

10 key themes

Global antitrust in 2021



Freshfields Bruckhaus Deringer

10 key themes

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Global antitrust in 2021

Welcome to our latest look at the 10 biggest trends in the world of antitrust.

2020 turned out like few, if anyone, had expected. With the fallout from the pandemic sure to linger for some time yet, there will continue to be difficult times in 2021 but there is at least the promise of a more stable global political environment and, driven by vaccine successes, the beginning of a global economic recovery.

Antitrust policy and enforcement is now mainstream news. In 2020, it has been front and centre in discussions about large tech players and digital markets; it features as a core issue in the debate on sustainability; it arose in the initial response to the pandemic with authorities releasing guidance to allow a degree of co-operation for essential goods and services like groceries and medical equipment; it remains a key consideration in global trade negotiations and EU/UK relations; and antitrust policy even emerged as a central theme in the US presidential election. This central role for antitrust is expected to continue into 2021 as governments assess the role of competition policy in advancing societal goals relating to environmental sustainability, data and technology, and reciprocity in international trading relationships.

'Antitrust is higher on the agenda of our clients than it has ever been before. Rapidly developing laws and policies are permeating more aspects of our clients' core business interests, and are often critical to their strategic plans. Our global antitrust group remains at the top of its game - advising at the forefront of complex deals, investigations and litigation. We are delighted to share our collective insights from this experience in our "10 Key Themes" report, which I hope you will find as useful as always in navigating these issues in the year ahead.'



Georgia Dawson
Senior Partner

More resilience

The disruption wrought by the pandemic has been kind to some sectors (such as tech) but very hard on others (such as aviation, hospitality and bricks-and-mortar retail). As a result, many firms are reassessing their business models. For the 'winners', this may involve making changes to pre-empt antitrust scrutiny or respond to new regulatory requirements. But for all businesses – winners or not – it's about becoming more resilient to future shocks.

To put themselves on a more sustainable footing, companies could, for example, reshape their supply chain or diversify their offerings. This could mean acquiring or collaborating with a competitor. But that also of course means inviting antitrust scrutiny.

More international co-operation

The traditionally high level of information sharing between the US competition authorities and their counterparts in the EU and other parts of the world dipped during the Trump administration. Under Joe Biden, who is keen to rebuild relations with America's traditional allies, it should recover.

In Europe, Margrethe Vestager has suggested building a common transatlantic understanding of 'fair competition' in the technology space in order to create a global standard. While attractive to some, the plan is ambitious because a consensus will not only require support in the US, but also from other leading agencies such as the UK's Competition and Markets Authority (CMA).

With the UK now fully detached from the EU in the antitrust enforcement sphere, the CMA has a say over transactions that previously fell exclusively to the European Commission (EC). The CMA won't of course operate in isolation. But enhanced co-operation doesn't necessarily mean that the CMA will agree with its peers, as demonstrated by its increasingly assertive approach.

More enforcement

When it comes to updating antitrust rules for the digital age, the EU leads the way. Its proposed Digital Markets Act (DMA) for example will introduce new obligations for 'gatekeepers' regarding practices that 'limit contestability or are unfair' and will empower the EC to impose structural and behavioural remedies for non-compliance. Such a major overhaul of competition law may be less likely in the US, although the Biden administration is expected to pursue some antitrust reform and be more aggressive in antitrust enforcement than its predecessor.

One thing is clear, however, and that is the agencies will surely keep the tech sector at the top of their lists. In the past, buyouts of start-ups by the larger tech players were, by and large, not caught by merger control rules because they were either not reportable or not deemed worthy of further investigation. But future acquisitions by 'big tech' should expect more scrutiny, regardless of the size of the target. In the Asia-Pacific region, draft antitrust guidelines for enforcement in the platform economy have been released in China, a new monitoring mechanism for certain large platforms will commence in Japan and developments in Australia regarding antitrust in digital markets continue to make headlines.

Existing (but less frequently utilised) tools may be dusted off and see more use or be reformed. For example, authorities in Brazil and the UK have recently used their interim measures powers, while Germany and other EU member states look to reform or introduce their own interim measures powers.

Enforcement and intervention are also likely to increase in other key consumer-facing or innovation-led sectors. But it won't just be about consumer harm in the traditional economic sense. The pandemic has highlighted issues around national economic resilience and vulnerable consumer groups. As a result, agencies are likely to set their policy lens more widely in determining which cases to bring.

Emerging from the pandemic, there is an acute awareness in boardrooms of environmental, social and governance concerns and the role that sustainability will play in the recovery. Policymakers are increasingly seeking to incorporate sustainability into antitrust frameworks, and so these considerations will likely remain relevant into the post-pandemic era.

Read on to explore these themes and more. We will be hosting a number of events throughout the year. If you are interested in joining the discussion, please speak to your usual contact in our antitrust, competition and trade team.

On behalf of everyone at Freshfields, wishing you a healthy 2021.



Thomas Janssens

Global Head,
Antitrust, Competition
and Trade Group



01

Antitrust in a changed world

The role of antitrust in driving
sustainable economic growth



Diminishing faith in competition law – time for a reset?

Are antitrust and competition laws failing to deliver beneficial outcomes to consumers and should governments be intervening more to correct market failures and reverse growing inequalities in society? A growing academic consensus seems to think so. If politicians and authorities agree, businesses should prepare for a tougher enforcement environment in 2021.

The key complaint is that competition enforcers have failed to prevent a trend of increasing consolidation and concentration in markets, to check the power of leading firms or to protect consumers and citizens adequately from anti-competitive practices. In addition, the crisis hitting many sectors as a result of the pandemic has bolstered calls for closer alignment of antitrust laws with wider industrial and public

policy concerns, such as national resilience, consumer protection, unfair trade practices and data privacy, with more politicians and authorities demanding a reset or reorientation of competition policy to help drive sustainable economic growth and recovery.

Debate on these matters has sparked a proliferation of investigations, inquiries and reports which consider a variety of broad questions, including:

- whether current laws are capable of reaching, or can be adapted to reach, the perceived concerns; or
- whether broader reform is required, for example through expanding antitrust law to cover a more egalitarian set of objectives or through the adoption of new mechanisms, such as ex ante regulation or market investigation tools.

Although these debates are still being had, it seems clear that change – and in some jurisdictions dramatic change – is being demanded and may soon be on the horizon.

‘Many governments around the world were already considering reviews of aspects of their competition regimes, whether due to concerns about concentration in certain sectors or due to events like Brexit in the UK. These reviews have now taken on a different character as a result of the pandemic, as governments seize the opportunity to implement broader policies under the cover of fostering sustainable growth post-COVID-19.’



Michele Davis
Antitrust Partner,
London

Implementing a more ambitious enforcement agenda – the steps so far

Competition agencies around the world are being urged to act more decisively and forcefully to safeguard the competitive process and to ensure that their policies and enforcement priorities not only protect consumers, but also address sustainability goals and inequalities in society (including those arising from regional imbalance, race and gender). Many are already taking the articulated concerns seriously and are, for example:

- scrutinising the impact of mergers much more closely, including acquisitions of start-ups, sometimes referred to as ‘killer acquisitions’, and past mergers (see theme 2). Both the US Federal Trade Commission (FTC) and Conselho Administrativo de Defesa Econômica (CADE) in Brazil, for example, are conducting wide-ranging studies into past acquisitions by technology companies;
- carrying out investigations into the conduct of technology companies, including data collection or other practices which may be seen as favouring their own businesses over rivals (see theme 5);
- placing greater emphasis on the importance of firms behaving fairly and focusing resources on anti-competitive conduct that harms individual citizens, especially the more vulnerable (eg through challenging price increases by pharmaceutical firms); or

- considering whether, and if so how, broader public policy matters can be folded into competition analyses:
 - several authorities, for example, are actively considering how competition and sustainability policies can work together to achieve improved standards and outcomes for the environment and consumers, with the EC’s Executive Vice-President, Margrethe Vestager, indicating that she will welcome initiatives by companies to work quickly, in line with competition law, to go green and that the EC might be prepared to give comfort about the compatibility of such agreements with EU competition law in order to provide greater clarity and guidance (see theme 6); and
 - in the US, a broad debate continues as to whether root-and-branch antitrust reform is required. Some politicians and scholars contend that antitrust law should pursue a broader citizen welfare standard, allowing issues such as employment security, wage levels, economic freedom of consumers, the well-being of small and medium-sized enterprises (SMEs), the diffusion of concentrated private and political power and the preservation of democracy to be addressed.

‘Consistent with the increasing public and political attention on antitrust issues and the recent election of Joe Biden, we are expecting further enforcement focus and profile from the US antitrust agencies. We anticipate that the federal antitrust agencies will come under continued political pressure to pursue enhanced enforcement, litigation and in-depth analysis of both merger control and single-firm conduct. Calls for legislative reforms to expand the scope of the antitrust laws are likely to continue, as well as the focus on large consumer-facing sectors such as tech and life sciences – with further focus on potentially extended theories of harm involving nascent competition, innovation and big data.’

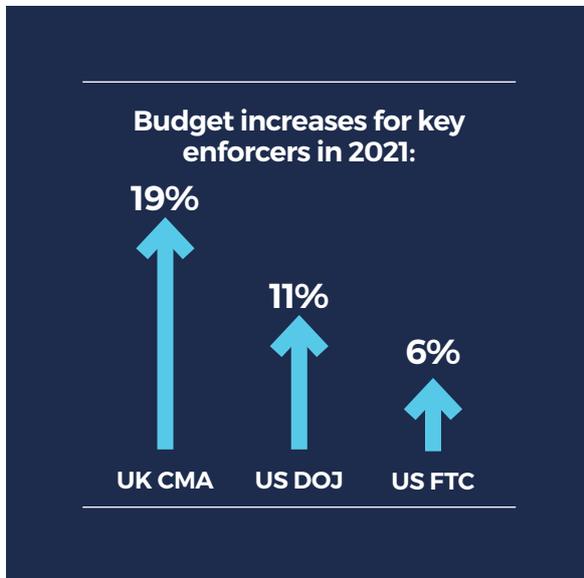


Justin Stewart-Teitelbaum
Antitrust Partner,
Washington DC



The shift to a data driven economy we are currently experiencing will also need a shift in how we look at markets and in particular consumer harm, which in data driven markets does not necessarily manifest itself in price increases but in less choice and innovation.

Statement by Margrethe Vestager
(Executive Vice-President, European Commission) to the
US House Subcommittee on Antitrust, Commercial
and Administrative Law (July 2020)



Safeguarding of national businesses operating in sensitive and strategic sectors

Fewer countries are now willing to accept unreservedly the benefits of free trade, open markets and foreign investment. The pandemic has focused attention on the importance of national resilience and autonomy of supply, accelerating a trend for new and tougher mechanisms to control foreign direct investment and other policies to protect national interests. These are principally being designed to protect businesses operating in sensitive and strategic sectors, including critical national infrastructure or advanced technologies and companies providing essential supplies to governments and emergency services, including military and dual-use sectors (see theme 4).

Although these regimes frequently operate in parallel to antitrust regimes, the concerns being addressed are often intertwined, particularly when authorities are influenced by political agendas and governments may be required to decide on remedies where national interests outweigh competition concerns.

