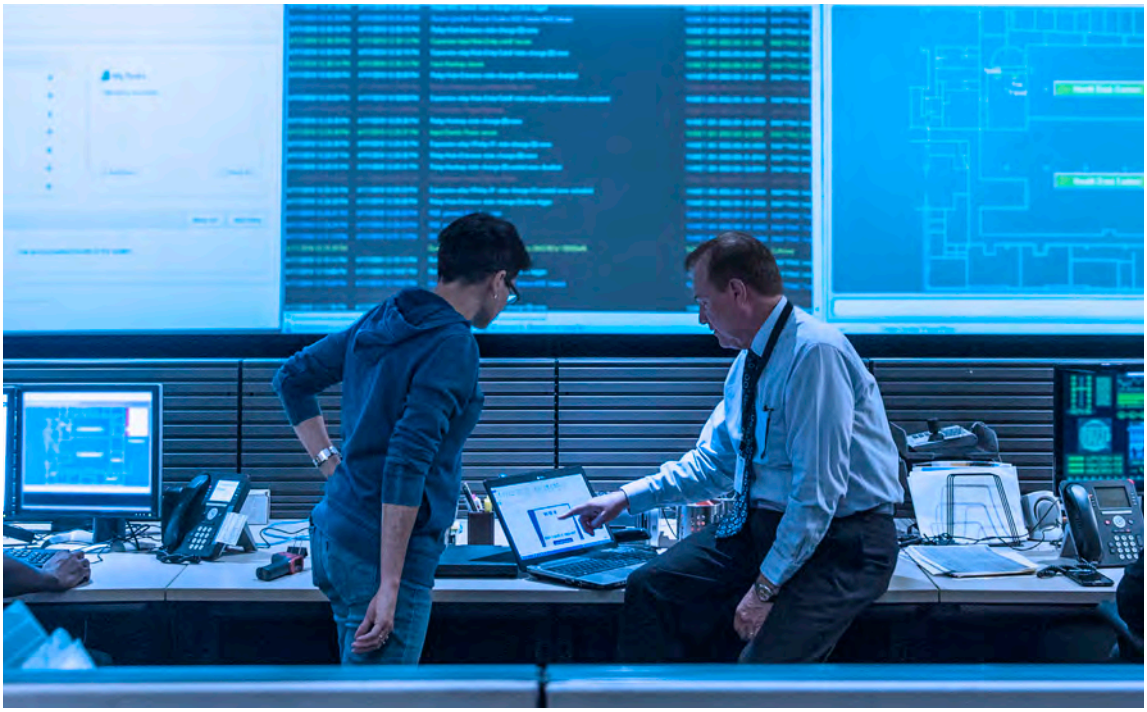
10 key themes

Global antitrust in 2020

Freshfields Bruckhaus Deringer

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10 key themes

Ten years of looking ahead

Welcome to the 10th edition of our annual review of the antitrust landscape.

The world has changed dramatically since we published our first 10 Key Themes in Global Antitrust a decade ago. Then, big tech looked very different to today, globalisation was widely accepted as the model for the international economy and climate change was further down the political agenda.

Policy priorities, investment flows and consumer preferences have all shifted since 2010, while businesses are increasingly interconnected and enforcement continues to increase globally. That's why – as we enter the third decade of the 21st century – a sophisticated understanding of the antitrust environment is more important than ever.

A data society

The last decade has been marked by rapid advances in technology and innovation. Much of this revolves around sharing personal information, enabling the development of valuable products and services. While for many people this is a hugely beneficial development, antitrust regulators are concerned that it has led to power being concentrated in a small number of hands.

The question now is how politicians and enforcement authorities will act to preserve markets and innovation – and protect privacy and choice – in the future.

The EU has acknowledged that the boundaries between competition, consumer protection and privacy have become blurred, with new Commission president Ursula von der Leyen reappointing antitrust chief Margrethe Vestager to an expanded brief that covers not just competition enforcement but also the regulation of the digital economy.

The 2020 US presidential candidates and members of Congress from both parties are also vowing to reinvigorate antitrust enforcement in the digital arena and are proposing new legislation.

Concerns about under-enforcement and so-called 'killer acquisitions', coupled with important reviews into tech which concluded in 2019, have resulted in calls for more rapid enforcement.

We believe that throughout 2020 and beyond remedies sought by antitrust enforcers will become more consumer-focused, with moves to promote greater transparency, easier switching between services (including greater data portability) and the ending of the customer 'loyalty penalty'.

A sustainable society

As the range of green products and services widens, so producers will need to agree common standards to help consumers make informed and sustainable choices.

And with the most challenging aspects of climate change requiring collaboration between businesses, those involved will need to test the historically narrow approach to consumer welfare or public good used to justify past collaborations in order to deliver wider public policy goals, including carbon reduction.

A new world order

Ongoing trade disputes between the US, China and the EU have led some analysts to conclude that we are entering a 'deglobalised' age.

Governments are introducing new rules (or making greater use of existing frameworks) to protect strategic technologies and build national champions. The use of antitrust rules and foreign investment regimes to control cross-border deals will be a key trend to watch over the months and years to come.

With technology increasingly in enforcers' sights, the climate emergency front and centre and international relations more strained than ever, 2020 promises to be a testing year for businesses, politicians and regulators alike.

We will, as ever, be keeping a close eye on developments. We will be hosting a number of events exploring the shifting antitrust landscape throughout the year, so if you are interested in joining the discussion please speak to your usual contact in our antitrust, competition and trade team.

On behalf of the entire team at Freshfields, best wishes for 2020 – we hope it will be a prosperous and fulfilling one for you all.

Thomas Janssens

Global Head, Antitrust, Competition and Trade Group

01

The digitised economy

Will 2020 be the year of action?

2019's reviews and studies – the story so far

2019 saw broad debate across the globe as to whether there should be greater enforcement of antitrust law targeting the business models of digital platforms and especially their use of data and algorithms – practices that have made many of the tech companies so successful.

There has also been an increasingly active discussion on whether existing antitrust laws give authorities sufficient powers to deal with issues raised by digital innovation or whether reform, or even new specialist laws and regulators, should be created.

Numerous reports into competition in the digital era have been looking into these issues, as authorities seek to deepen their understanding of digital markets and determine if they have the requisite 'tools' to apply antitrust law to the issues they now face. In 2019 alone:

- the US Federal Trade Commission (FTC) created a permanent Technology Enforcement Division and is currently preparing digital guidelines relating to platforms in conjunction with the Department of Justice (DOJ). Separately, State Attorneys General have individually and collectively launched investigations into digital platforms;
- the European Commission published a report by three academics considering how EU competition policy should evolve to continue to promote pro-consumer innovation in the digital age – the Commission's response to the report is keenly awaited;
- the UK's Competition and Markets Authority (CMA) launched a digital markets strategy and opened a market study on online platforms and digital advertising following publication of a report by the digital competition expert panel led by Professor Jason Furman (former economic adviser to President Obama);
- the French and German competition authorities published a joint study addressing the potential risks associated with the use of algorithms (in addition to a previous report they published on Competition Law and Data);
- in Japan, a variety of new laws and guidelines have been introduced (or are imminent) to regulate digital platforms, including new digital transparency legislation, amended merger guidelines and new guidelines on abuse of superior bargaining position in the context of use of personal data; and
- the Australian Competition and Consumer Commission (ACCC) published recommendations following an in-depth digital platforms inquiry, which the government followed with a series of proposed regulatory reforms.

