SULLIVAN & CROMWELL LLP

S&C memo

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Observations About the U.S. Department of Justice's First Action Seeking to Block a Merger Under the Biden Administration

Yesterday's lawsuit seeking to block the proposed merger of Aon and Willis Towers Watson highlights the complications of obtaining merger clearances for a multinational transaction that requires significant divestitures to address competitive overlaps. The DoJ complaint highlights three important points:

Continued focus on the robustness of remedies. Aon and WTW attempted to satisfy competitive concerns with the deal (which the DoJ viewed as reducing the insurance industry's "Big Three" brokers to just two) through divestitures—some demanded by the European Commission to resolve its concerns about competition in Europe, and some designed to ameliorate separate DoJ concerns about competition in the United States. The DoJ deemed some of the proposed divestitures to be sufficient but said that others did "not come close" to satisfying its concerns, noting that one divestiture buyer anticipated that customers of the divested business would quickly return to the merged Aon-WTW. Resolving obvious competition concerns with a cross-border transaction requires a robust remedy that satisfies all the world's antitrust enforcers. Increasingly, that entails finding an acceptable upfront divestiture buyer. Because it takes time and effort to craft an effective remedy and persuade antitrust enforcers to accept it, having a carefully thought-out remedy strategy is often the key to success.

Protecting large businesses. The DoJ's complaint focuses on the proposed transaction's potential effect on "large customers," defined in one instance as "at least the firms in the Fortune 1000." That focus echoes the Federal Trade Commission case back in 2015 that sought to protect "national customers" served by Sysco and US Foods. Regulators are increasingly rejecting the argument that large customers can fend for themselves, and are willing to bring cases even if they lack obviously sympathetic victims.

Document creation. The DoJ's complaint quoted several management presentations to the parties' boards of directors, going as far back as September 2015. That helps illustrate that, although old documents may

not have to be submitted with a Hart-Scott-Rodino filing, they may still come to light if antitrust enforcers take a close look at a deal. Companies contemplating transformative M&A transactions need to consider the ramifications of what they write, even if a contemplated transaction may not proceed until years into the future.

Aon and Willis Towers Watson issued a joint statement last night stating that they "remain fully committed to the benefits of our combination," so the ultimate resolution of the matter (which is still being reviewed in other jurisdictions as well) remains to be seen.

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