Invigorated enforcement and new rules are imminent

A variety of measures are being contemplated across the globe to ensure that competition law and policy addresses perceived weaknesses and facilitates economic recovery. These include more active steps to tackle consumer harm, to foster competition in

digital markets, to break down barriers to entry and to promote dynamic, innovation-driven competition which delivers benefits to consumers and businesses across the board. In 2021, we can expect to see:

- strengthened enforcement and better resourced competition agencies. This is a core priority, for example in the UK, following its final departure from the EU on 31 December 2020, and for some policymakers in the US; and
- changes to antitrust laws and the adoption of new tools to address market failures, including sector-specific regulation and market investigation tools:
 - the EC has released its proposed DMA reforms, which seek to supplement competition enforcement in digital markets and introduce a regulatory regime for large online platforms which act as ‘gatekeepers’ (see theme 5); and
 - the election of Joe Biden as President of the United States, together with the digital markets report issued by the Democratic Majority Staff of the US House Subcommittee on Antitrust, Commercial and Administrative Law (US House Report), signals that pursuit of some antitrust reform – or at minimum expanded enforcement – is likely to be forthcoming in the US.

Next steps in both the US and the EU are keenly awaited, while new tools due to commence in other countries will be watched with interest. In Japan, a new monitoring review mechanism, overseen by the Ministry of Economy, Trade and Industry (METI) rather than the Japan Fair Trade Commission (JFTC), will commence for certain large platforms, which will include some mandatory disclosure requirements across a range of practices (see theme 5).

‘Although the European Commission has acted forcefully against a number of leading firms in recent years, it remains concerned about gaps in its current toolkit which it believes preclude timely and effective intervention against broader structural concerns. New tools and regulations to plug these perceived gaps are expected imminently.’



Frank Montag
Antitrust Partner,
Brussels

Looking ahead in 2021:

Businesses must remain vigilant for reforms and new rules in a fast-changing regulatory environment and prepare for a more aggressive enforcement environment and greater scrutiny of:

- markets and mergers, particularly those involving innovation-led, data-heavy or consumer-facing businesses;
- the commercial practices of firms with market power, especially unfair pricing and selling practices;
- the conduct of firms in digital markets where many competition agencies have expressed their intention to prioritise fairness for consumers and open access for all stakeholders;
- anti-competitive collaborations (or cartels) in distressed sectors or bid rigging affecting public procurement. Although many authorities have been sympathetic to business collaboration designed to increase output, or overcome shortfalls, of vital products and services during the pandemic, the intention has not been to provide a general licence in favour of horizontal co-operation. In the US, for example, the Department of Justice (DOJ) is prioritising the prosecution of procurement collusion offences through its newly created Procurement Collusion Strike Force, including those related to COVID-19; and
- conduct harming broader public policy goals, such as improved environmental standards or protection of workers.



02

Merger control

Where new laws and policies will bite

Companies planning deals in 2021 should plan for higher levels of regulatory intervention in many of the major jurisdictions, including:

- in Europe, where policy shifts and the post-Brexit landscape will see more transactions subject to the jurisdiction of the EC and/or the UK's CMA;
- in the US, where the Biden administration is expected to scrutinise transactions more closely and increase co-ordination with authorities globally; and
- in Japan, where in December 2019 the JFTC clarified in its merger control policies the circumstances in which it would review non-notifiable cases and has in fact conducted six such reviews.

We also expect authorities worldwide to apply more detailed, and probably more sceptical, scrutiny to transactions, particularly those involving innovation-led, data and digital markets. These changes reinforce the need for deal planning to feature a co-ordinated global merger control strategy.

Casting a wider net

As a result, some transactions which might not have otherwise been reviewed (or reviewed only in a light touch way) will be more likely to be subject to an in-depth investigation by authorities, including the EC, the CMA and/or US agencies.

Article 22 referrals are likely to become more common. Since 2005:

<p>9 out of 10 Article 22 requests by member states have resulted in a referral to the EC</p> <hr style="border-top: 1px dotted #ccc;"/> <p>No more than four Article 22 requests in any year</p>	<p>Only two Article 22 requests, on average, were made each year</p> <hr style="border-top: 1px dotted #ccc;"/> <p>Less than 1% of transactions reviewed by the EC each year started as Article 22 requests</p>
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The EC has announced a new policy on referrals under Article 22 EU Merger Regulation (EUMR). It will encourage EU member states to refer certain transactions to the EC, even where the transaction does not meet the national merger control thresholds of the referring member states. Further guidance is due to be published in mid-2021. The policy change is largely directed at facilitating the review of so-called ‘killer acquisitions’, including in the digital and pharmaceutical industries, which might otherwise not trigger the (often revenue-based) jurisdictional thresholds of the EC and member states. This policy shift will increase uncertainty across all industries as to:

- whether a transaction may ultimately be subject to an EC merger investigation;
- whether parallel EC and member state reviews will occur; and
- overall transaction timetables (eg when the timeline commences for such an Article 22 referral and when parties would be able to close their transactions) – the standstill obligation kicks in under Article 22 when the EC has informed the merging parties of a member state’s referral request. If a transaction has not closed at this point, the parties are no longer permitted to close until EC clearance has been secured.

Avoiding gun-jumping risk must therefore be factored into timetables and integration planning, as merging parties may have to navigate a longer than expected pre-closing period during which there can be no integration.

‘Our experience of working with both the EC and national competition authorities will help us anticipate the increased risk of Article 22 referrals going forward. Merger parties should prepare for more detailed assessments at the individual EU member state level and the possibility of seemingly smaller, localised transactions requiring EU merger clearance.’



Following the end of the Brexit transition period, the CMA can now investigate transactions in parallel to the EC. No longer restricted by the EU’s ‘one stop shop’ principle, we can expect the CMA to claim jurisdiction over more transactions by taking advantage of its very flexible ‘share of supply’ jurisdictional test. Proactive engagement and co-ordination will be needed to manage the CMA process alongside merger control processes in other jurisdictions. Updated guidance by the CMA suggests that it may decide not to investigate transactions where remedies imposed or agreed in other jurisdictions would likely address any UK competition concerns, for example where all relevant markets are broader than national in scope.

‘The CMA has taken an increasingly expansive approach in its interpretation of the share of supply test, including in some of our recent matters, to capture transactions with a limited or tangential UK nexus. We expect this approach to continue post-Brexit, with the CMA having announced late last year that it aspires “very much to be at the top table discussing international mergers”.’



In the US, the Biden administration is widely expected to usher in a re-energised era of merger enforcement. Amid calls by some that there has been under-enforcement in several industries, including tech and pharma, we anticipate the agencies will use new tools or reinvigorate existing tools to catch acquisitions of nascent competitors, vertical transactions or minority acquisitions. These tools include use of the Federal Trade Commission Act's Section 6(b) powers to conduct industry studies, breaking up past acquisitions deemed to have anti-competitive effects, rule-making authority to regulate conduct ex ante and bringing (and potentially losing) more cases challenging deals.

Greater hurdles

For large digital or tech deals we may see the following (often controversial) proposals materialise in 2021:

- In the US, the most eye-catching proposals include:
 - codifying bright-line rules, including structural presumptions, that would presumptively prohibit transactions resulting in high market shares or increased concentration. This would shift the burden of proof to the merging parties to show that the transaction would not reduce competition;
 - introducing a presumption against acquisitions of start-ups by dominant firms; and/or
 - prohibiting acquisitions of potential rivals and nascent competitors. In order to establish harm on potential/nascent competition grounds, the agency would not need to show that the potential/nascent competitor would have been a successful entrant absent the deal.
- In the Asia-Pacific region, the Australian Competition and Consumer Commission (ACCC) has recommended that large digital platforms in Australia should provide the ACCC with advance notice of any acquisitions. Australian merger laws are also being reviewed to determine whether express reference should be made to considering the effect of the removal of a potential competitor and the nature/significance of assets being acquired (either directly or as part of a business acquisition). Japan has already revised its merger guidelines to consider the effect of data and R&D on competition. In South Korea, the Korea Fair Trade Commission

announced plans to introduce a transaction value-based notification requirement, first proposed in 2018, which would trigger filings in acquisitions of start-ups which might not meet current turnover-based thresholds.

'With Democrats in control of the House and Senate, some of the more sweeping proposals from Congress and progressive critics have a chance of materialising, if not through legislation then through agency appointments. However, this area will continue to be the source of considerable debate and one that we are monitoring closely. One area that has received bipartisan support in Congress is increased funding for the antitrust agencies, which will likely lead to more investigations and potentially more merger challenges in court.'



Meghan Rissmiller
Antitrust Partner,
Washington DC

- In the EU, discussions continue around reversing the burden of proof in big tech acquisitions of small start-ups to show that adverse effects on competition are 'offset by merger-specific efficiencies'. A similar idea was mentioned in the 2020 paper on *Start-ups, Killer Acquisitions and Merger Control* from the Organisation for Economic Co-operation and Development (OECD). In Germany, draft amendments to the merger control rules are intended to impose obligations on certain companies active in specific and highly concentrated sectors to notify transactions that would not have been subject to notification obligations. In France, a proposed law would require digital platforms designated by the French Competition Authority to notify all mergers and the French Competition Authority itself has suggested that certain companies be required to notify all mergers to the EU and/or national competition authorities.
- In the UK, a separate mandatory merger regime and reporting obligations for acquisitions by companies with 'strategic market status' could be introduced. This would involve the CMA deciding cases on a lower standard of proof (compared with the current balance of probabilities standard).

Common ownership concerns also continue to occupy the minds of policymakers, coming to the forefront a few years ago in the EU during the Dow/DuPont merger. Research suggests that common ownership has become more common and the 2020 *Common Shareholding in Europe* report (commissioned by the EC’s Directorate-General for Competition) suggests the topic continues to be on agencies’ minds and is here to stay, particularly in transactions involving innovation.



We also expect a greater focus on behavioural remedies in transactions involving big data, with the EC likely to take a more interventionist approach when considering data-related concerns. A wide spectrum of behavioural remedies relating to data – including data use/data silos, data access and interoperability standards – may become more common in the future.

Reflection and reform

2021 is expected to be a year of reflection on the effectiveness of merger control regimes globally. For example, the EC plans to review some of its recent decisions and their effects on prices, choice, quality and innovation. It will evaluate the performance of the merger rules in the light of digitisation, growing concentration levels and growing profits. The EC also plans to increase the use of simplified procedures and more streamlined processes, allowing more resources to be focused on transactions raising complex issues or novel concerns. In Germany, proposed reforms include increasing some of the turnover thresholds and some simplifications to the merger control procedures. In France, the introduction of an ex post merger control regime will continue to be explored.

In the US, the FTC will continue its Section 6(b) study on past acquisitions in the tech space and is likely to initiate other industry studies to evaluate the efficacy of prior enforcement and develop reforms.

The Chinese authority, the State Administration for Market Regulation (SAMR), has been consulting on proposed amendments to China’s Anti-Monopoly Law (AML). In the merger control sphere, the proposed changes include defining ‘control’ in the AML itself for the first time, higher penalties for gun-jumping, and provisions to allow the clock to be stopped during merger reviews.

‘Standstill obligations preventing closing and integration should not prevent merger parties from protecting their data and systems. With longer pre-closing periods, we are finding that it is all the more important to plan well in advance for cyber security, while still complying with laws against gun-jumping.’



John Fisher
Global Transactions Partner,
Silicon Valley

Looking ahead in 2021:

- **Prepare for a more complicated merger review**, requiring greater co-ordination across multiple jurisdictions including:
 - a more sophisticated competition risk assessment, including consideration of transaction value, likely complainants, issues around the loss of potential competition and innovation and concerns at the individual EU member state level;
 - accounting for and allocating risk in transaction documents, including the likely longer merger review timeframes;
 - co-ordinating timelines and remedy discussions across authorities in the light of the longer review periods in certain jurisdictions; and
 - careful planning for closing and integration, especially given increasing gun-jumping sanctions in some jurisdictions.
- **Expect a more thorough scrutiny by authorities.** Parties will need to gather more evidence and prepare for detailed examination of the following (particularly in mergers involving potential competition, innovation and data and in vertical transactions):
 - internal documents, including materials covering synergies, deal valuation and transaction rationale;
 - the competitive effectiveness of potential competitors;
 - the impact of common shareholders; and
 - divestment and behavioural remedies, which need to be considered from the early stages of deal planning.
- **Look out for opportunities to contribute** feedback to help shape the merger control laws when reviews commence.