'The Japanese antitrust authority has been closely examining the data practices of a number of global and domestic digital platforms. An across-the-board government oversight team is also being created, under the direct supervision of the prime minister, to discuss competition issues arising in digital markets.'

Kaori Yamada
Antitrust Partner,
Tokyo

Outcome of reviews

These reviews have led to a proliferation of far-reaching – and not always consistent – recommendations, including for legal reform, codes of conduct, greater data mobility and openness, greater focus on data ethics, further regulation, the creation of units for overseeing digital markets, stricter appraisal of mergers and even the unwinding of previously approved past mergers. Exactly what changes, if any, should be adopted remains, nonetheless, controversial and is still being vigorously debated:

- some are calling for closer analysis, and the need for a greater understanding, of digital markets before any changes are introduced;
- others are demanding urgent action. It is far from clear, however, that making sweeping changes to existing legislation, or setting up entirely new regulatory bodies, would be either quick or effective.

At least in Europe, the track record of enforcement appears to belie the underlying theory that existing antitrust laws are insufficient. In 2019, the European Commission:

- imposed a €1.49bn fine on Google for abusive practices in online advertising (the third infringement decision it has taken against Google since 2017, resulting in total fines of €8.25bn);
- imposed a €242m fine on Qualcomm for a predatory pricing abuse; and
- opened proceedings into whether Amazon has used data collected as a platform owner to gain a competitive advantage when competing with sellers using its platform to connect with customers.

Although the correct approach is not necessarily straightforward – as a recent interim decision of the German courts makes clear by setting aside, in critical terms, the remedy order of the German competition authority against Facebook – many are arguing, credibly, that it is not new laws, but rather greater expertise and careful case management within the antitrust agencies themselves that would make the most difference in this area.

'Competition agencies across the world are closely scrutinising the landscape and functioning of the digital economy. Many authorities have created special units with a digital focus to investigate and assess competition in digital markets. In the future, closer examination of both single firm conduct and M&A in the digital space can be anticipated.'

Justin Stewart-Teitelbaum
Antitrust Counsel,
Washington DC

Will 2020 be the year of action?

If 2019 was a 'year of reports', it is clear that agencies around the world are under pressure to make 2020 a 'year of action'. Margrethe Vestager (newly appointed Executive Vice-President of the European Commission for a Europe Fit for the Digital Age and responsible for the Commission's competition portfolio) has already signalled bolder action in the next five years compared to her first term as Competition Commissioner.

In the short term, heightened competition scrutiny can be anticipated for:

- mergers where one or more parties have access to potentially valuable data or those involving acquisitions of start-ups – sometimes called 'killer acquisitions' by critics (see theme 3);

- business practices of digital platforms, particularly:
  - how data is gathered from users (its purpose and the protections in place); or
  - whether any types of data could be considered to confer a competitive advantage or to be an 'essential facility' and, if so, how access should be given;

'In the UK, we're likely to see regulators work towards creating general codes of data ethics, with a particular focus on new technologies. Regulators have been looking at various ethical issues that might impact consumers, including algorithmic decision-making, and transparency around data collection. The UK Information Commissioner is due to publish a consultation paper on its proposed 'AI auditing framework' in January 2020, and the UK Centre for Data Ethics and Innovation will continue to assess the risks of data-driven tech.'

Giles Pratt
IP Partner,
London

- restrictions in distribution agreements, such as platform 'most favoured nation' clauses or exclusivity provisions; and
- price-setting algorithms, to determine whether they are allowing competitors to co-operate unlawfully in violation of antitrust laws prohibiting anti-competitive agreements.

Competition agencies are also likely to make greater use of:

- interim measures: powers to halt potentially anti-competitive conduct pending investigation (as the European Commission did in 2019 in proceedings against Broadcom when it used these 'cease and desist' powers for the first time in 18 years);
- intrusive remedies: powers, for example, to mandate the sharing of data (although this will require careful alignment with relevant consumer and data protection agencies to ensure protection of data subjects' rights); and
- technology-assisted review: technology and algorithms to uncover competition infringements such as electronic screens to test for cartels (see theme 10).

'Intensified enforcement in 2020 can be anticipated. Executive Vice-President Vestager will be keen to make an early impact in her new digital role and is under some pressure to show that, in future, digital cases can be managed in a more streamlined and effective manner. At the same time, the UK CMA is due to publish a major digital report in 2020 and will want to prove that it can be among the top agencies globally following Brexit.'

James Aitken
Antitrust Partner,
London

Agencies around the world are under pressure to make 2020 a 'year of action'.

More radical changes may lie ahead

In some jurisdictions, preparatory steps may also be taken for more radical, longer-term solutions, through legislative change, especially competition or data protection law reform, and/or regulation. In the US, Senator Warren is even advocating that a new US digital platform regulator should have power to break up companies and impose non-discrimination obligations on platforms. These more dramatic proposals are likely to be fiercely contested throughout the legislative process.

Legislators across the EU are considering whether competition laws are adequate to deal with practices emerging in the digital economy. The Dutch Government has submitted a policy letter to the House of Representatives setting out measures that would allow stricter application of competition rules to digital platforms, and competition law reform is on the way in Germany.

'A French parliamentary committee recently joined the chorus of European and other voices calling for merger control to be adapted for the digital economy, and echoes calls elsewhere for all big tech company acquisitions to be notifiable.'

Jérôme Philippe
Antitrust Partner,
Paris

Looking ahead in 2020:

- **Track developments closely:** as laws and policies evolve, companies should track the implications carefully to ensure they remain compliant across their businesses.
- **A wide net:** given the rapid pace of digitisation, more businesses will be affected by wide-ranging investigations and will need to consider how their conduct will be viewed as enforcers cast their investigatory nets increasingly broadly.
- **More cases and faster intervention:** driven by pressure to act quickly, competition agencies are likely to open new antitrust cases designed to test the scope of existing laws while considering what future reforms might be needed.

Join the discussion at Freshfields' TechConnect events.

Whether you're a tech company, investing in tech or digitising your business, TechConnect provides the platform to network, share insights and stay ahead of the rapidly evolving regulatory, investment and enforcement landscape. In 2020, we will continue to host TechConnect events in key markets globally to explore the greatest hurdles and opportunities facing tech companies as they seek to grow, innovate and defend their businesses.

Register your interest, contact:
techconnect@freshfields.com

02

The age of international tensions

How will antitrust policies change to meet new political and economic objectives?

The impact of political change on antitrust policy

2020 will witness a series of political changes that will impact global power structures and relationships, and may contribute to an emerging phenomenon of international fragmentation after a decade of globalisation:

- the US presidential elections;
- China's expanding influence and geographic reach;
- the start of the new European Commission's agenda;
- continuing stasis within the World Trade Organization (WTO); and
- the UK's exit from the EU.

The past year has already signalled a shift away from the long-standing narrative of globalisation in international politics. Trade wars (including US–China, US–EU, Japan–South Korea) and the paralysis of the WTO have undermined world trade, while a renewed focus on the impact of international conglomerates on local markets has challenged the orthodoxy of the global perspective of recent years.

