



Antitrust enforcement after market turmoil

Key issues for business in 2010

Foreword

January 2010

Last year, we all experienced unprecedented challenges in our business environment across the globe. The antitrust authorities, and businesses facing investigation, were not immune to those challenges. For the first time in decades, mainstream politicians and regulators have been questioning the broad principles of free market economics as the best route to achieving long-term stability and protecting consumer welfare. The authorities charged with enforcing antitrust laws – which are largely built on those principles – have been repeatedly forced to defend their positions. These pressures have a direct impact on how antitrust laws are enforced and how the authorities are pursuing their objectives.

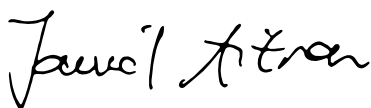
The major authorities are also experiencing changes in leadership. There will very shortly be a new competition commissioner in Europe. The US administration under President Obama is entering its second year of office and the new regimes in the emerging economies (most notably China) are stepping up their activity levels.

This report highlights how these issues may affect your business decision making this year. We hope you find it useful.

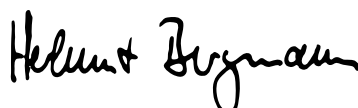
Our team has been at the cutting edge of developments in all areas of antitrust enforcement over the past year. We would be delighted to discuss these issues, and our recent experience, in more detail.

Please do not hesitate to contact one of us or one of your more regular contacts in the team.

With best wishes for 2010.



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Lessons from 2009 – how will they affect your business decisions in 2010?

The year began with widespread panic about the strength of our global financial markets and the long-term impact on the real economy.

As leading antitrust enforcers repeatedly advocated the role of competition in markets, these pronouncements appeared, on more than one occasion, to conflict with the actions of governments and their extending reach into markets.

As we continue the long climb to recovery, the emerging views of politicians and antitrust authorities on when – and how – they should intervene to correct perceived ‘market failures’ will be a crucial element of the regulatory landscape in which businesses will compete.

‘In difficult economic times, consumers need robust competition more than ever.’

EU competition commissioner, Neelie Kroes, 21 October 2009

Restoring trust and confidence in markets – when, and how, will regulators intervene and how should businesses prepare themselves?

Governments around the world have at times appeared schizophrenic about how to restore trust and confidence in markets. On the one hand, they have focused on protecting business and jobs, promoting national champions and calling for greater regulatory scrutiny of markets.

On the other hand, they have been keen to promote competition as the best route to achieving long-term economic growth and stability.

Antitrust enforcers have consistently remained focused on protecting consumers. There has been a definite hardening of approach in some areas to reflect the changing dynamics of competition, and companies found guilty of anti-competitive behaviour face heavy financial sanctions, despite pleas for more lenient treatment to reflect the economic circumstances.

‘There is no question of ignoring the potential effects of the merger on competition... but the stability of the UK’s financial markets is the government’s priority and it is right that this merger should have been considered on the basis of how that crucial public interest is best served.’

Baroness Vadera (UK business under-secretary of state) on the clearance of Lloyds TSB’s acquisition of HBOS, 3 November 2008

‘I think one of the many lessons that we have to learn... is that you do have to keep a very rigorous eye on the competition that is available, on the high street and generally.’

Alistair Darling (UK chancellor of the exchequer), 3 November 2009 (one year after Lloyds-HBOS was cleared)

Looking ahead: new challenges and new people – what to watch out for

These challenges remain, but some new areas are also coming to the fore.

- **National protectionism to shelter domestic production:** in November 2009, the Commission published a report claiming that the EU's major trade partners took more than 220 potentially trade-restrictive measures between October 2008 and October 2009. These measures may directly conflict with antitrust laws, which aim to prevent companies or states from protecting markets from foreign competition. Companies may want to try using antitrust laws to combat protectionism, both in the more established regimes and in emerging economies.
- **Governments' continuing influence in markets and the interface between competition and regulation:** when the crisis passes, political influence in markets is likely to recede, but, given the loss of confidence in financial markets, will it ever return to its previous levels? The influence of antitrust authorities in protecting consumers when governments have significant interests in how markets are working will be a key challenge in 2010.
- **Unwinding the state aided position of the banks:** following the EU approvals of restructuring plans for several leading European banks that received aid during the crisis, 2010 will see a major re-shaping of the competitive landscape for the European banking industry. Antitrust authorities will be charged with keeping this emerging state of competition under close scrutiny.