03

Deal disputes

Prepare for a more litigious environment

In 2021, evolving market conditions, including regulatory intervention, technological innovation, a new US presidential administration and the continuing impact of COVID-19, will likely shift deal dynamics and contribute to a higher volume of threatened deal disputes, both with authorities and between merging parties.

Against this backdrop, it is vital for companies to adopt effective strategies to identify and mitigate transaction risks, while remaining live to opportunities of deal-making in this environment.

Practically, this means sellers and buyers should equip themselves with the right transaction toolkit, including support and advice from both transactional and litigation teams.

Shifting deal dynamics

In 2020, the COVID-19 crisis brought with it the threat of merger litigation, including a dispute between LVMH and Tiffany & Co regarding LVMH's efforts to obtain antitrust approvals and a dispute between EssilorLuxottica and GrandVision regarding GrandVision's management of its business in light of the pandemic. Although many of these types of dispute settled in the latter half of 2020, there has nonetheless been a growing trend towards more threatened deal disputes.

In light of increased deal uncertainty and risk, 2021 is likely to see more transacting parties reverting to, or at least threatening, litigation to challenge the scope of provisions in their transaction agreements.

‘It is increasingly important for agency-facing and litigation teams to work together closely throughout the life cycle of a transaction, with agency-facing, deal-party and shareholder disputes arising with greater frequency at different stages of a transaction, covering everything from disputes regarding compliance with Sale and Purchase Agreement terms and conditions, through to completion statement and warranty claims, and regulatory reviews.’



Nicholas Frey
Antitrust and Dispute Resolution
Partner, London

Avoiding disputes – deploying the right transaction toolkit

Whether you are a seller looking for speed and deal certainty, or a buyer seeking transactional flexibility in evolving regulatory and market conditions, integrating disputes experts into your antitrust and corporate teams will help you better prepare for the merger control hurdles and disputes that may arise.

• **Breaking up**

In an environment in which the outcome of merger control review is becoming increasingly uncertain, merging parties may want to consider negotiating reverse termination fees that become due in the event of failure to receive the requisite regulatory clearances. The triggering events and exceptions to these fees can be nuanced and can make a difference for a well-advised party.

• **Protecting yourself**

Companies may consider incorporating extensive obligations to close the deal swiftly, including through contractual obligations to obtain promptly all necessary regulatory clearances, potentially subject to remedies required by the agencies. The negotiation of such clauses will involve a thorough analysis of potential antitrust risks.

• **Long-stop dates**

Long-stop dates can be valuable in uncertain economic markets to ensure a purchaser’s prompt

compliance with its regulatory obligations. Long-stop dates should be balanced against the need for time to comply with increasingly lengthy merger control timetables internationally and also to take account of the interplay between those investigations and any subsequent remedies process.

Remarkable results, unrivalled understanding

When facing merger control authorities, clients choose Freshfields because we have led:

<p>The only 2 successful appeals of EC merger prohibitions since 2002</p>	<p>The 1st merger defeat of the US FTC at trial since 2015</p>	<p>On 1 of only 2 appeals of UK prohibitions remitted back to the CMA</p>
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• **Being specific**

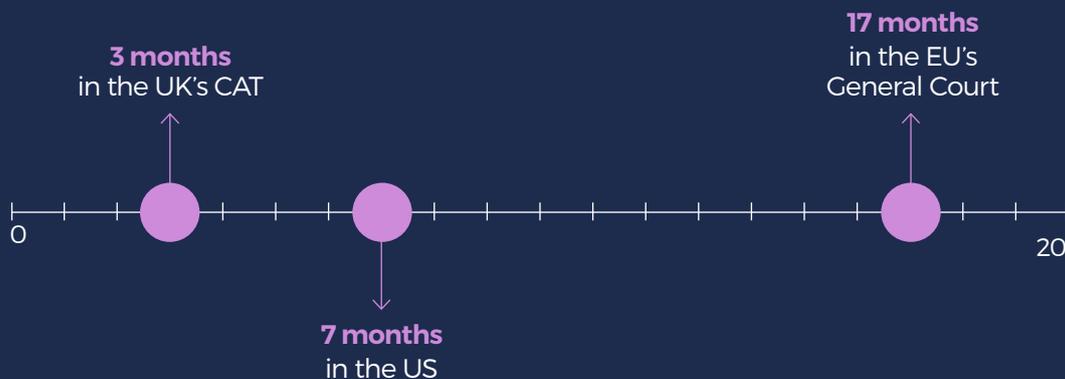
Specificity is key with respect to contractual provisions which address regulatory approval obligations. Companies should ensure that deal documentation properly outlines the types of actions required to satisfy merger control processes and that documentation reflects negotiated terms specific to the jurisdictions where regulatory approval is required. This may not only prevent future litigation but will provide greater deal certainty for buyers and sellers alike.

• **Consistent communications**

In light of the extensive document disclosure obligations in many merger control processes internationally, communications – both internal and external and with investors and other stakeholders – must be clear, unambiguous and consistent.

Court challenges to merger decisions can vary widely across jurisdictions

Average time from filing to first court decision in merger appeals lodged and completed since 2018:



Substantive challenges

We saw a number of significant substantive agency challenges in 2020. In the EU, the General Court upheld the appeal brought by CK Hutchison against the EC's prohibition of its proposed acquisition of rival company O2 UK – the first review of the 'significant impediment to effective competition' test that was introduced by the EU in 2004. Meanwhile, thyssenkrupp's appeal against the EC's decision prohibiting the proposed joint venture with Tata Steel is pending before the General Court and covers a broad range of issues.

In the UK, the Competition Appeal Tribunal (CAT) has (in a rare move) remitted the CMA's phase 2 prohibition decision back to the CMA for reconsideration as a whole in the JD Sports/ Footasylum completed merger.

In the US, the DOJ has shown an openness to using non-traditional tools for challenging transactions

it deems problematic, using arbitration to resolve a dispute over market definition in Novelis/Aleris – a first for the DOJ – and has indicated its intent to keep arbitration in its repository of tools. The DOJ's recent challenge to Visa's acquisition of Plaid is an example of authorities viewing acquisitions of nascent or potential competitors in high-tech markets with more scepticism.

'In the US in particular, the agency lawyers investigating the deal often pivot to a litigation mindset much earlier than merging parties may realise. It's important to be aware of this fact and ensure that party executives are delivering a clear, consistent and persuasive narrative about the deal's pro-competitive benefits from day one.'



Julie Elmer
Antitrust Partner,
Washington DC



Closing dates need to be set with sufficient lead times to provide headroom to resolve the unexpected before running into default situations and disputes.

Procedural challenges

Procedural disputes are also becoming more commonplace. The recent, failed attempt by the CMA to fine JD Sports for its alleged failure to comply with a hold separate order (issuing the joint largest fine to date for such a breach) illustrates the heightened interventionism of the UK authority and highlights the need for parties to ensure they are ready to respond to agency challenges as necessary. Meanwhile, in the US, the DOJ has filed its first enforcement action in decades relating to a third party's failure to comply with a request for information.

As the decisional practice of agencies evolves, it is strategically advantageous for parties to be aware of the ways in which the execution of transactions may be hindered or even thwarted. Ensuring involvement of litigation teams in transactions from the outset will help lay the foundation for substantive or procedural disputes that may arise later.

'Strategic investors looking for regulatory approvals in cross-border transactions should take the time and make an effort early on to prepare a consistent line of argument and evidence to support their multi-jurisdictional filings, including increasingly important Foreign Investment Control filings. "Rushing the regulators" no longer works for larger deals. Closing dates need to be set with sufficient lead times to provide headroom to resolve the unexpected before running into default situations and disputes.'



Martin Klusmann
Antitrust Partner,
Düsseldorf

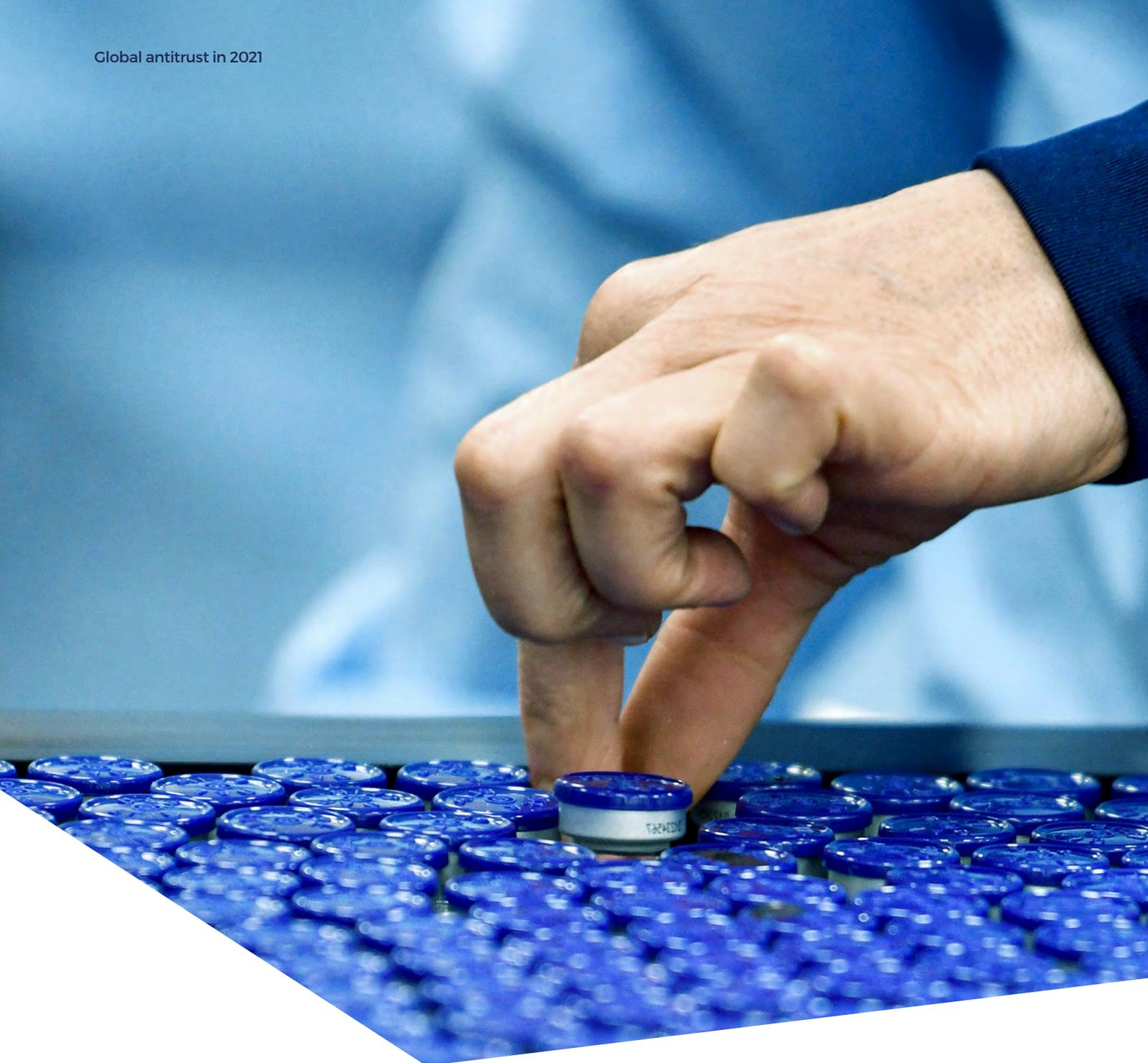
Looking ahead in 2021:

- Wherever you are in the world, mitigating against litigation risk to create greater deal certainty will be paramount in 2021.
- As approaches continue to evolve in the US, Europe and the UK, expert knowledge of the governmental and regulatory landscape will be key to implementing successful commercial strategies. Given the expected increase in international co-operation during the year to come, international co-ordination will be critical to maximising the prospects of transaction success.
- An integrated antitrust, litigation and corporate team is critical throughout the process, regardless of whether the transaction is ever litigated in court, to guard against potential deal disputes and to manage effective affirmative messaging about pro-competitive deal rationale and merger defences.