↓69%

CHINESE INVESTMENT IN SENSITIVE SECTORS
such as automotive, energy, financial, health and IT
IN THE US
in the last 5 years

Combined with the overt political push for national champions in key sectors, it appears that the long decline in global trade barriers may be reversing. This trend will have implications for business in the year ahead in a number of key areas.

> **'2020 will witness a series of key developments, impacting international and national trade and antitrust policies for years to come. Businesses must be prepared to influence and adapt to them to ensure their continued success.'**

Martin McElwee
Antitrust Partner,
Brussels and London

A greater focus on domestic political concerns in antitrust cases

The new European Commission takes office against a background of explicit national political pressure for an increased role for political and industrial priorities – mainly driven by national politics and a belief in national (or sometimes European) champions.

While the focus of this has principally been in merger cases to date (eg in *Siemens/Alstom* – where the Commission's decision to block the transaction was heavily criticised by national politicians in Germany and France for an alleged failure to support European companies, leading to calls for changes to EU merger review), the impact may also be felt in other types of antitrust cases.

UK Prime Minister Boris Johnson has, for example, said that he plans to replace the EU's state aid regime with a system giving the UK Government 'greater discretion' to allow 'extremely rapid' interventions in the case of economic turbulence and a new public procurement regime favouring British suppliers.

Understanding the domestic political impact of a particular case will become increasingly important.

'It is important to fit the narrative of future deals to the new imperative of an EU Industrial Policy – this includes the impact of any transaction on local European industry and possible consequences for the EU's ability to innovate and compete globally.'

Christiaan Smits
Head of EU Regulatory and Public Affairs, Brussels

More deals attracting national security and other public policy scrutiny

The past few years have seen a significant increase in the importance of national security and related public policy issues in the review of transactions. Navigating these domestic concerns – often while also navigating separate merger control reviews – takes significant planning and co-ordination (see theme 4).

The growing role of industrial policy and fairness for consumers

Changes to political dynamics have also contributed to an uptick in competition authorities taking account of consumer fairness and industrial policy concerns in their investigations and decision-making (see theme 9):

- European Commission President Ursula von der Leyen and Executive Vice-President Vestager have both stressed the need for markets to work better for consumers, business and society during the twin climate and digital transitions in the next Commission term;
- in the US, Assistant Attorney General at the Department of Justice (DOJ) Makan Delrahim has stood behind the consumer welfare standard as the lodestar of antitrust enforcement, while Federal Trade Commissioner Rohit Chopra has tied the US's future economy and democracy to its ability to restore free and unfettered competition; and
- in China, public interest and consumer welfare have been built in as fundamental goals of antitrust and are likely to continue to play an important role in enforcement in the current geopolitical atmosphere.

How will the supra-national actors respond?

To ensure fair and effective competition, antitrust authorities and other regulatory bodies – particularly those at supra-national level – are likely to continue to try to create a 'level playing field' by broadening the remits of their antitrust, state aid, merger control, trade and foreign investment tools.

The past year has already seen a flurry of state aid cases in Europe, particularly those focusing on tax, including relating to the UK's Controlled Foreign Company (CFC) regime. Whilst the traffic has not all been one-way in the Commission's direction (it has either pulled back or been knocked back in a couple of high-profile cases involving US multinationals), the EU courts have shown some willingness to use state aid rules to impose an EU-level 'arm's length dealings' requirement for tax purposes. This could substantially expand the Commission's reach in an area traditionally thought of as a member state competence.

'We have not yet seen the end of the Commission's actions in the fiscal state aid cases. But the process is maturing. So perhaps we have seen the end of the beginning.'

Eelco van der Stok
Tax Partner,
Amsterdam
and

Paul Davison
Tax Partner,
London

EU political leaders have also insisted on level playing field guarantees (commitments would involve upholding EU standards on tax, state aid and the environment) as part of any agreement with the UK as the UK leaves the EU.

More broadly, Executive Vice-President Vestager has indicated that the European Commission will review its rules on antitrust, mergers and state aid with a strengthening of competition enforcement powers to make them fit for purpose in the modern age. This will include a review of the Commission's approach to defining product and geographic markets in merger and antitrust cases, to ensure it properly reflects today's global and digital markets.

At the same time, as the US presidential campaign enters into high gear, we can expect candidates from both sides of the political spectrum to continue their focus on consumer welfare.

'In this American election year, expect continued scrutiny of high-tech industries and an intense focus on pharmaceutical pricing and other healthcare costs.'

Mary Lehner
Antitrust Partner,
Washington DC

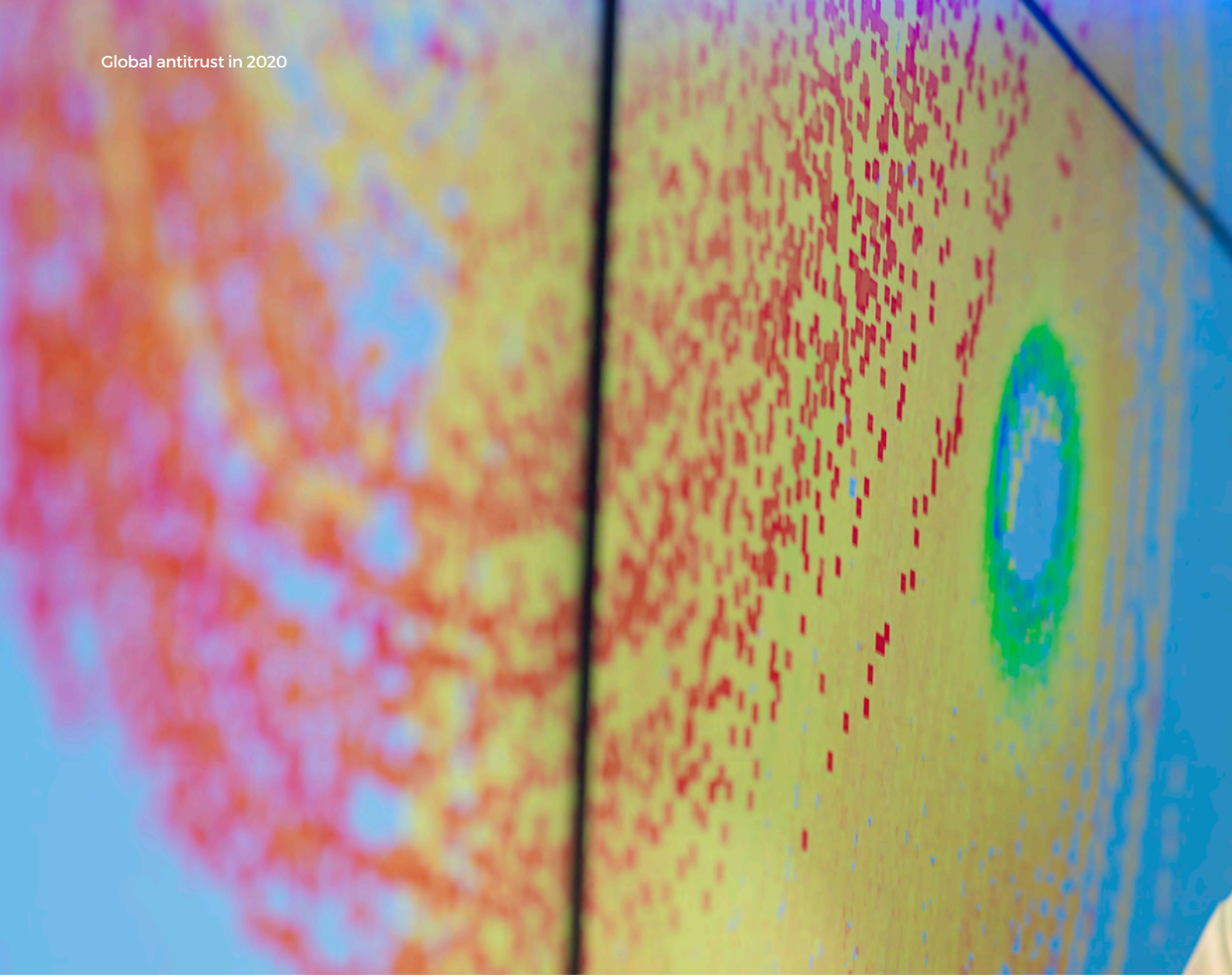
In contrast to the general raising of trade and market access barriers internationally, China has countered with an overhaul of its foreign investment rules by opening up more sectors to foreign investment. It has adopted the new Foreign Investment Law, introducing measures to place foreign-invested enterprises on a level playing field with domestic investors.