- **Consumer-focused goals of competition enforcement:** new theories of economics are gaining more credence as many lose confidence in the principles of 'rational choice' economics as the best route to predicting market behaviour. Behavioural economics, for example, suggests that business and consumer conduct is often – and predictably – inconsistent with rational choice-based theories. Antitrust authorities have been taking a close interest in these theories, but the full impact on decisions about whether to intervene in markets, and how to remedy perceived failings, is yet to be seen.

On 1 February, the new Commission – unveiled on 27 November – is expected to take office. The new competition commissioner, Joaquín Almunia, promises to continue Neelie Kroes's hands-on policy approach. His front-line experience as commissioner for economic and monetary affairs since 2004 has provided him with a thorough understanding of economics and markets in the current climate. However, unlike his predecessor, Almunia's career has been in politics – as a leading figure in the Spanish socialist party – rather than business. Whether this will lead to significant changes in focus remains to be seen.

As the new Commission takes office and the US administration enters its second year, the enforcement of antitrust laws in an era of scepticism over free markets and increased political intervention will affect business decisions across many sectors.

'After the entry into force of the Lisbon Treaty, EU legislation and enforcement will be even more important for business in Europe than before. Businesses active on the single market will need to understand how the political and legal influences inter-relate at all stages of policy, law making and implementation in the context of the new "EU 2020" agenda.'

Andreas von Bonin, partner, Freshfields (Brussels)

The key issues for business

This report focuses on the following key questions, which will affect your business environment and could affect your decision making over the next year.

- To what extent will your day-to-day commercial practices and relationships with competitors, customers and suppliers attract more scrutiny than they used to?
- How should companies respond to growing pressure from governments to collaborate with competitors in order to deliver on specific policy objectives – including environmental, technological and health targets – when such collaboration may infringe the antitrust laws and lead to heavy financial sanctions?
- If you are planning to make acquisitions this year, has the crisis changed the criteria against which your deals will be assessed?
- Which direction are the new antitrust regimes in the emerging economies heading and what will this mean for your business?

Risk and exposure: despite pleas for more lenient treatment, the authorities are focusing even harder on cartels and imposing tougher sanctions against companies and individuals who infringe the rules

The financial difficulties faced by many companies have brought into sharp focus the appropriate level of fines and sanctions against companies engaged in anti-competitive behaviour. Despite pleas for more lenient treatment, all major authorities prioritise the elimination of cartels and see heavy financial sanctions as an important punishment and deterrent mechanism. In 2009, the Commission imposed the second-largest cartel fine ever issued in Europe (€1.106bn on two companies in the gas cartel case). In the US, the Department of Justice (DOJ) continued to issue large criminal fines in 2009, including substantial fines related to its investigations of the LCD television and air cargo segments.

The continuing tough approach was illustrated by the recent refusal by Europe's General Court to suspend enforcement of a cartel fine pending an appeal. Despite the fact that the Slovak firm in question had, since the fine was imposed, been declared insolvent, and faced liquidation, the Court saw no reason to depart from the usual rule requiring a bank guarantee or immediate payment of the fine.

Several authorities are also actively looking at increasing the use of sanctions on individuals, including director disqualifications and criminal proceedings. Many companies will be looking at the increased risks faced by directors as a result of such changes and how those risks should be mitigated by changing the way directors behave in practice.

'Research carried out by the OFT suggests that sanctions which impact on the individuals involved in a breach of competition law have a strong motivating effect.'

**UK Office of Fair Trading,
August 2009**

'The Antitrust Division's criminal enforcement program in recent years has obtained unprecedented success in cracking large domestic and international cartels... In the last three years, over \$2 billion in criminal fines and more than 162 years in jail time have been imposed in cases prosecuted by the Division.'