We have seen a marked uptick in merger litigation challenging agency decisions blocking transactions, for example:

- in the US, we represented Evonik in its landmark victory in February 2020 in litigation brought by the FTC to block its acquisition of PeroxyChem (the first time the FTC had been defeated at trial since 2015);
- at EU level, we led the only two successful appeals of EC merger prohibitions in the last 18 years. We represented CK Hutchison in overturning the EC's 2016 prohibition of its proposed merger with O2 UK, with the EU's General Court ruling in May 2020. We represented UPS in the annulment of the EC's 2013 prohibition of its proposed merger with TNT, first by the General Court in 2017 and subsequently on appeal by the EC in the Court of Justice of the EU (CJEU); and
- in the UK, we represented JD Sports in the CAT, which resulted in the remittal back to the CMA for full reconsideration of the proposed JD Sports/Footasylum merger, which the CMA blocked in May 2020 (only the second time that the CAT has remitted a merger prohibition decision back to the CMA).



04

Politics and antitrust

The impact of geopolitical tensions on mergers and antitrust risk

The last few years have seen a marked rise in geopolitical tensions across the globe and a resulting increase in protectionist and interventionist approaches to M&A activity.

2021 is likely to see a continuation of the recent trend of more jurisdictions introducing far-reaching foreign investment and public interest review regimes. We are likely to see increasing tension between increased regulatory co-operation among allied jurisdictions on merger control on the one hand and, on the other, foreign investment reviews and the potential for protectionist agendas to lead to reduced regulatory co-operation between jurisdictions seeking to protect domestic champions.

The result is increased levels of deal uncertainty, a more complex appraisal and allocation of risk, enhanced scrutiny of ownership structures and longer completion timelines.

‘Like in merger control, global transactions require global strategies for foreign investment filings in order to be successful and to mitigate the concerns of governments, which themselves are seeking more and more to co-ordinate their enforcement.’



Frank Röhling
Antitrust Partner,
Berlin

Foreign investment controls continue to grow and multiply

Foreign investment controls have been multiplying globally for a number of years and 2021 is likely to be no different. A number of legislative proposals promising to impact the foreign investment landscape are underway, particularly in Europe. Fifteen jurisdictions in the EU now have a foreign investment regime, eight of which are new or recently amended, and others are planned, including in Ireland, Denmark and Sweden.

The new EU framework on the screening of foreign direct investments came into force in October 2020. Unlike the EUMR, the new EU Screening Regulation does not impose a ‘one stop shop’ filing obligation on parties. However, it puts in place a co-operation mechanism between EU member states and the EC, creating additional scope for concerns at the member state level to spill over to other member states and adversely impact deal completion.

The UK government’s National Security and Investment Bill (NSIB) is making its way through parliament, carrying with it the prospect of mandatory filing and pre-approval requirements across 17 critical sectors; a UK government ‘call-in’ power for any other deal; and heavy sanctions for non-compliance across a range of sectors and encompassing all kinds of transaction (including minority acquisitions). The NSIB is expected to come into force later in 2021 and will operate alongside the Enterprise Act 2002’s existing ‘public interest’ regime governing media plurality, public health and financial stability.

Even in China, where foreign investment restrictions have been loosened in recent years and where its national security review rules have been used sparingly, the trade war that has hitherto dominated US–China relations continues to threaten the status quo. It has already led to retaliatory trade measures that could spill over into merger control review (which already includes Chinese industrial policy and public interest considerations) or even into foreign investment and national security reviews. The Biden administration is unlikely to change the current political and trade dynamic between the two countries significantly, hinting at further potential intervention against foreign investment in China.

In fact, a return to stronger ties between Europe and the new Biden administration may negatively impact foreign direct investments from China into Europe.

‘Many of the changes being adopted have major substantive and procedural implications and are being implemented with little advance notice and, in some cases, even with retroactive effect, making this a particularly tricky regulatory environment to navigate.’



Christine Laciak
CFIUS Special Counsel,
Washington DC

One per week



The average number of national security-related investment measures by G20 governments in 2020

Elsewhere, existing regimes have proposed material changes to jurisdictional rules, lowering the thresholds for review and making it far easier, and therefore more common in the future, to trigger reviews. This includes the Golden Powers regime in Italy; the Foreign Investment Review Board review in Australia (where monetary thresholds had been temporarily removed entirely and still remain at \$0 for certain transactions); and the Japanese regime where the relevant shareholding threshold for notification of investments into Japanese listed companies in certain key industries has been lowered to just 1 per cent.



Register your interest

To help our clients navigate the fast-changing foreign investment landscape, we're launching a quarterly FDI regulatory monitor in 2021. Register your interest here.



‘For investors from Asia, in particular China, foreign investment risk is no longer just about CFIUS in the US. Instead, an early risk assessment across multiple jurisdictions is now critical to successful deal planning and execution.’



Alastair Mordaunt
Antitrust Partner,
Hong Kong

A new concept of national security?

The scope of foreign investment and public interest regimes continues to expand, in line with an ever-broadening concept of what constitutes national security – the outcome of the attempted Broadcom/Qualcomm tie-up, to cite just one example, was at least in part driven by a desire to protect against China’s dominance in 5G, which the US government believes would be detrimental to US national security. The UK NSIB may encompass a similarly broad concept of national security which no doubt underpins the UK government’s current estimates of up to around 1,800 deals being notified each year.

‘National security legislation tends not to draw clear lines around what constitutes a threat to national security. While that provides necessary flexibility to governmental decision-makers, the secretive nature of these processes and evolving notions of national security make for a difficult-to-decipher and ever-changing regulatory environment for dealmakers.’



Aimen Mir
CFIUS Partner,
Washington DC

Government reaction to the COVID-19 pandemic has also indicated a greater willingness to extend existing regimes to cover sectors that until now would not have traditionally featured in public interest and national security reviews in many countries.

Governments have quickly realised that the protection of domestic capabilities across healthcare sectors is important for national security and have reacted accordingly. For example, the temporary widening of regimes to encompass all aspects of public health and health technology sectors has been made permanent in France, Germany and Spain. The ease with which these regimes were expanded could well set a precedent for further expansion of foreign investment and national security regimes across the world in the coming year.

State subsidies coming under antitrust scrutiny

Nowadays governments are no longer reluctant openly to entertain the prospect of inserting politics into antitrust reviews. A striking new tool, with potentially far-reaching consequences, is the EC’s White Paper on levelling the playing field as regards foreign subsidies, which proposes an expansive new legal instrument targeting any kind of foreign-subsidised commercial activity affecting the EU in order to plug a perceived gap in EU antitrust enforcement. The regime would combine ex ante and ex post tools and grant significant investigatory and sanction powers. It will add multiple layers of uncertainty and complexity to deals that touch on EU markets. An assessment and awareness of such issues at an early stage of deal planning is crucial to navigating the complexity. The issue of subsidies was indeed one of the biggest stumbling blocks to the UK achieving a post-Brexit deal with the EU.

‘Tackling the effects of foreign subsidies in the EU single market is a top priority of the Commission. A new foreign subsidy regime will add to the regulatory requirements for dealmakers as a foreign subsidy assessment will have to be factored into deal timetables alongside the existing merger control and foreign investment review rules.’



Rod Carlton
Antitrust Partner,
Brussels and London

Looking ahead in 2021:

- **Make foreign investment and public interest filing assessments central to your risk assessment:** an early assessment of potential foreign investment filings, especially in 'at-risk' sectors or involving state-owned entities, is key to risk management and deal certainty. Remember that rules are changing fast and often, so keeping an eye on developments even during 'on-the-road' deals is required.
- **Be prepared for extensive disclosure requests:** authorities may require extensive information in relation to ultimate ownership structures, transaction rationale and target activities – with enhanced intergovernmental/cross-agency co-operation, especially in the EU and between the US and the EU and their Western allies.
- **Stakeholder engagement is essential to successful deal execution:** being able to convey an accurate portrayal of the business activities and key technologies of the target company to authorities, governments and other relevant stakeholders early in the process will be crucial to facilitating approvals in foreign investment and merger control reviews.
- **International co-ordination of local expertise** will be needed in order to understand the domestic and regional drivers that impact reviews while at the same time being able to co-ordinate global messages in the face of increased convergence.





05

Antitrust, data and tech

Promoting competition and innovation

Antitrust authorities have long recognised the importance of data as a cross-sectoral resource. As agencies and non-governmental organisations publish their reports on competition in the digital economy and the role of data, many are coming to the view that the current antitrust toolbox is not sufficient to deal with many of the issues raised by the digital economy. While enforcers and governments around the world consider new regulations for digital markets, it remains to be seen how tensions between different regulatory regimes, including antitrust and data protection, will be resolved.

Data at the regulatory crossroads

It has now been over two years since the EU General Data Protection Regulation (GDPR) came into force and businesses were required to implement additional safeguards for processing personal data gathered from individuals in Europe. Other jurisdictions, such as Brazil and California, have since implemented similar data protection rules. As a relatively new law, the enforcement of the GDPR is being developed in a series of cases before competent privacy regulators and through private litigation, which continues to gain prominence in Europe.

Notwithstanding the fact that privacy laws such as the GDPR set out a detailed code for privacy protection, including identifying the associated enforcement authorities and processes, antitrust authorities do not appear willing to leave the enforcement of privacy standards to the specialist regulators. On the contrary, several antitrust authorities are seeking to use generally applicable antitrust laws to devise additional privacy rights and enforcement processes in a manner not obviously envisaged by lawmakers.



Until the resulting tensions between privacy and antitrust laws are resolved... businesses will need to navigate a legal landscape characterised by significant uncertainty.

The UK's CMA has, for example, proposed the application of 'GDPR+' requirements for certain platforms that would impose a 'fairness by design' duty to the choices that users make when using online platforms and services. The UK government has noted, however, that interventions of this nature will require further consultation. Most notably, the action of the German Federal Cartel Office (FCO) involving Facebook, which will continue through the German courts in 2021, goes further, suggesting that the breach of privacy laws can be sanctioned as an exploitative antitrust abuse. In addition, the ongoing work of Australia's ACCC and Japan's JFTC assessing antitrust and privacy issues in tandem has been particularly prominent in this context internationally.

'The GDPR was enacted after extensive evidence gathering, stakeholder involvement and political debate. In that context, it is striking that antitrust authorities, which are not subject to the same checks and balances as legislatures, are showing a marked willingness to establish differing legal standards for privacy protection through creative use of antitrust law to open up access to data to promote innovation. These attempts at novel applications of antitrust law are likely to continue to come before the courts during 2021. Until the resulting tensions between privacy and antitrust laws are resolved by the highest courts, businesses will need to navigate a legal landscape characterised by significant uncertainty.'