'China has been continuing to open up its market to foreign investment. Yet we are also seeing early signs that national security review may become more prominent and capture a wider scope of industries and transactions.'

Hazel Yin
Antitrust Partner,
Beijing

Looking ahead in 2020:

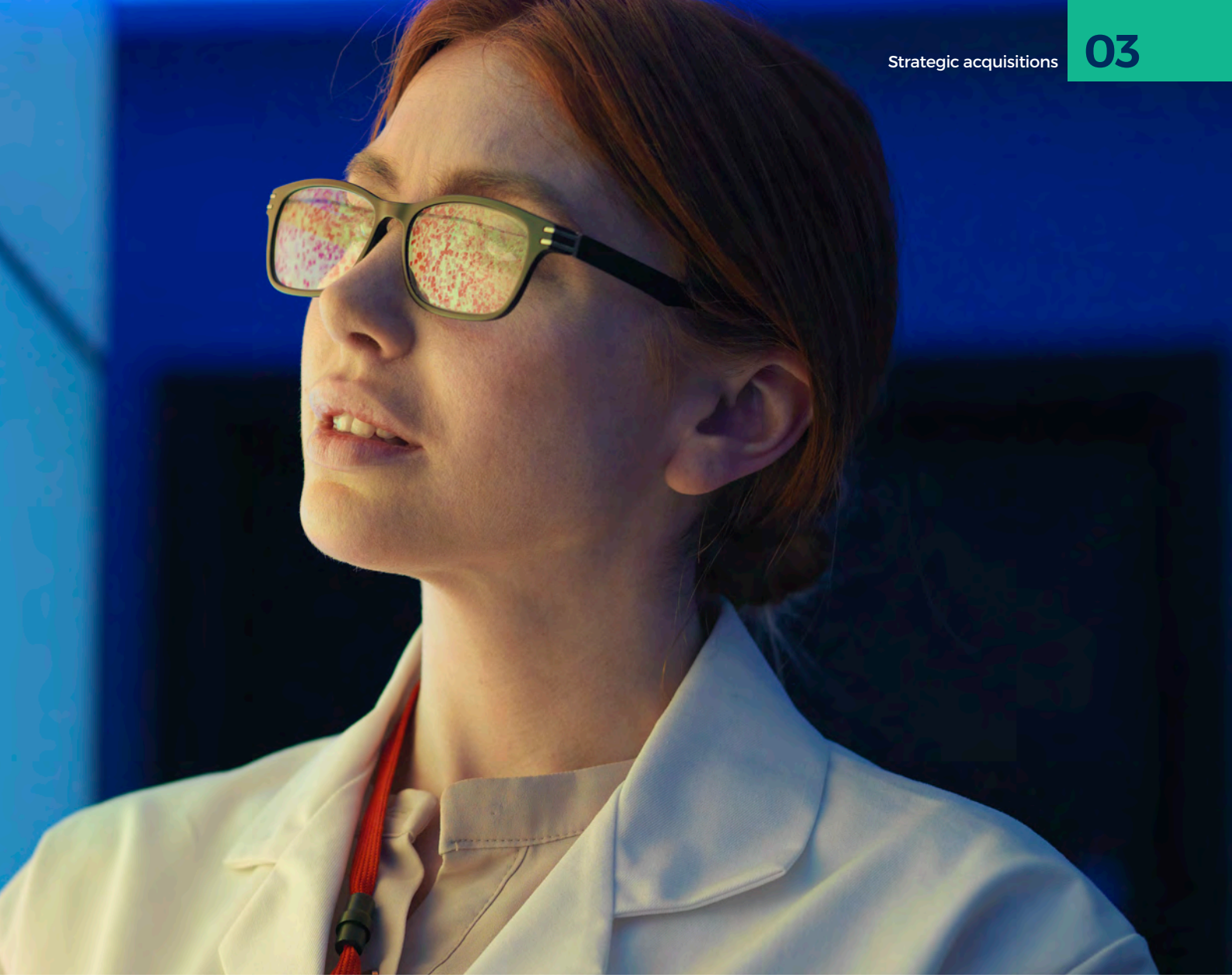
- **Global companies should prepare themselves for increased scrutiny** both in a merger control context and via wide-ranging sector inquiries feeding into policy updates or enforcement action. Increasing divergence in the rate and pace of change across the major economic blocs cannot be ruled out in 2020 and may impact the desirability of investment in some jurisdictions as well as increase the resources needed to address an increased regulatory burden.
- **Knowing the local political and regulatory environment will be key** to successful commercial strategies.
- **Test your rationale – particularly for cross-border deals – from all angles** in each key jurisdiction (eg the EU, the UK, the US and China).
- **Monitor key regulatory and/or political developments** that directly or indirectly affect your sector and adjust your strategy accordingly.
- As national approaches diverge, **international co-ordination will become even more critical** to maximise your chances of success.



03

Strategic acquisitions

Assessing risk in an era of heightened intervention in deals



Which deals are likely to face greater scrutiny in 2020?

Transactions in innovative industries, such as pharmaceuticals and tech, remain high on the agenda of merger control authorities globally amid concerns about potential under-enforcement in recent years. As competition authorities seek to predict the impact of proposed transactions on potential future competition in complex and rapidly evolving markets, companies planning strategic acquisitions need to prepare for a rigorous review.

Transactions involving digital markets remain an area of specific focus for merger review in view of their importance to the global economy and the difficulty of evaluating their impact on potential future competition. Authorities around the globe have held hearings, established task forces and commissioned studies considering the effectiveness of current merger control tools in digital markets, both whether the correct transactions are subject to the review process and whether reviewed transactions are being cleared when they should have been subject to remedies or prohibited altogether (see theme 1).

Many start-ups ultimately aim to be bought out by a larger company to give them access to better resources and a wider customer base. Whilst the impact of such acquisitions will in many cases be pro-competitive, authorities remain concerned that some of these transactions have the specific intention of slowing innovation and removing potential future competition: so-called ‘killer acquisitions’.