**Christine Varney (assistant
attorney general, US DOJ),
12 May 2009**

Settlements and leniency – is the balance right?

The first formal settlements of EU cartel proceedings are likely in 2010, under a new procedure adopted in 2008. These will provide answers to some of the questions over how the settlement process works in practice and the extent of its benefits for firms.

The possibility of settlement means that companies facing cartel investigations face a new set of factors when deciding what action to take. For example, is leniency less attractive because, even if the cartel is discovered, there may be the option of a fine reduction (albeit smaller) through settlement? Is settlement worthwhile, despite the small fine reduction offered, because it may result in a decision that would be detrimental in defending damages claims? In such circumstances, more than ever, careful analysis of the risk that an individual party faces will be crucial in determining the best defence strategy.

Litigation – challenging regulatory decisions and the risk of private actions

Private litigation in Europe – and in particular damages claims based on antitrust infringements – is becoming increasingly common, despite the absence as yet of specific EU legislation. The high-profile debate over the past few years, and most recently discussion of a possible EU directive intended to facilitate such actions, appears itself to have achieved to some extent the Commission's aim of increasing such 'private enforcement'.

Damages actions in the EU – either brought independently or, more frequently, based on an infringement finding by an authority – now present a risk that needs to be taken very seriously by firms considering applying for leniency in respect of a cartel or otherwise deciding on strategy for dealing with infringement issues. (See [our briefing on follow-on damages](http://www.freshfields.com) at www.freshfields.com.)

'As we await the first EU cartel settlement with great interest, the national competition authorities in Europe have shown a high level of procedural flexibility to allow for speedy settlement. In one case, the German Bundeskartellamt settled with the parties in only a couple of months following the dawn raids. Such flexibility is a potentially useful development for businesses subject to these lengthy and complex investigations.'

Helmut Bergmann, partner, Freshfields (Berlin)

Government pressures to co-operate privately on specific policy objectives

Aside from the direct interventions by governments during the recession, there is a growing trend for politicians to try to avoid introducing new regulations to achieve specific objectives, but to encourage voluntary industry-wide arrangements as an alternative. Common areas where these arrangements are appearing include health (better signalling on food packaging), the environment (use of plastic bags) and technology (digital communications). Antitrust authorities, meanwhile, are charged with rooting out such collaboration and preventing distortions to free market competition.

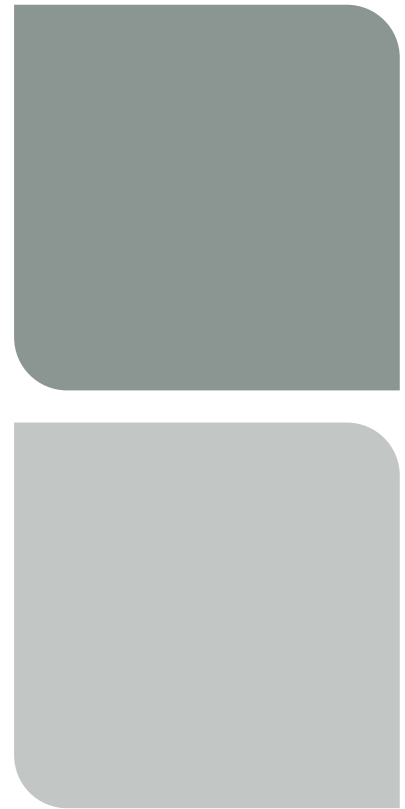
Businesses caught in the middle are advised to foster dialogue between the sponsoring government department and the antitrust authorities, so that the public policy benefits of collaboration are articulated while meeting the antitrust authorities' objective to achieve such aims with the minimum adverse effect on competition.