James Aitken
Antitrust Partner,
London

Novel applications of antitrust law to data-related issues extend beyond privacy issues. For example, recent initiatives by the CMA and the EC to restrict the use of targeted advertising by online platforms reflect an increasing trend of using antitrust laws to tackle perceived consumer protection concerns.

How to unlock big data

Businesses continue to face contradictory pressures around their use of data. Data protection authorities have placed restrictions on the degree to which businesses can share personal data with third parties and are increasingly using their enforcement powers to police such conduct. On the other hand, antitrust authorities are looking to platforms to open up access to their data which the authorities believe may lower switching costs, stimulate innovation and drive market entry and competition. While digital businesses continue to evolve their approaches to privacy protection under pressure from relevant regulators, advertisers and publishers continue to push for greater data access.

Legislatures and antitrust authorities across Asia, Europe and the US continue to explore ways to enhance interoperability and data portability requirements to promote competition. While there is significant partisan disagreement regarding many of the ambitious reforms described in the US House Report – such as a proposal to prohibit companies that operate online platforms from selling their own products on those platforms – enhancing interoperability and data portability appear to be areas of potential common ground that could be ripe for legislative reform. This bipartisan consensus may provide the US authorities with new tools for enforcing the antitrust laws. Ongoing discussions among Democratic and Republican lawmakers also may presage the possibility of broader reforms.



‘Policymakers in the US, UK and EU all have proposed significant reforms aimed at regulating competition in digital markets. Many of the reforms proposed in the US House Committee’s digital markets report would reach well beyond the tech sector and have profound implications for a wide range of companies doing business in the United States. While US lawmakers may not succeed in enacting many of their most ambitious plans, the Biden administration is expected to pursue stronger antitrust enforcement and to seek greater alignment and co-ordination with antitrust authorities in Europe. It will be important to monitor this transatlantic convergence on key substantive issues in the coming years.’



Alan Ryan
Antitrust Partner,
Silicon Valley

In addition to requiring platforms to share their data, antitrust authorities are increasingly looking to place restrictions on how that data can be used by the platforms themselves. In particular, the EC’s probe against Amazon for using aggregated data from Amazon marketplace sellers in its own retail decision-making will continue to advance in 2021. Despite the fact that many businesses use market intelligence, large datasets and automated systems as part of their decision-making, the EC’s public statements suggest that it is taking a stricter approach to the use of aggregated data by large businesses, noting that ‘the case is about big data’. It remains to be seen how the EC will weigh the possible pro-competitive benefits of such data use against any perceived harms. This development may also result in an increased focus on data use, data silo and data access remedies.

The conduct being investigated also forms part of that which is to be restricted ex ante under the EC’s DMA proposal, intended to govern the conduct of so-called ‘gatekeeper’ platforms. If passed through the EU legislature, the DMA would restrict those platforms’ abilities to give their own services preferential treatment and – similar to the US House Report – require some level of interoperability between services. Implementation of these proposals will necessarily have far-reaching implications for those businesses engaging with ‘gatekeeper’ platforms.

Exploring common data spaces and data pools

Governments are becoming increasingly alive to the importance of a home-grown data industry and are keen to ensure a degree of regional ‘data sovereignty’. Most notably, the EC has announced plans to develop common European data spaces relating to strategic sectors – including energy, financial services, health, agriculture and climate change.

In its ‘Strategy for Data’, the EC set out its policy to promote the creation of ‘data pools’, overcoming data as a barrier to entry and expansion and enabling innovation.

However, there remain unanswered questions both in relation to collusion risks and around the extent to which businesses contributing to data pools will be required to provide access to third parties. In particular, it is not clear whether access to third parties will only be mandated where data is considered indispensable to compete in the relevant market in line with the ‘essential facilities’ doctrine, or whether it will be based on a lower standard.

Proposals for updates to the EC’s Horizontal Co-operation Guidelines are expected in March 2021 – combined with an offer by the EC to provide specific project-related guidance, this is intended to provide businesses with confidence to pool data without concerns about breaching antitrust laws.

‘Competition authorities need to clarify the legal framework for data pooling in order to allow companies to engage in pro-competitive data sharing confidently. Companies should normally be free to choose with whom to share their data but need to be mindful not to create an “insiders vs outsiders” dynamic whereby those that find themselves outside of the pool would face barriers to compete.’



Sascha Schubert
Antitrust Partner,
Brussels

The regulatory jigsaw – global issues with local remedies

While many antitrust authorities have come to the view that they need new tools to address issues in the digital economy, they have not reached a consensus on how best to ‘tool up’ and implement regulation. Until recently, and in contrast to the degree of co-operation which exists in the area of merger control, there has been limited international co-operation or even alignment on how to apply antitrust laws to data and digital business models.

Consistency is not just important for businesses that may otherwise be required to fragment their practices across regions. Consumers may also be disadvantaged by certain proposals on default standards and data use which may impact the personalised service received by consumers from digital businesses. At the same time, some high-profile antitrust actions in the digital sector in recent years may have had little impact. While authorities have focused on imposing eye-wateringly high fines, these actions may not have resulted in any structural change or a shift towards a more competitive dynamic in the market nor in any benefit to consumers.

National competition authorities have signalled their intention to take their findings to international fora and seek renewed engagement on potential co-operation. In addition, the EC’s Executive Vice-President Margrethe Vestager has signalled an intention to build ‘transatlantic convergence’ with the new US administration, with a view to agreeing a digital rulebook ‘likely to become the global standard’.

‘Regulators from a handful of countries are closely communicating with each other to align their policy directions. While there is a consensus to enhance the red tape beyond antitrust regulations, they are also aware of the need to be flexible to preserve innovation and address issues in the rapidly evolving digital economy. Japan is one of the first countries trying to reclaim the notion of “pre-regulation”, where the Ministry of Economy, Trade and Industry rather than the JFTC will start a regular “monitoring review” somewhat emulating the industry regulations we would typically see in the financial services or energy sectors. Stakeholders should not shy away from voicing their views to influence the still nascent regulations and policies.’



Kaori Yamada
Antitrust Partner,
Tokyo

Looking ahead in 2021:

- **View data issues holistically:** businesses should continue to expect antitrust authorities to utilise the principles of regulated industrial sectors when seeking to set higher standards for businesses. As tensions grow between legal regimes, commercial and legal teams will need to work together to agree on business proposals that are compliant with evolving regulatory approaches.
- **Assess the appropriateness of data pooling:** consider whether the benefits to innovation outweigh any wider obligations to make data available.
- **Consider the implications of new rules (including as business grows):** given the rapid and diverging way in which antitrust regulations are developing, commercial decisions will need to be taken with an eye on future (potentially conflicting) regulatory developments. In addition to the EC's DMA proposal and the US House Report's recommendations, both of which include proposals for interoperability:
 - In April, the UK government will establish a Digital Markets Unit (DMU) within the CMA to oversee an enforcement regime for platforms with 'strategic market status'. The DMU will continue the work of the CMA's Digital Markets Taskforce in designing and later enforcing provisions of a principles-based code of conduct, including around an 'open choices' principle to ensure core services interoperate with third-party technologies. However, the UK government has stopped short of providing the DMU with powers to mandate interoperability, noting that such interventionist powers require further consultation. The CMA's Digital Markets Taskforce has urged the government to act quickly.
 - Amendments to German competition law are continuing through the German parliamentary process, having received endorsement from federal government. The amendments will bestow additional obligations upon companies with 'paramount cross-market significance', including similar prohibitions on hampering interoperability. However, the future relationship with the DMA would still need to be clarified, as the DMA may restrict tighter 'gatekeeper' rules at the national level.
 - Following the recent launch of the Digital Market and Competition Unit in 2019 under the Prime Minister's Office and parliament's approval of the Digital Platform Transparency Act in 2020, Japan's METI will start a new monitoring review mechanism for certain large platforms in Japan in the early half of 2021, subjecting these platforms to mandatory disclosure requirements across a broad range of business practices.
 - China's authority, the SAMR, will take forward its draft antitrust guidelines for enforcement in the 'platform economy' which aim to clarify how conduct of platforms - including relating to use of and access to data - may fall foul of anti-monopoly rules.



06

Sustainability and antitrust

The role of competition law in helping
business meet sustainability goals



Co-operation between competitors to achieve sustainability goals can be far more effective than unilateral action or legislation but may be hampered by concerns regarding competition law risk. As policymakers and companies seek to implement ambitious sustainability goals, there is a growing recognition that antitrust law has a role to play.

‘Sustainability is at the top of our clients’ strategic agendas. We are advising on the risks and opportunities of collaborations across the supply chain to achieve a sustainable and prosperous future.’



Tim Wilkins
Global Partner for Client Sustainability,
New York

Lofty aim, but still restrictive environment

Slow or ineffective implementation or jurisdictional limitations often mean that government regulation is not always the most effective means to achieve ambitious sustainability objectives. It is therefore

increasingly clear that corporate action will be indispensable to tackling environmental and other sustainability challenges on a global basis.

While sustainability can be a source of individual competitive advantage, collective action may be required for reasons of scale or where individual initiatives could result in a significant ‘first-mover disadvantage’. Examples of co-operation agreements to achieve sustainable objectives include:

- conducting joint research into less polluting technologies;
- committing to (probably higher) minimum standards for manufacturing and supplying goods and services (eg to use recycled packaging materials or to reduce packaging levels); and
- agreeing to phase out less sustainable (but cheaper) products and replace them with more sustainable alternatives.

While many such initiatives will not raise competition law concerns, others may well be considered restrictive of competition, particularly where they may lead to price increases or materially reduce the range of available products.

Weighing sustainability benefits

The lawfulness of agreements that restrict competition is generally assessed by considering the impact of the agreement on consumer welfare. Antitrust enforcement has traditionally focused almost entirely on the strict economic and quantifiable impact of agreements on current consumers of the products directly covered by the joint initiative, with little consideration of wider and longer-term environmental or societal effects.

A consensus is emerging across many jurisdictions that antitrust enforcement practice must consider broader sustainability benefits within the consumer welfare assessment.

‘Competitors considering a joint sustainability initiative need to be clear about the indispensability of collaborating and set clear boundaries for the project. Evidencing sustainability benefits and building the pro-consumer narrative are critical elements of project planning.’



Mary Wilks
Antitrust Counsel,
London

More flexibility and guidance required

2020 has been the year of increased awareness and consultations. Several competition authorities in Europe have taken the lead on this topic and published draft guidelines and discussion papers, inviting views on how competition policy can support sustainability objectives.

These developments are welcome as clear guidance is required to allow companies to draw the line between permissible co-operation and anti-competitive collusion. In particular, clarity about the types of joint schemes that will normally fall outside the scope of antitrust provisions and the circumstances in which restrictions of competition may be exempted as a result of their sustainability benefits would likely provide a real impetus to beneficial projects. In the absence of concrete and workable guidance, for understandable reasons, companies often adopt a conservative approach resulting in potentially beneficial industry initiatives being dropped.

While environmental sustainability is a key focus, the United Nations Sustainable Development Goals are

much broader, as they also encompass economic and social sustainability goals. Collaboration across the supply chain to achieve these wider societal objectives can be particularly difficult to reconcile with the current antitrust enforcement framework where it involves promoting a fair trade objective which will likely involve a price rise for consumers. More flexible procedures enabling consultation and some form of agency ‘comfort’ or ‘no-action’ letter are needed to enable companies to be bolder in seeking to achieve these objectives.

‘Now is the time to influence the policy debate. Authorities argue that no cases are being presented to them. Companies consider that there is too much uncertainty. The stalemate needs to be addressed from both sides, by contributing to the debate, presenting initiatives and sharing concrete guidance.’