In view of the small size of such targets, which may not yet be revenue generating, these transactions are not necessarily subject to merger review in many jurisdictions. The US has always had a transaction value threshold for mandatory merger review (and revised it specifically after the internet boom to capture the acquisition of certain high-value, low-revenue targets), and the German and Austrian authorities introduced this in 2018 to catch transactions (particularly in digital markets) where turnover is low but valuation is high.

The European Commission canvassed opinion about introducing a transaction value threshold in 2017 but has not taken this forward so far, although Executive Vice-President Vestager has indicated her continuing interest in this area.

'Whilst a transaction value threshold is not currently anticipated at EU level, following the introduction of transaction value thresholds in Germany and Austria we can expect more acquisitions of successful smaller companies to come to the authorities' attention, raising the potential of referral up to the European Commission, which the parties should provide for in transaction planning.'

Martin Klusmann
Antitrust Partner,
Düsseldorf

In their substantive review, authorities continue to grapple with how to analyse the specific features of digital markets, in particular access to data and network effects. Across all industries, the authorities' focus on innovation theories of harm continues and companies should expect detailed review of this issue in future transactions. Particularly in focus is what merging parties' plans would have been absent the transaction at hand and the impact of those alternative plans on market structure and competitiveness.

Anticipating higher levels of intervention

As antitrust authorities become more interventionist generally, borderline cases that might have been cleared five to ten years ago now face closer scrutiny and risk. Recent examples in the US include the Federal Trade Commission's ongoing challenges to the *Tronox/Cristal* and *Evonik/PeroxyChem* mergers.

The EU General Court's judgment in *CK Hutchison*'s challenge of the European Commission's decision to prohibit its proposed acquisition of UK mobile operator *O2* is also anticipated in the first half of 2020. This judgment is expected to be the first to review the 'significant impediment to effective competition' test that was introduced for EU merger review in 2004, and the Commission's increasingly expansive interpretation of this standard over the last 10 years. The judgment will also be the first ruling by the EU Courts on what has been seen as a restrictive approach by the Commission to in-country consolidation in telecoms markets.

This follows the 2019 *UPS* judgment where the Court of Justice criticised the Commission for failure to disclose relevant evidence. That failure is now the basis for a €1.7bn damages claim by UPS against the Commission.

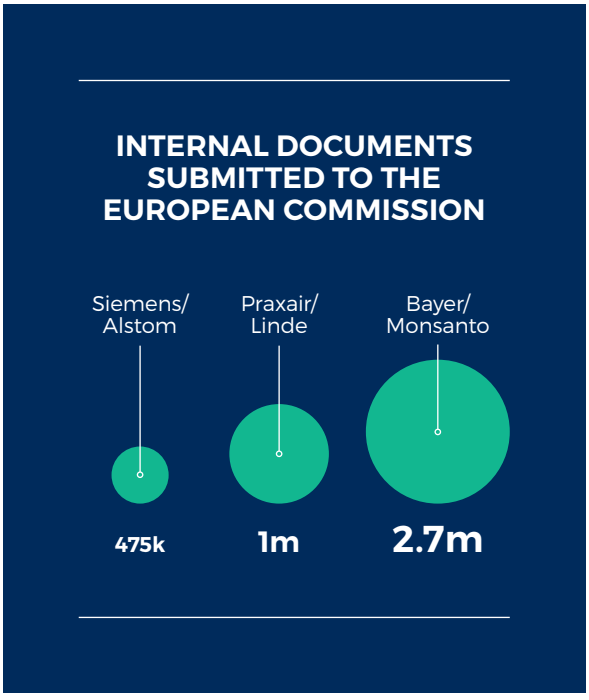
The role of evidence – internal and third party

As authorities seek to determine these increasingly complex issues within the confines of the merger review timetable, the parties' internal documents are an important focus. Companies should anticipate significant internal document production as part of the review.

Whilst customer feedback has always been taken very seriously by merger control authorities, issues raised by competitors are increasingly playing into authorities' theories of harm, and the parties will want to think carefully about likely third-party reactions in planning their merger review strategy.

'Buyers should take particular care in evaluating potential synergies and how and where these might arise when assessing the business case for the transaction – careless wording can raise concerns about the buyer's intentions that can be hard to dismiss.'

Deirdre Trapp
Antitrust Partner,
London



Impact on deal timing and certainty

With increasingly rigorous merger reviews around the globe, parties are seeking to provide for this in transaction documents through lengthening the period between signing and closing. Sellers wishing to achieve certainty of execution are requiring that buyers commit to making significant efforts to secure necessary merger control approvals, including seeking unconditional obligations to take all necessary steps to do so ('hell or high water' clauses). Both parties need to front load their antitrust analysis to be able to negotiate their position in relation to such requirements.

'No buyer covenant to achieve closing (even a hell or high water commitment) is necessarily risk free. Where the outcome of regulatory review is uncertain, merger parties ought to be prepared to negotiate reverse termination fees that come due if the buyer fails to receive the requisite regulatory clearances. The nuances of the triggers of these fees, whether they constitute liquidated damages, whether they are payable in the form of cash or strategic assets, and the exceptions to the triggers are among the issues that can make a difference for a well-advised party.'

Ethan Klingsberg
Global Transactions Partner,
New York

The potentially lengthy period between signing and closing is a period of uncertainty for the target business, and buyers will want to limit the potential for value loss and the defection of key staff during that period. Continued vigilance around potential gun-jumping can be expected from authorities around the globe, and care must be taken in providing for buyer oversight of and decisions regarding the conduct of the target business pre-closing. Authorities may raise questions on deal protocols during the merger review, so it is critical that this does not go further than necessary to protect the value of the investment.

2009–19
Increase in average time taken for complex cases notified to the European Commission

↑83% pre-notification

↑63% length of investigation

Increase in average length of phase 2 decisions

↑30% length of decision

Remedy strategy

Antitrust agencies have demonstrated their continued preference for structural (or quasi-structural) over behavioural remedies in recent cases. Remedies in innovation cases are almost always likely to be structural: the parties should think in terms of a stand-alone R&D unit unless it is possible to show that specific assets can be carved out without undermining their innovation potential. On the other hand, fair, reasonable and non-discriminatory (FRAND) type obligations would seem more likely to address concerns regarding big data. A 10-year series of FRAND commitments was recently accepted by the European Commission to address concerns regarding access to TV channels, streaming services and advertising space in relation to a proposed broadcasting acquisition.

'If an authority has concerns regarding what it views as a "killer acquisition", limited or targeted divestitures may not work (or be applicable) and the parties may need to convince the authority on the substance to avoid a prohibition or litigation.'

Jenn Mellott
Antitrust Counsel,
Brussels and Washington DC

The remedy process is dynamic and open to manipulation by interested third parties.

The remedy process has become significantly more complex over the last 10 years – merger control authorities are taking more time to review and test the parties' proposals and demanding larger commitments to address their concerns. The remedy process is dynamic and open to manipulation by interested third parties. Merging parties need to ensure there is enough time to address any concerns within the merger review timetable.

Concerns about the practicality of implementation and viability may lead to remedies that are greater in product and/or geographic scope than strictly necessary to remove the overlap between the parties. Fix-it-first or upfront buyer requirements are an increasingly material possibility to address viability concerns, and parties need to factor this into transaction planning. The parties may be prepared to accept a longer pre-notification period (including pre-notification market testing) to seek to reduce the authority's concerns before the formal filing timeline starts, but need to ensure sufficient time remains at the back end of the transaction timetable to provide for remedies negotiation and implementation.

