and means of the processing of the data subject's data is the "data controller." The party processing the data subject's data on behalf and under the instructions of the data controller is the "data processor". Under GDPR, "data processing" is defined very broadly and includes things like collecting, retrieving, using, organizing, consulting, transmitting, erasing, or storing data.

- **Analyze the Company's policies and procedures around data privacy protection for employees**. Particularly for internal document requests that require collecting materials from Europe and producing them to a non-European Agency, assess whether the disclosures made by the Company to employees in its standard data privacy notices provide adequate notice for the intended processing, or if new notices should be produced that are specific to the relevant internal investigation.[22] Recent guidance from the European Data Protection Supervisor ("EDPS") indicates that under appropriate circumstances data controllers do *not* need to notify data subjects before providing European data to European regulators; however, check to see whether the Company's internal policies are consistent with that approach.[23]

- If you are engaging a discovery vendor, outsourced document reviewers, a law firm, or other third-party providers to work on the investigation, **discuss their data privacy protection protocols with them**. Particularly for investigations that implicate data maintained in Europe, assess where they will be processing data as data processors on your behalf (or as data controllers themselves). **Ensure that your contracts with data processors reflect all GDPR requirements** and flow-down obligations with which vendors processing personal data on your behalf must comply.[24]

- If the request for internal documents calls for producing documents maintained in Europe or relating to individuals that are based in Europe, before collecting documents, **establish the lawful basis for processing the personal data** you will need to collect.[25] In particular, make sure that you have a clear record with the requesting Agency about the need to process the data

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22 A core principle of GDPR holds that data controllers must be transparent when processing personal data (Article 5 GDPR determines fair, lawful and transparent processing). Articles 13 and 14 GDPR specify information that data controllers must provide to data subjects to comply with such transparency obligation, including, among others, the purpose of processing, the recipients of the personal data, and whether the personal data will be transferred outside the EEA.

23 *See* Letter from the EDPS of 22 October 2018 concerning "Investigative activities of EU institutions and GDPR," ("EDPS Guidance"), pp. 6 and 7, *available at https://edps.europa.eu/sites/edp/files/publication/18-10-30_letter_investigative_activities_eui_gdpr_en.pdf* (concluding that Article 14(1)(e) does not require data controllers notify data subjects that they are processing personal data if the data controller is disclosing the data in order to enable EU institutions to carry out a particular inquiry within their powers based on EU law, since EU institutions in this case are excluded from the category of recipients in Article 14(1)(e)). It is important to continue following further guidance and developments on this front.

24 Under Article 28 GDPR, data controllers shall only engage data processors that provide sufficient guarantees of compliance with GDPR. Article 28 sets forth a number requirements and conditions for the hiring of data processors, including detailed terms that data controllers must include in their contracts with data processors (such as contractual provisions concerning confidentiality, security, data exports, responding to requests from data subject exercising privacy rights, periodic audits, etc.).

25 Article 6(1) GDPR lists the lawful basis for processing personal data. These include: (a) processing based on consent from the data subject; (b) processing necessary to perform a contract with the data subject or to take steps at the request of the data subject prior to entering into a contract; (c) processing needed for compliance with a legal obligation to which the data controller is subject; (d) processing needed to protect the vital interests of the data subject or other natural person; (e) processing in order to perform a task carried out in the public interest or in the exercise official authority vested in the controller; (f) processing based on legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights of the data subject. As discussed below, Article 6(1)(c) and 6 (1)(f) generally are the most relevant provisions for responding to requests for internal documents. Consent could also be suitable under Article 6(1)(a); however, GDPR imposes very high standards for consent to be valid, and the data subject has the right to withdraw consent at any time, so in practice Article 6 (1)(c) and (f) provide a clearer basis for processing data in response to a merger investigation.

in question.[26] If the requesting Agency is based in Europe, and if it has issued a formal information request to the Company, then this should be relatively straight forward.[27] If the Company is instead making a voluntary production to a European Agency, consider creating a record that the Company is doing so in order for the Agency to carry out a particular inquiry and to perform its duties as set in EU or Member State law, or words to that effect.[28] Similarly, if the Company is processing EU-based data (or data otherwise related to individuals that are based in Europe), so that it ultimately may be produced to a non-European Agency, consider creating a record that the Company is doing so in order for the non-EU Agency to carry out a particular inquiry and perform its duties as set in its corresponding national law.[29]