Paul van den Berg
Antitrust Partner,
Amsterdam and Brussels

International convergence among antitrust enforcers will be crucial given the global nature of many supply chains. The EC has indicated that it will liaise with national competition authorities to encourage a uniform approach; and international organisations such as the International Competition Network and OECD will have a critical role in fostering international best practices to give sufficient certainty to business.



48% of respondents identified climate change and environmental and sustainability goals

as the most relevant development affecting the application of the EC’s Horizontal Co-operation Guidelines



Now is the time to influence the policy debate. Authorities argue that no cases are being presented to them.

Assessing the sustainability benefits of M&A

Merger control has so far featured less prominently in the debate on sustainability and antitrust, although specific cases have taken sustainability factors into account in market definition or the competitive assessment, for example as regards incentives to innovate.

Similar issues as for competitor collaborations apply for companies considering a merger with potentially anti-competitive effects, but which pursues sustainability objectives, for example achieving the necessary scale to implement sustainability goals. Seeking to use sustainability to demonstrate merger-specific efficiencies requires the parties to produce economic evidence which demonstrates that the benefits for consumers (or wider society) outweigh any lessening of competition. Competition authorities have set a very high evidentiary bar for this type of analysis and guidance on the substantiation of sustainability efficiencies will be needed to enable companies properly to assess whether they can rely on a 'sustainability defence'. Conversely, businesses should be prepared for additional scrutiny in a merger review context where their transaction is perceived to harm consumers by reducing their choice of environmentally friendly products and/or technologies.

'With governments increasingly setting ambitious sustainability targets, transactions aimed at driving this agenda are inevitable. Companies will need to think critically about how they document and substantiate any claimed efficiencies generated by a transaction more than ever before.'



Ninette Dodoo
Antitrust Partner,
Beijing

The role of public funding

In Europe, State aid rules have already proven to be an effective tool in promoting and achieving green objectives (eg in the area of generating energy from renewable sources), and the EC has in the past adopted specific guidelines in this area. Crowding-in, which involves public funding strategies resulting in increased private investments, is essential to raise the substantial investment required to achieve the ambitious environmental goals of broader regulatory initiatives, such as the EC's European Green Deal.

Against this background, the EC is considering adjusting the existing rules to allow more aid, or aid on easier terms, for green projects. On the other hand, the granting of State funds for less environmentally friendly uses is likely to attract closer scrutiny or may be made subject to sustainability commitments. For example, State aid for Air France in response to COVID-19 contained conditions to cease offering flights on certain domestic routes to meet environmental goals. Ultimately, the legal framework for the granting of public support for green projects is becoming increasingly favourable, and companies should consider these rules when planning for investments. This can become relevant for instance when tackling energy transformation processes in a range of industries.

'The European State aid framework is currently under review. Changes are expected to create opportunities for sustainability-related industrial transformation processes.'



Maria Dreher
Antitrust Counsel,
Brussels and Vienna

Looking ahead in 2021:

- **Shape the debate:** antitrust agencies around the globe are seeking industry input to shape policy changes and guidance documents. Providing concrete examples of sustainability collaborations that are not going ahead because of uncertainties over antitrust enforcement is a significant opportunity for companies to ensure that their needs and concerns are taken into account.
- **Plan ahead for regulatory guidance:** competition authorities are inviting companies to seek case-specific guidance where proposed sustainability collaborations raise genuinely novel competition law issues. Consider early on in the development process whether to engage (informally) with enforcers to ensure there is time to factor in any evidence gathering requested by the authority (eg a consumer survey) or to implement any feedback received on the parameters of the initiative.
- **Building a helpful evidence bank:** competitors considering sustainability collaborations should ensure that the need for collaboration rather than individual action is clearly documented, particularly where the collaboration involves large, well-resourced global players. Similar considerations apply with respect to planned M&A. Given the potential difficulties of evidencing the sustainability benefits for current and future consumers, building up a helpful evidence bank should form part of early project planning. It is also important to ensure everyone involved understands the scope of the collaboration and guidance is provided to mitigate unwanted effects, in particular exchange of competitively sensitive information or alignment in other areas.



Our cross-office antitrust and sustainability group is contributing to the debate at local, regional and international levels through industry networks, agency consultations and discussions with clients.

To register interest for our client events,
or to learn more, contact:
sustainableantitrust@freshfields.com



07

Antitrust damages

Evolving trends in individual and mass claims

Methods for bringing individual or mass claims following antitrust decisions are continuing to evolve and claimants are being innovative in how they bring claims. For example, in Germany, assignment models have been widely used by litigation funders to bring antitrust mass claims. These models can and have been successfully challenged by us. 2021 will bring further case law (including at the appeals level) on the admissibility of such models.

In the UK, claimants are seeking to use the opt-out class action regime in the UK's specialist competition claims tribunal for claims that arguably do not relate to substantive competition issues. For example, two proposed opt-out collective proceedings relating to the sale of rail tickets to passengers relate to what are in substance allegations of consumer mis-selling. However, by framing those claims as an alleged abuse of dominance claim, the claimants seek to be able to use the antitrust-only opt-out class action rules.

'There is increasing elision of antitrust and consumer issues such that the silos between them are breaking down. So business cannot assume general consumer redress development will have no or little impact in the antitrust sphere.'



Mark Sansom
Antitrust and Dispute Resolution Partner,
London

Developments in procedure

Procedures in antitrust claims are also developing. Perhaps surprisingly, in some jurisdictions expert evidence is not always used to assess overcharge levels and therefore damages. In Germany, the District Court of Dortmund recently issued a decision awarding a 15 per cent overcharge plus interest and excluding any pass-on by the claimants to their own customers, without relying on any expert evidence. Similarly, a number of courts in Spain (in Valencia, Barcelona and Pontevedra) have assessed damages in follow-on antitrust claims as being around 5 per cent of the relevant purchase prices, again without having significant regard to expert evidence. Will this rough-and-ready approach be upheld upon appeal and/or spread to other countries?

'In Germany, we expect further guidance in 2021 from our Federal Supreme Court in cartel damage matters, including on questions like presumption of harm, damage calculation and passing on. Also the big leading cartel damages cases will make further progress.'



Roman Mallmann
Dispute Resolution Partner,
Düsseldorf



Although antitrust class actions have been a part of the US legal system for decades, the law is constantly evolving.

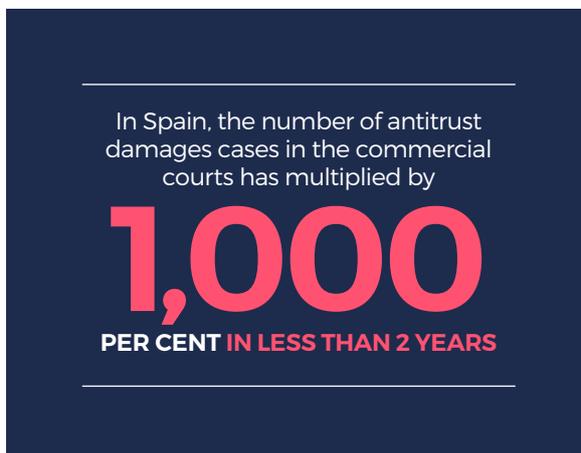
In the UK, the *Merricks v Mastercard* Supreme Court decision handed down in December 2020 resulted in a remittal of the case back to the first instance tribunal for a rehearing on class certification. However, given the untimely death of one of the UK Supreme Court Justices who heard the case before judgment was handed down, the reasoning of the Court was left split on key issues. These will need to be considered further by the tribunal in that case and in the upcoming certification hearings in a series of other cases, which have been on hold pending the Supreme Court judgment. 2021 will therefore be a pivotal year in the development of the UK's class action antitrust regime.

In Spain, the number of antitrust damages cases in the commercial courts has multiplied by 1,000 per cent in less than two years. Procedural changes introduced by the EU's 2014 Antitrust Damages Directive, such as granting claimants in antitrust damages claims minimum rights to discovery of the defendants' documents, are now affecting the conduct of such claims in civil law jurisdictions that previously did not provide for documentary disclosure. With the increase in volume of cases, and the volume of evidence in each case, this is likely to prove to be challenging for the courts to manage and may give rise to disparities of approach across different EU member states.

'Identifying the litigation risks attached to any antitrust infringement early on will be vital. Some countries have short litigation deadlines and concentrated trials; a comprehensive approach across various and different jurisdictions is critical to being successful.'



Natalia Gómez
Dispute Resolution Counsel,
Madrid



In the US, appellate courts are continuing to refine developed standards for class certification. In particular, the Ninth Circuit is considering appeals in cases addressing whether indirect purchasers who reside outside of California can recover antitrust damages under California law. It is also considering under what circumstances to allow a class action to proceed when some, but not all, class members are alleged to have been injured by the challenged conduct. Because the Ninth Circuit includes some of the most active antitrust courts in the country, those decisions have the potential to have an outsized impact. Another significant development has been the confirmation of Justice Amy Coney Barrett to the Supreme Court. Her prior writings do not reveal much about how she will approach antitrust class actions in the coming years, and it will be interesting to watch how closely she hews to the generally defence-friendly views of her mentor, the late Justice Antonin Scalia.

'Although antitrust class actions have been a part of the US legal system for decades, the law is constantly evolving, creating new opportunities for those who follow these developments closely and new traps for the inattentive.'



Andrew Ewalt
Antitrust Partner,
Washington DC

Looking ahead in 2021:

- **Defendants will need to be aware of the increasingly multi-jurisdictional and co-ordinated nature** of antitrust damages litigation, and the need to ensure that their defence strategy takes a joined-up approach across all relevant jurisdictions.
- **They should be aware too of claimant tactics seeking to 'front-run' claims** in jurisdictions that may offer a route to a quick judgment of the court and a loose approach to the assessment of damages, in the hope that such judgments would be influential on other jurisdictions too.
- **In the US, many antitrust class actions follow criminal investigations and prosecutions** brought by the DOJ. Criminal enforcement has declined in recent years, and it will be worth noting whether under the Biden administration and new leadership at the DOJ there are steps to reinvigorate criminal enforcement.
- **Notwithstanding Brexit, the UK will continue to be a key forum for follow-on damages litigation** in Europe, and the EC's infringement decisions will continue to give rise to damages actions in the UK for a long time to come.



08

Reshaping your supply chains

Antitrust risks and opportunities in focus



With trade wars, changing patterns of trade, technological innovation and increased stakeholder scrutiny on the environmental and social impact of supply chains, it is no wonder that supply chain management continues to attract high levels of attention. Add to this the security of supply concerns that have arisen globally during the COVID-19 pandemic and it is evident that many businesses have faced, and continue to face, strong headwinds in 2020 and beyond in relation to optimising and improving the resilience of their supply chains.

'As businesses reorganise and digitise their supply chains in response to multiple disruptive market and geopolitical factors, they must keep an eye on the limits that antitrust places on their activity and consider broader compliance issues that come into play in supply chain management.'



Rafique Bachour
Managing Partner and
Antitrust Partner

Antitrust issues in the supply chain

New approaches and commercial models are emerging, but this is one of those areas where there remains quite some divergence among antitrust agencies globally so what works in one place may need to be adapted elsewhere, especially when you have actual or potential competitors in your supply chain.