Continued focus on dominance claims

Even in the current economic climate, competition authorities continue to investigate potential abuses of dominance by companies worldwide. For example, in the US one of the first official acts of the new Obama Antitrust Division was to discard the Bush administration's guidance on monopolisation as too lenient. The US Federal Trade Commission has recently asserted that its statutory authority to challenge 'unfair methods of competition' is broader than the antitrust laws and serves as an independent basis to attack unilateral conduct by Intel and other allegedly dominant firms. In the EU in May the Commission fined Intel €1.06bn for exclusionary abuse of dominance, its highest fine ever on a single company.

'In Italy, we have experienced a significant increase in the number of dominance cases in the past few years. Most recently, these cases have focused more on broader consumer protection concerns rather than classic consumer welfare economics. The vast majority of cases are settled with behavioural commitments, which may be very burdensome for the companies involved and which often resemble regulatory measures designed to protect consumers rather than eliminate the cause of the competition concern.'

Tommaso Salonic, partner, Freshfields (Rome)

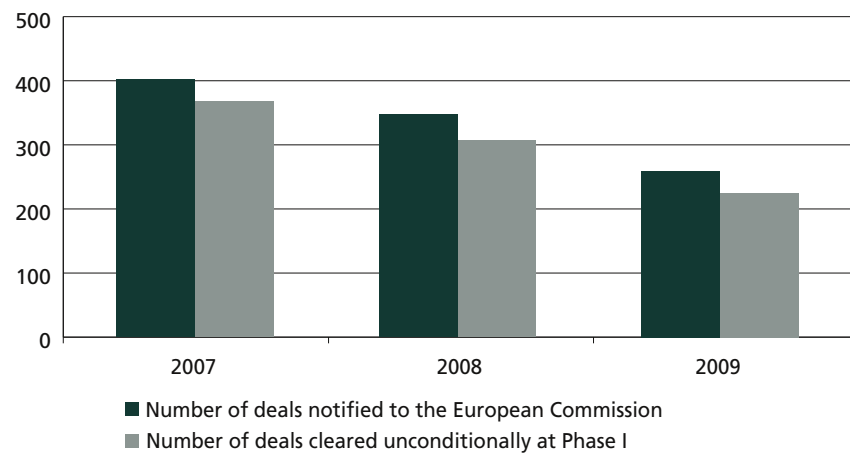


Mergers and acquisitions: has the crisis changed the criteria against which your deals will be assessed?

The collapse of the mergers and acquisitions (M&A) market was illustrated by the dramatic fall in notifications to the European Commission over the past two years.

Mergers notified to the Commission peaked in 2007 (at 402) and fell by over a third in 2009 (to 259).

Deals notified to Commission and proportion of Phase I clearances



If you are planning on making acquisitions next year, what criteria are such deals likely to be assessed against?

- **Rigorous merger control needed to build healthy markets in the future:** the authorities have made clear that rigorous merger control is, if anything, more important in a downturn, to ensure we have healthy markets in the upturn. The

number of notified deals may have fallen, but an increased proportion of those deals are subject to more detailed scrutiny. Companies planning to acquire businesses in their own markets should not necessarily expect a light-touch review, but should be prepared for the opportunities and challenges arising from the changing economic environment.

Phase I cases in the EU and UK¹

	2007	2009
EU: proportion of cases cleared unconditionally at Phase I ²	91%	87%
UK: proportion of cases raising material issues at Phase I ³	20%	36%

¹ Similar data is not yet available in other jurisdictions.

² Source: European Commission.

³ Source: UK Office of Fair Trading (cases considered at a case review meeting in the years 1 April 2007-31 March 2008 and 1 April 2008-31 March 2009).