'Antitrust authorities are market-testing remedies much more extensively than they did 10 years ago. The statutory deadlines for submitting remedy proposals do not always reflect this and may not provide enough time to negotiate a solution. It is therefore crucial to start the remedy process sufficiently early in the merger review.'

Thomas Wessely
Antitrust Partner,
Brussels

Looking ahead in 2020:

- **An enhanced compliance culture is essential for acquisitive companies:** internal documents are an increasingly important tool for merger review and authorities like to see documents written when the transaction was not yet in contemplation. You may not know what transactions you will want to do in the next two to five years, but you can try to avoid limiting your options through careless wording in your internal documents.
- Given the importance attributed to customer feedback, **consider likely customer reaction when assessing a potentially more difficult deal** from a merger control perspective, and aim to address anticipated concerns in the merger filings.
- Lack of resourcing may slow down the merger review if it is not possible to produce information or documents quickly in response to authorities' requests. For larger-scale transactions, **consider a dedicated project team** to co-ordinate the merger review process, and whatever the size of your deal, ensure that the executives who will be contributing to the merger review understand the demands of the process.
- In cases where remedies may be needed, plan for these from the outset and **be prepared to table remedies before the formal deadline** to allow sufficient time before the end of the merger review for market testing and negotiation.

04

Foreign investment

The impact of newly strengthened powers of political intervention in cross-border deals

Foreign investment control – the 'new normal' for cross-border deals

Foreign investment screening remains a key consideration for dealmakers in 2020. The ongoing trend is for governments to introduce new powers or strengthen existing powers to screen – and potentially impose restrictions on – foreign investments.

Against a backdrop of growing trade tensions, this is leading to heightened politicisation of deal-making and increased deal execution risk, or, at the minimum, delays to deal timetables. It is therefore more important than ever to incorporate effective strategies to identify and mitigate these risks into transaction planning from the outset.

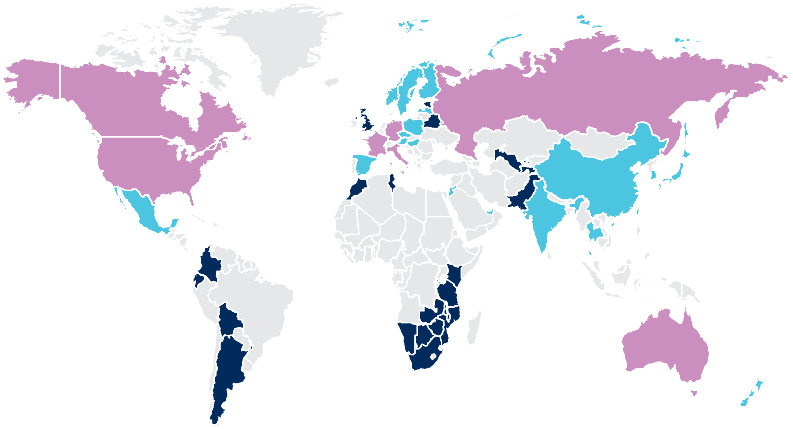
> **'CFIUS is now at version 3.0, with strengthened jurisdiction, enhanced enforcement powers, and millions of dollars of new resources to review transactions, monitor and enforce compliance, and co-ordinate with other countries, many of which are just advancing to versions 1.0 or 2.0 of their own foreign investment review regimes. This makes it critically important for dealmakers to develop a solid foreign investment review strategy early on.'**

Aimen Mir
CFIUS Partner,
Washington DC

Mandatory notification requirements are becoming more standard

A GROWING NUMBER OF JURISDICTIONS REVIEW INBOUND M&A

Over 100 jurisdictions now have investment laws



- Foreign investment review
- Public interest review
- Jurisdictions with increased enforcement activity

Over 100 jurisdictions now have foreign investment or public interest laws – most notably in Europe, Asia, Australasia and North America. Of these, a growing number are introducing mandatory notification requirements with respect to some foreign investments.

'2019 has seen a further increase of governmental powers to screen and potentially intervene in cross-border M&A. It is therefore critical to conduct a foreign investment filing risk assessment up front and factor this into deal structuring and planning.'

Alastair Mordaunt
Antitrust Partner,
Hong Kong

Even jurisdictions that were traditionally voluntary are introducing mandatory notification requirements in some sectors. In the US, national security review by the Committee on Foreign Investment in the United States (CFIUS) used to be entirely voluntary, but a mandatory notification regime was introduced in October 2018 with respect to investments in US critical technology companies. By February 2020, investments by foreign persons in which a foreign government holds a 'substantial interest' (currently expected to be 49 per cent) will be subject to a mandatory filing requirement if the target US business is a critical technology company, is involved in critical infrastructure or holds certain sensitive personal data.

In the UK, legislation for a stand-alone national security review process has been proposed for 2020. Initial government analysis suggests a much greater level of review and intervention under the new rules than has historically been the case. While a voluntary system, those familiar with the UK's voluntary merger control regime will appreciate that the regime is likely to have real enforcement impact.

'The UK is moving towards greater levels of intervention, with new rules on the horizon expected to increase the level of review significantly. In 2019, enforcement of national security issues under the existing rules was directed for the first time at acquisitions by private equity and pension funds – including the take-private of Inmarsat by a consortium of US, Canadian and UK funds – indicating that all types of buyer should expect scrutiny, irrespective of their country of origin.'

Alex Potter
Antitrust Partner,
London

Co-operation and convergence of foreign investment regimes

Co-operation among competition authorities worldwide has been the norm for several years with established frameworks and networks. International consensus has been built around procedural and substantive issues. Historically, there has not been similar convergence or co-operation among foreign investment review authorities, but that is changing to some extent.

While national foreign investment regimes can differ materially in terms of the types of transactions captured, the key sectors at risk and the types of concerns identified, we are seeing increased co-operation and convergence be it through:

- formal frameworks as in the EU;
- increased informal exchange between relevant authorities; or
- cross-fertilisation of existing ideas across jurisdictions.

There are known examples in which CFIUS has reached out to its counterparts in other jurisdictions with respect to a particular transaction, and legislation to be implemented by February 2020 directs CFIUS to undertake greater international engagement in support of US national security interests. With the possibility of countries (and their investors) being 'excepted' from certain of CFIUS' authorities – based, in part, on the robustness of the respective jurisdiction's foreign investment regime – there will be greater incentives for convergence and co-operation.

The EU is also incentivising greater convergence and co-operation, at least between EU member states. The new EU rules, applicable from 11 October 2020, provide for a co-operation mechanism between member states and the European Commission in screening direct investments from outside the EU on public security grounds. While the ultimate decision over whether to permit a foreign investment will remain with member states, the mechanism allows for information to be requested from the national authorities, and for the European Commission to issue non-binding opinions to which member states must give 'due consideration'.

The new rules are applicable retroactively in part, so opinions may be issued up to 15 months after the investment is completed. This means that foreign investments completing from 11 July 2019 onwards face possible intervention via the co-operation mechanism once the mechanism is established. Such transactions could, depending on available remedies under national law, be subject to enforcement action against the investment post-completion, so special care should be taken when assessing whether a foreign investment filing should be made.