- **Joint ventures, strategic alliances and other arrangements with (actual or potential) competitors** need careful design: joint purchasing in the presence of market power can be problematic, as can arrangements for access to IP and know-how, and data collection and exchange. Information exchange between competitors always attracts scrutiny and is attracting increasing attention where platforms compete downstream with their own business users.
- **Some vertical arrangements**, made between companies at different levels, can also raise antitrust scrutiny. With suppliers increasing the volume of direct online sales they make, many of the contractual provisions they may wish to use with their independent distributors can be void or attract fines. Pricing restrictions – not only traditional resale price maintenance (RPM) but also newer types of arrangements prevalent in online commercial relationships such as restrictions on selling through particular types of online platforms such as marketplaces, bans on brand bidding, most favoured nation clauses (MFNs) both ‘wide’ and ‘narrow’ – continue to be a key enforcement focus for many agencies globally.
- **Firms that are dominant** or hold a strong market position need to be particularly careful that measures intended to secure supply, such as exclusive or long-term contracts, do not foreclose competitors from obtaining supplies. Similarly, if they amass large amounts of data, questions may arise as to whether they have an obligation to grant competitors access (see theme 5).

Around the globe: similar but different

While many of these concerns are relevant in most jurisdictions, there are also significant differences around the world – and some changes on the way – that will affect business in 2021:

- While US enforcement remains overall relatively relaxed towards vertical restraints, it does have certain unique features such as the law prohibiting price discrimination as between retailers (the Robinson–Patman Act), which may make per se illegal the privileging of certain types of distribution outlets over others. US courts and authorities also treat vertical practices leading to horizontal collusion (‘hub-and-spoke’ arrangements) as severely as those anywhere else.

‘While it is generally true that the US antitrust laws are less stringent regarding vertical restraints, there are certain unique features which require diligence – not least the prohibition on discrimination when giving like distributors different pricing terms.’



Bruce McCulloch
Antitrust Partner,
Washington DC

- In China, new guidelines on the automobile sector, and proposed guidelines for the platform economy, make it clear that not only RPM but other vertical restrictions such as parity clauses and exclusive dealing, previously dealt with largely in the context of dominance, are of increasing interest to the SAMR. Its enforcement activity has been developing very rapidly in the last few years and looks set in 2021 to cover an increasingly broad range of conduct and practices not only in the digital sphere but also much more widely.



In practical terms, remaining compliant in the UK for the next couple of years will mean following the EU equivalent rules with which business is already familiar.

'Enforcement against vertical restraints in China looks set to accelerate and the SAMR is set to widen its focus beyond its traditional RPM cases. Recent guidance makes it clear that the SAMR will be going after a much broader range of conduct, taking up concerns such as MFNs and exclusive dealing.'



Hazel Yin
Antitrust Partner,
Beijing

- The EU has been reviewing its rules on supply and distribution agreements and there are now the first indications of where a change of approach is likely, particularly for agreements that are common in relation to platforms and other digital businesses (see below). But the traditional focus on RPM, in particular in many EU national authorities, continues unabated.
- Brexit: in the immediate term most conduct previously illegal will remain so in 2021, and the EU block exemption for distribution agreements will be retained in UK law until its expiry on 31 May 2022. While the medium term could well bring gradual divergence between EU and UK competition law, the CMA's traditionally rigorous enforcement in this area is unlikely to diminish.

'In practical terms, remaining compliant in the UK for the next couple of years will mean following the EU equivalent rules with which business is already familiar. The political driver for Brexit, however, is to facilitate divergence with the EU and a competition level playing field has been one of the major stumbling blocks in the Brexit trade negotiations. So be ready for changes down the road.'



Deirdre Trapp
Antitrust Partner,
London

Between 1 June 2010 and 1 January 2020, EU national competition authorities reported

391 in **21**
vertical cases sectors

54%

210 of these concerned RPM

New EU distribution rules will take shape in 2021

Some distribution practices are treated differently in different EU member states. An overarching concern behind the current EU review is therefore to ensure consistency across national authorities and avoid divergent approaches. In particular, there are important differences in the context of online sales, for example in the treatment of bans on sales on online platforms, the use of price comparison websites, parity clauses and online advertising restrictions.

Possible features of the revised rules discussed in the latest public consultation include:

- increased generosity for: non-compete clauses, different prices and terms for supply of goods for online sale, and efficiencies generated by RPM;
- the removal of the benefit of block exemption from (some) price parity clauses;
- removal or narrowing of the exemption for dual distribution (when a manufacturer competes with its retailers), or else extension of the exemption to cover also wholesalers/importers who compete with their retailers; and
- exempting certain active sales restrictions to give more protection to selective distribution systems.

Other issues have also been raised by stakeholders:

- when can a platform benefit from the rules that take agency arrangements outside the scope of antitrust prohibitions;
- selective distribution: the legality of online sales and advertising restrictions, including those on the use of third-party platforms and price comparison sites, and on bidding for search terms;
- the implications of information flows in dual distribution situations; and
- the distinction between active and passive sales.

Looking ahead in 2021:

- **If reshaping your supply chain means collaborating with competitors**, whether through structured alliances or on an ad hoc basis, be alert to the antitrust risks and ensure your people are clear about the dos and don'ts, including those on information exchange.
- **Be ready to review your European distribution policies** as the revised EU rules take their final shape towards the end of the year, and meanwhile contribute to the EC's consultation if you have specific concerns you wish to voice.
- **RPM remains a major focus**, especially in Europe and China, but other restrictions common in the digital environment are of increasing interest to authorities and need to be high on any compliance and risk management agenda.
- **Brexit does not mean that EU law ceases to affect business activity in the UK:** check exactly what it means for your contracts and conduct.



We are contributing to the European Commission's consultation on revision of its rules for vertical arrangements. This is a key step in the ongoing review process before the current rules expire in May 2022.

To learn more, contact:
distributionrules@freshfields.com



09

Under investigation

Protecting your rights of defence through investigations and litigation

Some agencies are turning to more expansive and intrusive investigative techniques in complex investigations. Broad requests for documents in one jurisdiction have the potential to expose many more classes of documents to authorities or third parties in other jurisdictions. These trends underscore the need for careful and co-ordinated responses across multiple jurisdictions if a company is to maximise the protection of its procedural rights of defence: allowing it to defend personal rights, such as privacy and the right to counsel, and to ensure a fair process overall.

Intrusive techniques and lengthy reviews, particularly in Europe

The ability of agencies to conduct and gather evidence from on-site 'dawn raids' or physical inspections is facing practical challenges:

- evidence is increasingly being stored digitally – a trend accelerated by remote working – thereby reducing the volume of physical evidence that would be gathered from on-site dawn raids at offices;
- data is often stored outside of the agency's jurisdiction, particularly for multinational firms; and
- social distancing requirements have added further complications as fewer staff will be working in offices and the agencies themselves need to consider the health impact on a company's employees, the agency's own staff conducting the inspection and on associated law enforcement and legal advisers.

Nevertheless, authorities are still pursuing more rigorous and intrusive investigations via wide-ranging document discovery exercises with more significant penalties.

‘The European Commission is increasingly requiring the production of large volumes of internal documents from businesses under investigation, with a growing risk of these broad document requests hoovering in irrelevant or personal documents.’



Alicia Van Cauwelaert
Antitrust Counsel,
Brussels

REMOTE WORKING

74%

of surveyed CFOs plan to shift at least **5% of employees** who previously worked on-site to permanently remote positions post-COVID-19

23%

of CFOs plan to shift at least **20% of their workforce** to permanently working remotely post-COVID-19

The EC’s document requests are increasingly based on search terms whereby businesses under investigation are required to submit *all* documents from identified executives/employees that respond to stipulated keyword search requirements, *regardless* of whether the documents are relevant or responsive to the EC’s investigation. These wide-ranging document requests are potentially more far-reaching than a traditional ‘physical’ process as the usual safeguards built into an on-site inspection, for example to exclude the production of certain classes of documents (such as personal information or documents not relevant to the subject matter of the investigation), are not necessarily present or accepted by the agency in relation to electronic searches.

Businesses can find themselves ‘between a rock and a hard place’, faced with both a wide-ranging electronic search request backed by significant sanctions and applicable data protection legislation requiring them to protect the privacy rights of their employees (and other impacted individuals). As a practical matter, solutions may involve proactively identifying documents containing sensitive personal data and seeking to engage with agencies to set up bespoke processes for dealing with such documents (eg the use of document logs or data rooms with safeguards to protect sensitive personal data).

It should be noted however that authorities are also lobbying for even greater investigative powers, especially the need to adapt to new ways that information is obtained, used and stored as a result of digitalisation. For example, as part of potential post-Brexit reforms, the UK’s CMA has called for broader powers to allow it to gather information which current laws may not allow (eg regarding the role algorithms play in decision-making). Interim measures powers are another feature appearing consistently in proposals by many authorities, including in Germany and Ireland. These powers allow authorities to implement far-reaching measures at the outset of an investigation (eg to cease allegedly anti-competitive conduct) where there is a risk of serious and irreparable harm to competition and *prima facie* evidence of an infringement, until the investigation is completed; and they have been used recently by authorities in the UK and Brazil. Moreover, the interim measures tool is likely to become more common in the EU following the *Broadcom* decision. The EC imposed interim measures in October 2019 ordering Broadcom to stop applying certain contractual provisions in agreements with six main customers for chipsets. By October 2020, the EC had accepted commitments from Broadcom (without finding an infringement) to suspend all existing agreements and not enter new agreements containing exclusivity/quasi-exclusivity arrangements and other exclusivity-inducing provisions – a relatively swift resolution.

Key challenges arising

The diverging approaches and procedural rules in different jurisdictions add layers of complexity to firms seeking to protect their rights when facing investigation by multiple authorities. For example, the widening scope of documents being gathered by the authorities in Europe, Asia and Australia is expected to have consequences in other jurisdictions like the US. Authorities are increasingly collaborating across jurisdictions and want to share information, discuss the evidence and align on theories.

'No agency wants to be caught with less evidence and information than another authority or private litigants. In practice, once a document has been disclosed to one agency, it can be difficult to claim that another authority or plaintiff should not receive it. A disclosure to one is likely to be a disclosure to many.'



Rich Snyder
Antitrust Counsel,
Washington DC

The parallel concern is that expansive document requests from an authority in a jurisdiction where legal privilege or privacy rights are narrow will broaden the pool of documents discoverable by private litigants around the world. Such private litigation may involve a damages claim directly related to the authority's investigation (eg cartel damages) or it may only be tangentially related to the subject of the original investigation (eg a plaintiff seeking an injunction due to an alleged abuse of dominance). Therefore, the ripples of an EC information request investigating one line of business could very well be felt in private litigation in the US regarding another line of business, months or years later, for example if privilege was found to be waived over certain documents when providing them to the EC.

- **Negotiating the scope of information requests:** different approaches are needed when negotiating the scope of document and information requests with different agencies. In the US, greater judicial oversight typically allows representatives of the parties to reach a compromise with agencies on the scope of requests. Some agencies will be more flexible than others in negotiating the scope of information requests and the timeline for responding.



'Discovery of documents produced to the European Commission as a class of documents to litigants in other jurisdictions can be of concern to the European Commission as it reveals its investigative strategy and may curtail a firm's incentive to co-operate freely with its investigation.'



Jérôme Philippe
Antitrust Partner,
Paris



Responding to a request for information can be like walking a tightrope...

- **Privilege claims:** the scope of legal privilege is wider in some jurisdictions than in others. For example, privilege under US and UK law covers communications with in-house lawyers, whereas this is not recognised under EU law; the scope in Germany is considerably narrower than in common law jurisdictions; and in Japan attorney–client communications are generally not privileged but the JFTC’s new Determination Procedure will protect some confidential communications with attorneys in relation to certain antitrust investigations. Where documents privileged under the rules of one jurisdiction are disclosed in a jurisdiction where such documents are not privileged, parties need to take proactive steps to demonstrate privilege has not been waived, so that they can continue to assert strong privilege claims in other jurisdictions.
- **Personal or private documents:** the protections available for personal or private information are greater in certain jurisdictions (such as the EU) in light of applicable data protection (eg the EU’s GDPR) or other secrecy rules. These safeguards give businesses some additional protections where

agencies’ broad document requests capture sensitive personal or private information. However, these protections are not equal across jurisdictions. For example, US courts will not always defer to European privacy rights, particularly if personal documents have already been produced to authorities in Europe.