- **Consider whether the data you are collecting will need to cross a border at any point** (e.g., if a custodian relevant to an FTC investigation works in a European office). The EU imposes strict limits on transfers of personal data out of the European Economic Area ("EEA").[30] Given

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[26] GDPR has specially strict requirements for the processing of "sensitive personal data" (referred to in Article 9 GDPR as "special categories of personal data" and defined as data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation). Sensitive personal data may only be processed based on explicit consent or other restricted situations. Although in principle merger investigations do not appear likely to trigger the processing of sensitive personal data, it is important to be able to identify any such data to ensure that the stricter GDPR requirements are observed.

[27] Processing data is permitted under GDPR Article 6(1)(c) when it is "necessary for compliance with a legal obligation to which the controller is subject." *But see* Recital 45 and Article 6(3) GDPR (providing that only obligations based on Union or Member State laws satisfy this condition).

[28] Processing data where the data controller expects to make a *voluntary* production to the EU or a member state likely will fall under Article 6(1)(f) GDPR. Unlike 6(1)(c), this provision is a balancing test that permits processing personal data when it is "necessary for the purpose of the legitimate interests pursued by the controller or by a third party, *except* where such interests are overridden by the interests or fundamental rights and freedoms of the data subject…." The EDPS Guidance at p.6 confirmed that processing personal data to "voluntarily provide information to EU institutions…in order for the EU institutions to perform their tasks carried out in the public interest" may fall within this "legitimate interest" provision. *See also* p.8 (noting, "The GDPR does not prevent the submission of information containing personal data to EU institutions, either in response to a legal obligation to do so or on a voluntary basis," as long as EU institution acts within its powers and spheres of competence).

[29] We do not yet have an interpretation of 6(1)(f) that expressly applies it to non-European merger investigations; however, interpretations of the predecessor to GDPR supported this inference. *See* Article 29 Data Protection Working Party ("Art. 29 WP") Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, 9 April 2014, at p.19 ("the need to comply with a foreign obligation may represent a legitimate interest of the controller, but only subject to the balancing test of Article 7(f), and provided that adequate safeguards are put in place such as those approved by the competent data protection authority"), *available at http://www.dataprotection.ro/servlet/ViewDocument?id=1086*. As discussed below, in addition to establishing the strongest legal basis possible for processing this data, parties responding to a request for internal documents should take steps to minimize the amount of personal data being processed as part of that response.

[30] Article 45 GDPR only permits transfers of data to the few countries that the EU considers to have an "adequate level of protection." At present, the jurisdictions recognized as adequate are: Andorra, Argentina, Canada (for commercial organisations), the Faeroe Islands, Guernsey, Israel, the Isle of Man, Jersey, New Zealand, Switzerland, United States (limited to the "Privacy Shield" framework), and Uruguay. *See* complete list *available at https://ec.europa.eu/info/law/law-topic/data-protection/data-transfers-outside-eu/adequacy-protection-personal-data-non-eu-countries_en*. Data transfers to other countries are prohibited unless the transfer is based on one of the safeguards mentioned in Articles 46-48 GDPR, or in one of the derogations mentioned in Article 49 GDPR. Examples of Article 46-48 safeguards are: (i) transfers based on standard contractual clauses (or model clauses) approved by decisions of the European Commission (Decision 2001/497/EC, Decision 2004/915/EC or Decision

such export data restrictions, it is crucial to have a clear understanding of the intended data workflow: (i) within your own group of companies; (ii) from you to discovery vendors, law firms, and other third-party providers; (iii) within the groups of such third-party vendors or from them to sub-contracted providers (e.g., from an e-discovery vendor to a translation service provider); (iv) from you (or from any vendor) to the requesting Agency. This may require making strategic choices on the location of the in-house teams and of the third-party providers involved in the investigation, or setting up remote review structures to avoid the actual cross-border transfer of data, in addition to putting in place the relevant safeguards to export data.