'The new EU co-operation follows a series of increasingly protective foreign investment measures in European countries. Currently, more than half of the EU member states have some form of foreign investment screening mechanism: it will be interesting to see if others will now follow suit, and how proactive the Commission will be in issuing non-binding opinions to national governments.'

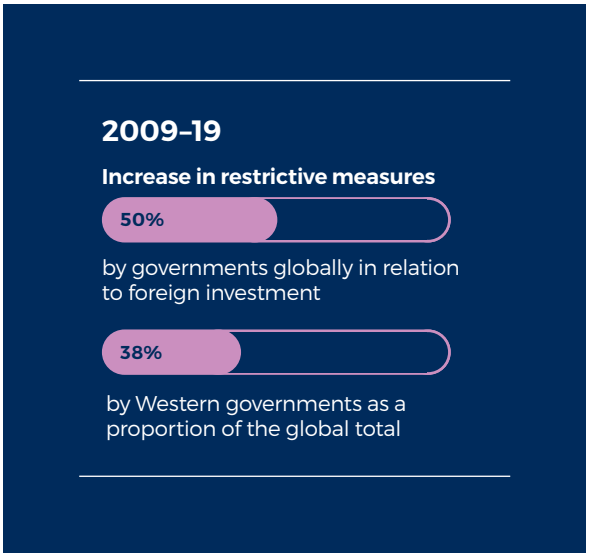
Juliane Hilf
Disputes and Regulatory Partner, Düsseldorf

Growing intervention by governments worldwide

It is not just the number of regimes and their respective review mandates that is expanding: the longer-term trend is towards greater intervention by national authorities. In the US, for example, the number of transactions subject to mitigation, prohibited or abandoned in light of CFIUS opposition has been growing steadily.

This enforcement trend is likely to continue as national authorities acquire greater powers for intervention:

- in France, new powers in 2020 will allow the Minister of the Economy to unwind, amend or prescribe interim measures in relation to transactions that have been implemented without prior authorisation; and
- in China, against the backdrop of US–China trade tensions, it is possible we will see an increased number of cases reviewed under China's national security regime that until now has only been rarely used.



Broadening the scope of foreign investment control

Foreign investment review has extended far beyond what was traditionally considered to constitute 'national security interests' and now often captures a wide range of sectors. The focus is increasingly on infrastructure (communications, energy, transport, defence), advanced (largely commercial) technologies (AI, nanotechnologies, quantum computing, robotic systems) and big data.

The interpretation of what is included in these sectors can be surprisingly broad, with a particular customer contract or kind of data being enough to bring a transaction within the scope of review. The concept of 'critical' infrastructure or technology is increasingly used by regimes, without a clear definition of 'critical'.

In Japan, the scope of review was recently widened:

- firstly, in terms of sectors subject to review, to include IT and telecommunication technology manufacturing, software development and infrastructure provision; and
- secondly, in terms of the extent of involvement in the target company, by lowering the filing threshold from shareholdings of 10 per cent to 1 per cent.

New rules in Italy have extended the scope of foreign investment review to 5G networks. A number of jurisdictions, such as Germany, have broader, non-sector-specific regimes. This will also be the case in the UK if the proposed new rules are enacted, after the existing rules were recently broadened to cover certain aspects of computing hardware and quantum technologies.

'The rapidly expanding scope of foreign investment controls is impacting deal risk in multiple sectors. Targeted due diligence informed by expertise in the types of acquisitions that may be caught is essential in order for foreign investment risk to be identified sufficiently early in deal planning.'

Paul Tiger
Global Transactions Partner,
New York

Lower trigger conditions leading to more reviews

In the past, many foreign investment regimes only caught either controlled investments or investments above a certain shareholding and of a certain size. Now, there is a growing trend towards lowering the thresholds to capture smaller minority and non-controlling investments:

- Germany's foreign investment rules capture any transaction relating to critical infrastructure where as little as 10 per cent of shares is being acquired;
- in the US, CFIUS' expanded jurisdiction to review non-controlling, non-passive investments of any size in certain US businesses will be fully implemented by February 2020; and
- in the UK, while the proposed new rules will require a level of influence to be acquired, it will be a low level, and there will be no materiality-based threshold requiring the target to have a specified level of turnover in the UK (with the current turnover threshold having already been reduced to £1m in 2018 for intervention in certain industries).

Looking ahead in 2020:

- **Conduct a foreign investment risk assessment up front:** just as a cross-border deal requires a multijurisdictional analysis of antitrust filings, an analysis of foreign investment implications is also advisable, particularly in the most 'at-risk' sectors and/or where one of the investors is state-owned or has other ties to the state. Remember that the deal may be subject to foreign investment review even if there is no corresponding antitrust filing in that jurisdiction.

- **Anticipate detailed questioning on ownership structures:** remember that reviewing authorities may require extensive information on ownership structure, transaction rationale and target activities beyond the information typically requested by the antitrust authorities. This should be factored into timetables and deal planning. Private equity funds and other financial investors should be prepared for questions about fund structure and the access afforded to limited partner investors.

- **Consider the transaction structure:** authorities are gaining greater powers to review a wider range of transaction types (eg minority stakes, asset acquisitions), but certain deal structures, such as consortia arrangements or limitations on shareholder rights, can minimise the review process.

- **Have a clear communications strategy from the outset:** close contact with the relevant authorities to ensure that decisions are based on an accurate understanding of the technologies and business activities of the target company is critical. Engagement with authorities and relevant stakeholders (including politicians) is also key to ensuring the investment rationale is properly understood.

05

Antitrust for financial investors

Navigating risk when bidding in a consortium

An uptick in consortia deals and buy and build strategies

We have seen a sharp uptick in consortia deal volumes over the past 10 years. Consortia deals can be a means to pool resources to go after an asset that is otherwise too big to acquire alone. Or they can involve financial investors engaging strategic partners with a view to combining assets to realise synergies, bring different expertise to the group or address capability requirements in remedies processes. Private equity investors are increasingly employing buy and build strategies or engaging in bolt-on acquisitions, via both joint investments and sequential deals.

Pooling resources can have material benefits – but can also create risk. What should financial investors be thinking about in these scenarios, both before the investment and once it is made?

2009–19

98%

increase in deals involving consortia, with those involving mostly financial investors growing by **259%**

'When a financial sponsor wants to execute a joint bid with a strategic partner for an asset in the same space, this can make antitrust come into focus at an early stage in a way that has historically been more familiar for strategic investors than financial sponsors.'

Victoria Sigeti
Global Transactions Partner, London

The bigger the consortium, the greater the execution risk

Acquiring targets as part of a consortium increases the likelihood of substantive competitive overlaps between the target and other portfolio company interests held by the investors. This is especially the case if the consortium includes strategic players and/or financial investors that have existing portfolio companies that are active in the same sector, even if they only hold minority stakes. It is crucial to identify potential competitive overlaps early in the process in order to be able to properly assess the level of antitrust risk and an appropriate strategy for dealing with it, as well as allocating it among the parties.

'Minority stakes and cross-directorships held by consortium members in competitors of the target are increasingly featuring as part of substantive antitrust assessments. This can surprise investors who haven't identified these overlaps in advance.'