- **Some flexibility on procedure but heavy penalties for companies trying to bend the rules:** merging parties may expect the authorities to show some flexibility in expediting procedures for emergency rescue acquisitions. However, companies attempting to create their own flexibility should expect heavy financial penalties. In 2009, the Commission imposed a record fine of €20m on a purchaser for closing its deal without clearance.
- **A greater political imperative behind deals:** governments have tried to influence decision making in mergers in a range of sectors – most notably the airline, automotive and banking industries. However, the effect of such influence on the ultimate outcome remains uncertain.
- **Multinational deals – a timely reminder that differences in approach remain and that the risk of divergent outcomes is real:** the Commission referred only five deals for detailed Phase II examination in 2009 (compared with 15 in 2007). One of those cases is Oracle's proposed acquisition of Sun Microsystems, which was cleared by the US DOJ in August but referred for detailed review by the Commission in November. This case provided the highest-profile public disagreement between the EU and US authorities on whether a merger should be allowed to proceed since GE-Honeywell in 2001. It follows years of increased co-operation between the authorities and apparent convergence in substantive review. This serves as a timely reminder that differences in approach between the US and EU authorities do remain and that companies should be prepared for lengthy investigations and the possibility of divergent outcomes following those reviews.

'After conducting a careful investigation... the [DOJ] concluded that the [Oracle-Sun Microsystems] merger is unlikely to be anticompetitive... At this point in its process, it appears that the EC holds a different view. We remain hopeful that the parties and the EC will reach a speedy resolution that benefits consumers.'

**Molly Boast (deputy assistant attorney general, US DOJ),
9 November 2009**

'I proposed at the International Competition Network's [ICN] eighth annual conference in June that international timetables are one of the key obstacles for international competition authorities to resolve this year. I hope the ICN may be able to make progress towards more consistent and efficient timetables.'

David Aitman, partner, Freshfields (London)



Cross-border M&A and the emerging markets – the increasing influence of new regimes and more vigorous enforcement

Since China adopted its Anti-monopoly Law (AML) in August 2008, the combination of new regimes and tougher enforcement practices has significantly raised the regulatory hurdle for cross-border M&A. As acquisition opportunities in the emerging economies grow, businesses will need to understand fully how these regimes operate in practice if they are going to get their deals cleared on acceptable terms and within reasonable timeframes.

Many new regimes are based on the European model, so they look familiar but they have some notable differences in key areas of procedure and substantive assessment. Companies should be prepared for some uncertainty over timetables, extensive information requests (often

with lengthy and time-consuming translations required), the possibility that non-competition factors may be taken into account in decision making and heavy political influence in certain particularly sensitive sectors.

In China, the Ministry of Commerce (MOFCOM) has clearly demonstrated how it is prepared to wield the full power of the AML in cross-border deals with an increasing level of sophistication in analysis and approach to remedies. As the next major regime to join, India partially enacted its new competition law in May, with merger control expected to follow in mid-2010. India, like China, may well be at the forefront of M&A activity over the next few years, so how the authorities implement the new regimes in practice will be watched closely by all businesses with interests in these regions and their advisers.

‘Notwithstanding the global financial crisis, more than 100 mergers had been notified to MOFCOM by the end of June 2009, with interventions leading to remedies or prohibition in six cases. Although such numbers are not necessarily big in mature jurisdictions, they are quite significant for what is effectively a new agency operating in a new area of law in China. The most striking feature of these interventions is the lack of Chinese names in the list – in fact, the only one was Huiyuan, which was Coca-Cola’s now-infamous target. All of the other deals in which MOFCOM extracted conditions in order to be persuaded to clear the deal were foreign-to-foreign deals that got tied up in the Chinese merger review process.’

Michael Han, partner, Freshfields (Beijing)

Acquiring distressed companies – is there more scope for acquiring failing businesses?

Most antitrust authorities may occasionally be persuaded to clear mergers on the basis that the alternative is one of the companies exiting the market entirely. Because of the strict conditions that need to be satisfied in these cases, very few deals have been cleared on this basis (and none during the current crisis at the EU level). However, the cases we saw in 2009 have clearly demonstrated the high evidential burden involved and the importance of early preparation to show that:

- **one of the parties will inevitably exit the market without the merger:** the exit must be certain, not likely, and decisions by profitable parents to close loss-making divisions are unlikely to satisfy the criterion;
- **there is no serious prospect of the target being re-organised:** the authorities may take the view that even businesses on the verge of administration may be restructured and survive; and
- **there is no realistic and substantially less anti-competitive alternative to the deal:** any prospect of a less problematic purchaser – or a lack of evidence that the parties have adequately tested the market for a buyer – is likely to mean the deal fails the test.