‘Responding to a request for information can be like walking a tightrope – Data Protection legislation may restrict your ability to respond fully to a request, in particular if information collected in Europe will be disclosed outside Europe.’



Satya Staes Polet
People and Reward Counsel,
Brussels

Despite these challenges, there are opportunities for parties to protect their rights and the rights of their employees if appropriate steps are taken. The exercise of these rights can also force authorities to provide better solutions and facilitate the better conduct of the investigation concerned.

Looking ahead in 2021:

The broad investigative approach taken by some authorities and the prospect of documents being requested by other agencies or private litigants off the back of that reinforces the importance of:

- **Scoping an information request** as soon as it is received and preparing robust and comprehensive methodologies upfront:
 - to assist with any negotiations with the agency over scope and proportionality; and
 - to put the authority on notice of the party's approach – and mitigate the risk of future disputes.
- **Co-ordinating across jurisdictions** on the procedural minutiae and not only the substantive legal issues. Parties should understand the differences in practice and procedure between the various jurisdictions where investigations and third-party private litigation could arise.
- **Mitigating the risk of cross-border document disclosure** to other agencies, private litigants or third parties – for example taking advantage of data protection laws in certain countries and taking steps to minimise the risk of waiving privilege in other jurisdictions. The timing of the exercise of these rights is crucial.



10

Antitrust and the individual

Managing individual liability and corporate responsibility

With the global pandemic creating economic uncertainty, companies have had to respond quickly, reacting to evolving circumstances, often under intense resource and time pressure. It is precisely during such times that the risk of antitrust infringements, and therefore exposure to both individual and corporate liability, is more acute. New challenges for employers arise with the advent of home-working and the 'hybrid' workplace. Now is the time to make sure that your HR and Risk & Compliance departments are match ready.

Counting the costs... for individuals as well as companies

Antitrust law infringements can be extremely costly for companies: exposure to significant fines, follow-on civil damages claims, reputational damage and/or disqualification from public tenders. Consequences for individuals can be just as severe. A Dutch court recently ruled that a North Sea shrimp trading company could recover antitrust fines from a former director involved in the infringement – a course of action always denied by UK courts and which is still pending with at least one court in Germany. Moreover, in many jurisdictions, individuals can be criminally prosecuted, fined and/or debarred from their profession. Recently, a Dutch national was imprisoned in the US for 14 months for her involvement in a price-fixing cartel, following extradition from Italy.

Such individual liability is increasingly relied upon by authorities to drive antitrust enforcement. The UK's CMA Executive Director for Enforcement has made no secret of its policy change to prioritise the pursuit of director disqualifications, noting publicly that it will consider director disqualifications in *all* cases where antitrust law has been breached: *'We are determined to... send a clear message about the personal responsibility that business people have for ensuring compliance with competition laws.'* In Germany, the Bundeskartellamt may, as a general rule, only fine a company where it has also imposed a fine on at least one employee involved in the infringement.

‘With 20 director disqualifications to date – half of which occurred in the last 12 months – the CMA is clearly ramping up use of this weapon in its fight against anti-competitive behaviour, recognising the importance of the deterrent effect of potential personal liability.’



Deba Das
Antitrust and Dispute Resolution
Partner, London

The responsible employer

Emphasising potential individual liability in antitrust law training should help companies in their efforts to ensure everyone abides by the rules. The stakes are high for companies and employees that do not: without employees co-operating with them during (external and internal) investigations, companies will usually not be able to meet the high evidentiary thresholds to qualify for immunity from or a reduction in the level of fine under leniency programmes. A pivotal question in that regard is also whether, and to what extent, a company is permitted to grant some form of amnesty to its employees (from damages claims and/or contractual termination) or to cover individual legal fees. This requires careful consideration, not least from a corporate, criminal and employment law perspective, and varies significantly by jurisdiction.

‘As authorities increasingly pursue individuals, it becomes even more important – and strategically challenging – for companies to make sure that they incentivise their employees to co-operate with the investigation while at the same time not being seen as deviating from their zero-tolerance policy.’



Tobias Klose
Antitrust Partner,
Düsseldorf

Employment agreements themselves are not immune from antitrust scrutiny. The US DOJ and FTC made clear in their 2016 Antitrust Guidance for Human Resource Professionals that they can, and will, criminally prosecute antitrust violations including no-poach, wage-fixing and other anti-competitive employment terms. 2020 saw the DOJ’s first criminal wage-fixing case against an individual in more than 100 years of antitrust enforcement, which was followed by the agency’s first criminal no-poach case in early 2021. Companies should revisit and, where necessary, revise existing employment procedures so as to ensure compliance. Now is the time to ensure that *all* employees, including HR departments, are aware of the risks and rules in order to avoid

unwanted future surprises. Robust compliance programmes and appropriate training can effectively help alleviate antitrust risk.

‘Navigating complex rules across multiple jurisdictions can be a minefield for clients. We have developed the Freshfields Antitrust 101 App to help clients stay on the right side of the law, minimising exposure to expensive and damaging investigations. Easy to understand guidance on the key rules, to the right person, at the right time – all with the push of a button.’



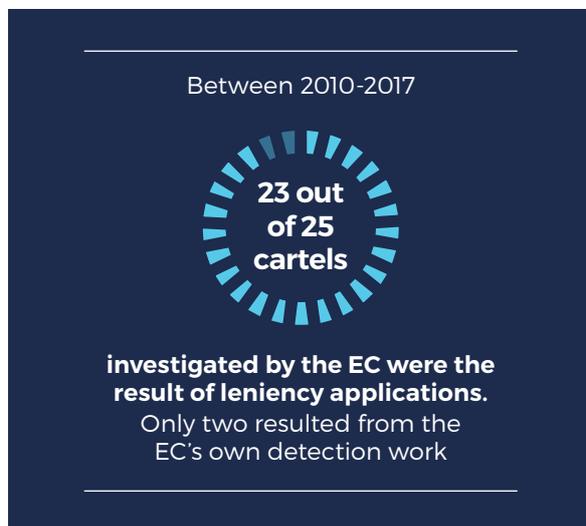
Ermelinda Spinelli
Antitrust Counsel,
Milan

But it doesn’t just stop at compliance; effective whistleblowing programmes – if things do go wrong – can make an important contribution to antitrust risk mitigation. Employees are often the first line of defence against antitrust violations, and their willingness and ability to speak up when they spot issues is critical, not least in a race to leniency.

‘Our 2020 Whistleblowing Survey suggests that there is still work to do to strengthen corporate culture around whistleblowing especially now that businesses are preparing for the so-called “hybrid workplace”, where home-working will become permanent, at least on a part-time basis. US tech and other companies that are allowing employees to permanently work from home where home is in a different jurisdiction will find it even more challenging to protect and nurture a speak-up culture.’



Maj Vaseghi
People and Reward Partner,
Silicon Valley





Freshfields' Whistleblowing Survey 2020

The survey reveals some worrying trends for organisations seeking to strengthen their speak-up culture. There has been a decrease in those who have been involved in whistleblowing (from 47 per cent in 2017 to 32 per cent in 2020), and also in the levels of confidence that senior management would offer support or encouragement in the whistleblowing process (from 40 per cent in 2017 down to 32 per cent in 2020). Perhaps more worrying, 22 per cent of employees are more likely to make a report directly to the authorities or the media, rather than their employer (up from 17 per cent in 2017). This highlights the importance of organisations revisiting their efforts to foster an open culture and to look critically at what might be impacting employees' willingness to raise concerns internally – especially in a more remote work environment (during and post-COVID-19).

Request access to the survey here.



Looking ahead in 2021:

What could permanent home-working and the hybrid workplace mean for antitrust compliance?

In assessing whether your HR and Risk & Compliance departments are fit for purpose consider the following:

- **Oversight and management issues:** make sure compliance remains high on the agenda and that an individual with the requisite seniority, credibility, experience and qualifications assumes ownership for ensuring adherence (an important point arising in the context of a recent UK High Court director disqualification case in which we successfully represented directors seeking limited permission to continue acting as directors). Moreover, make sure that your compliance function is sufficiently resourced and autonomous to perform effectively with direct reporting lines to the Board and/or Audit Committee.
- **Examine your current risk assessment** and look at how things may have changed, for example through the use of new technology or unusual working environments – do policies need to be updated? What is considered suitable or reasonable oversight in circumstances where employees are not physically present in the office? What substitutes could/should you put in place? Are there any new risks that need to be assessed in light of new working arrangements – for example, new policies in relation to the use of online videoconferencing platforms and cyber security?
- **Impact of new working environments on whistleblowing:** will employees' attitudes to whistleblowing be altered and how should whistleblowing arrangements (or promotion of those arrangements) adapt? Consider whether you need to refresh your current arrangements and how you can ensure they remain at the forefront of employees' minds when they are working remotely.
- **Adapting to virtual investigations:** conducting an internal investigation, and/or being faced with an external one, in times of lockdown or prolonged home-working poses practical challenges when it comes to interacting with employees, gathering and reviewing data and conducting meetings or subsequent disciplinary processes. Start thinking now about processes and procedures to ensure that you can adequately explore potential issues quickly and efficiently when needed.



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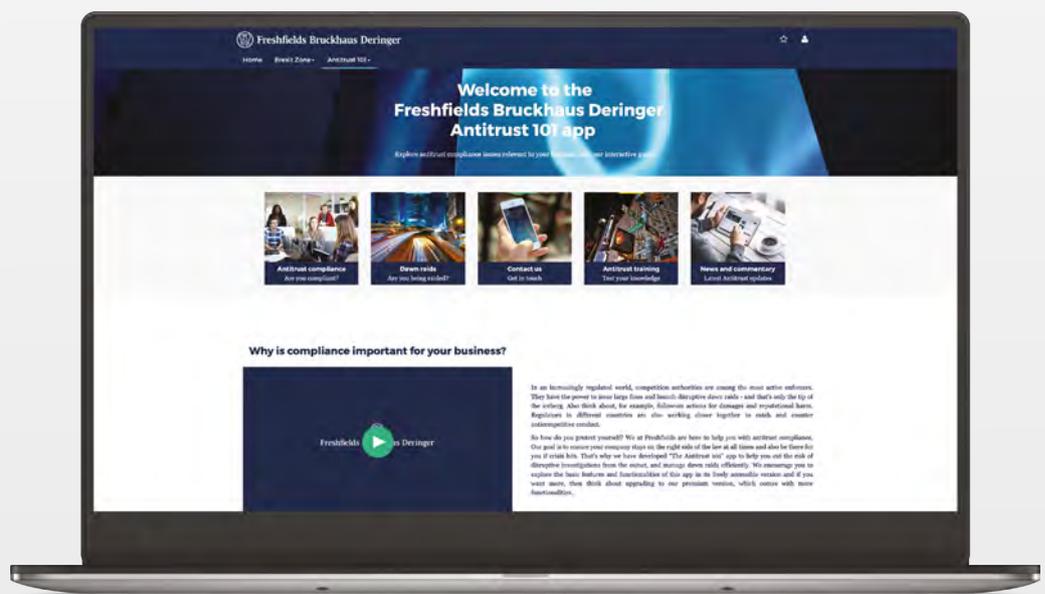
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