- At the time of collection for data housed in Europe or related to individuals based in Europe, **consider whether there are ways to narrow the volume of data being processed**. This may not be possible—often times, counsel will need to collect a complete body of data (e.g., all of a custodian's email files) so that they can truthfully certify to the requesting Agency at the end of the process that they conducted a comprehensive search. Documenting that counsel considered the issue and tailored its collection search as much as possible may nonetheless be useful if the Company's compliance with GDPR comes into question at some later point. For instance, to comply with the GDPR principle of data minimization, consider creating clear record that the Company is minimizing its processing of European-based data to data that is adequate, relevant, and limited to what is necessary in order to comply with or meet the needs of the requesting Agency.[31]

- At the time of production—particularly when producing internal records from Europe to a U.S. or other non-EU Agency—be clear with the receiving Agency that the production contains personal data, which must be maintained in strict confidence and which only may be retained for the period needed for the relevant inquiry.[32]

- For *any* production, whether made within the same jurisdiction or from one jurisdiction to another, **adopt appropriate technical and organizational measures to ensure the data being transferred follows appropriate security standards** (including protection against accidental loss, destruction or damage, unauthorized processing). This may include things like data encryption or pseudonymisation and good chain-of-custody protocols.[33] Take steps to ensure that the data is not kept for longer than necessary for the purpose for which it is being processed, and observe the other principles set in Article 5 GDPR.

2010/87/EU); (ii) intra-group transfers based on approved Binding Corporate Rules approved by the competent authority (Article 47); (iii) transfers based on consent and other narrowly applicable conditions. An example of an Article 49 derogation is transfer necessary for the establishment, exercise or defence of legal claims (Article 49(1)(e) GDPR).

31 *See* Recital 39, Article 5(1)(c) GDPR. In line with Art. 29 WP, the Guidelines on Article 49, p. 13, describe a layered approach for the personal data to be exported: "As a first step, there should be a careful assessment of whether anonymized data would be sufficient in the particular case. If this is not the case, then transfer of pseudonymized data could be considered. If it is necessary to send personal data to a third country, its relevance to the particular matter should be assessed before the transfer—so only a set of personal data that is actually necessary is transferred and disclosed."

32 GDPR is structurally complex, and navigating the conditions under which data can be transferred outside of Europe requires specialist advice. Broadly speaking, however, Article 49(1)(e) GDPR permits a Party to transfer data from the EU to third countries when occasional and "necessary for the establishment, exercise or defence of legal claims," including antitrust investigations, so long as (a) the data transferred is relevant and limited to what is necessary, and (b) the receiving party applies adequate protections to maintain the data confidentially. *See* Guidelines on Article 49 of Regulation 2016/679, Section III.5 (*ec.europa.eu/newsroom/article29/document.cfm?doc_id=49771*) (specifying Article 49(i)(e) covers antitrust investigations).

33 *See* Article 32 GDPR (providing guidance regarding security of processing personal data).

This summary just scratches the surface of data privacy rules and procedures in Europe in relation to internal investigations.[34] When confronting this issue in practice, confer with specialized counsel who can assist you in navigating these issues.

Conclusions

The merger investigation world is changing: jurisdictions like the EC and the UK increasingly are demanding internal documents from merger parties as part of the review process. Coordinating these efforts in global M&A transactions is a significant challenge for the team responsible for securing antitrust regulatory approvals.

By focusing on the three key issues for coordinating a global merger investigation—the scope of the search for evidence; the method of searching and producing evidence; and the confidentiality protections available for that evidence—counsel can deliver a more predictable, manageable process at a lower cost.

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[34] Beyond the data protection measures and obligations mentioned in this article, full-fledged compliance with GDPR requires companies to, among other things, put in place data governance structure (Articles 5, 27, 37-39); maintain a written record of the personal data that they process (Article 30); ensure that theirs systems and procedures enable data subjects to exercise their rights (Articles 15-22); develop a data breach response plan to mitigate data losses or other incidents involving data and, where mandatory, notify regulators and the affected data subjects (Articles 32-34).