New approaches to decision making – to what extent will recessionary conditions help or hinder you in making acquisitions over the next year?

Although the authorities have taken a strong stance on the importance of rigorous merger control, the difficult market conditions are affecting how some cases are reviewed and more examples are likely over the coming year. Merging parties should anticipate the following opportunities and challenges.

- **Arguments based on the longer-term conditions of competition:** market turmoil has changed the way in which companies compete in many sectors. We have already seen at least one case in which the authorities based their analysis on the pre-2007 situation because the recent period of ‘abnormal competition’ did not give a sufficiently accurate picture of longer-term market conditions.
- **New theories of competitive harm:** the authorities are, in parallel, placing less emphasis on more traditional competition assessments based on market shares and levels of market concentration, and more on alternative theories looking at a merger’s actual effects on the market. These types of assessment tend to rely more on detailed and contemporary evidence of actual and predicted consumer behaviour, which give rise to numerous challenges.

‘Even if the strict failing company defence is not available, the target may be struggling so badly that its future competitiveness is in doubt; that combined with a powerful synergy or efficiency case may well allow the strategic acquirer to gain approval where it might not have in better economic times.’

Bob Schlossberg, partner, Freshfields (Washington, DC)

- **New entry or capacity increases:** arguments that rely on low barriers to entry or the prospect of capacity increases and, therefore, potential competition as an effective constraint may be difficult to justify when companies are either too weak or unable to access sufficient finance to enter markets or increase production. Again, merging parties should be prepared to submit detailed and robust evidence of such constraints if they are going to gain clearance quickly.
- **Remedies:** in cases where the authorities require businesses to be divested for the merger to be cleared, there is an increasing risk that no suitable purchasers are available or that the divested assets are commercially unattractive. To reflect current market conditions, some authorities have hardened their approach by requiring an approved up-front buyer to have agreed the terms of the sale before the deal is cleared. Depending on the assets being sold, this can have serious timing and cost implications for the merging parties so the identity of such buyer(s) should be considered early.

The key message for businesses looking to make acquisitions in their own markets in 2010 is to prepare for rigorous review by compiling detailed and contemporary evidence on the merger's likely effects on customers and the company's ability to deliver any divestment remedies to approved buyers within a reasonable time period.

'Recessions are temporary, but mergers are forever.'

Carl Shapiro (deputy assistant attorney general, economic analysis, US DOJ), 13 May 2009, warning against using current economic conditions to secure approval for what would otherwise be judged an anticompetitive merger

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- In June 2009, *The Lawyer* named a London-based team Competition/Regulatory Team of the Year in recognition of its work advising Tesco on the unprecedented successful judicial review of a Competition Commission market investigation remedy. This is the third year in a row that we have won this award.
- In June 2009, our practice was named Global Competition Law Firm of the Year by *Who's Who Legal* for the fifth consecutive year.
- In April 2009, we were ranked as the top competition law practice globally, for the sixth consecutive year, in *PLC Cross-border Quarterly* magazine's Competition Super League.
- In January 2009, for the third year running, our practice topped the *Global Competition Review* GCR 20 list of the world's top competition practices.

Visit our website (www.freshfields.com/practices/antitrust) for further information on our practice and see overleaf for contacts across our international network.

'Freshfields Bruckhaus Deringer maintains the top spot by a significant margin thanks to the breadth and depth of its competition practice worldwide. This is an outstanding achievement and places the firm in a league of its own. The firm has continued to be involved in some of the highest profile matters and provides quality advice across its European network. On the other side of the Atlantic, its practice... is going from strength to strength... [It has also extended] its competition capabilities in Asia.'

PLC Which Lawyer's Competition Super League report, 2009

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Global Competition Review's GCR 100 press release, 2009

'Helping to accelerate the European Commission's previously sluggish processes of approval for State aid, Freshfields combined legal expertise with commercial and political negotiating skills.'

Financial Times Innovative Lawyers Awards, 2009

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