Rich Snyder
Antitrust Counsel, Washington DC

Generating multiple filings

More consortium members generally leads to a greater number of merger control and/or foreign investment control filings, with many jurisdictions triggering on the basis of the turnover and/or assets of acquiring entities who will exercise 'control', even if the target has no turnover. Even minority stakes not amounting to control (with shareholdings as low as 10 per cent) can give rise to filing requirements in some jurisdictions.

'The scope and nature of the operations of consortium members, as well as the arrangements between them, will drive the number and type of filings required and the length of time between signing and closing. In a competitive auction process, analysis of the impact of this should be carried out ahead of consortium formation as it may colour how the consortium's bid is viewed by the seller.'

Patrick Ko
Global Transactions Partner,
London

Merger filings can sometimes be avoided where consortium members adopt a so-called 'shifting alliances' structure, but this means none of the consortium members can have the ability to block important strategic decisions on a stand-alone basis. This kind of structure can attract close scrutiny to make sure it is not seen as an avoidance mechanism, especially in China.

Financial investors also need to tread very carefully around so-called 'warehousing structures' where the economic risk and upside of an asset are allocated to an ultimate purchaser that is not the notifying party. Authorities are taking tougher enforcement action against such two-step structures, particularly if they are seen as having been designed to avoid merger control at step one.

'Straightforward financial investments where antitrust is simply a process point to be addressed later are increasingly a thing of the past. Financial investors should be thinking early and carefully about antitrust and the part it can play in their deal planning.'

Winfred Knibbeler
Antitrust Partner,
Amsterdam

Addressing capability requirements in relation to remedy purchases

Businesses being sold as part of a remedy can make for attractive investments, with the prospect of taking advantage of the constrained timetable faced by the sellers. But antitrust authorities need to approve the identity of a purchaser of a remedy divestment business and they apply strict requirements regarding expertise and capability in order to make sure that the accepted remedy purchaser will be capable of replacing any lost competitive constraint as a result of the merger.

To satisfy these requirements, financial investors may need to team up with established industry players. A balance needs to be struck here to create the necessary credibility without raising new substantive antitrust issues, which can be a barrier to approval.

Financial investors may need to team up with established industry players.

'Being a remedy taker can put investors in a strong negotiating position but the approval process requires careful navigation and upfront planning.'

Rafique Bachour
Antitrust Partner,
Brussels

An alternative model: buy and build

An alternative way of benefiting from strategic partnering without facing the complexities and risk execution of a joint bid is to structure investments sequentially. This allows the initial investment to be made essentially free of substantive antitrust risk. But it is important to have a clear antitrust strategy and execution plan from the outset:

It is important to have a clear antitrust strategy and execution plan from the outset.

- Investors need to identify their target market and properly understand competitive dynamics and how they will be assessed. What consolidation transactions will be doable?
- Are remedies likely to be needed for later transactions and, if so, can they be easily executed without undermining deal economics or synergies? Who will be the purchaser?
- How best to execute more straightforward clearance processes to lay the ground for more complex acquisitions down the line?
- Maintain throughout a pro-competitive deal rationale and avoid the creation of documents that could undermine the antitrust strategy.

'We are seeing a lot more private equity clients looking at industry consolidation. When deal economics depend on being able to consolidate later, investing up front in careful antitrust analysis and strategy design can really pay dividends.'

Marie-Claire Strawbridge
Antitrust Counsel,
London

Avoiding collusion in an M&A process

Financial investors should be aware of the risk of collusion when teaming up with consortium members. There are often entirely legitimate reasons for acting as part of a consortium or with a strategic partner – for example where the size of the target is such that it cannot be acquired on a stand-alone basis, or there is a legitimate need to involve an established industry player in order to be able to effectively manage and grow the target post-transaction. As long as there is an objective justification and creation of the consortium does not lead to an elimination of competition for the relevant asset, this risk can usually be managed.

Looking ahead in 2020:

- **Prepare for new rules on information exchange:** in revising its horizontal co-operation guidelines this year, the European Commission is expected to provide guidance on the circumstances in which cross shareholdings can create an inappropriate conduit for information exchange. This will be a good time for investors holding non-controlling interests in more than one competing portfolio company to refresh their processes.

- **Review antitrust compliance and risk on any cross-directorships:** enforcement and/or the introduction of new legislation to address potential dampening of competition arising from so-called 'common shareholdings' across the same industry has been threatened in the past on both sides of the Atlantic. US agencies are this year expected to focus on cross-directorships, bringing enforcement actions where representatives of the same private equity company sit on the boards of competing companies. Investors should ensure that where they have investments across the same industry they have appropriate confidentiality procedures in place.

06

Supply and distribution chains

Time to review your contracts as laws are updated for the 2020s economy

Time to review your supply and distribution chains

In 2020, all businesses are advised to review the supply and distribution chains they depend on. Whether they source raw materials or components, purchase wholesale for on-selling, or sell luxury or high-tech goods to customers through different channels, the rise of e-commerce is raising multiple new legal issues (see theme 1).

As legal systems adapt to these changes, the challenge for businesses engaged in cross-border trade is not just to deal with changes in rules and policies, but also to factor in the differences of approach in different parts of the world:

- at one end of the spectrum is the US, where arrangements between players at different levels in the supply and distribution chain will rarely present material antitrust risks;
- EU law prohibits certain distribution practices such as resale price maintenance (RPM) even without proof of anti-competitive effects, and others when they are shown to affect competition. But differences remain within the EU: in Germany, for example, even when EU rules are being applied, the analysis typically will be stricter and less economics based than in a case before the European Commission and many other member states;
- in China, enforcement activity has developed very rapidly in the last few years to the point where RPM and certain other distribution practices are scrutinised to a level comparable to the EU, and the costs of non-compliance can be significant; and
- at the far end of the spectrum there are jurisdictions such as Japan and Korea, where the concept of abuse of superior bargaining position is actively used to address market failures and catches some practices that would not normally present a risk in the EU.

The EU is currently reviewing the regulation and guidelines that govern distribution practices to make them fit for the next decade.

'In the United States, although vertical restraints have been the focus of a few recent high-profile cases and are at the centre of the ongoing big tech investigations, US companies generally enjoy a comparatively relaxed attitude towards vertical restraints on their home turf. As a result, it is important for them to keep abreast of the very different rules that prevail across the rest of the world.'

Tom Ensign
Antitrust Partner,
Washington DC

Increasing enforcement activity in Europe and China

After many years of enforcement being left largely to Europe's national authorities, the last couple of years have seen an uptick in EU infringement decisions with a clear pipeline to come in 2020 and beyond. In fact, with cartel leniency applications down, resources appear to be being redeployed to focus on distribution practices and dominance investigations.

China will intervene to address not only China-specific issues but also whether distribution practices outside China have ramifications in China – and the State Administration for Market Regulation (SAMR) will come calling if it suspects infringements. It will continue to ramp up enforcement in this area, with RPM an especially hot focus, along with refusal to deal, exclusivity, tying/bundling and other forms of unilateral conduct that adversely affect the Chinese consumer and industry interests. New guidelines give advice on other terms, and coming case law should clarify how anti-competitive effects and efficiencies will be taken into account. Private actions are also on the rise: major platform JD.com, for example, has been joined by smaller platforms to sue another major online platform for allegedly imposing exclusivity commitments on its suppliers.

'In just a few years China has placed itself centre stage, going rapidly from its first major case on RPM in 2013 to the broad range of infringements that it tackles today.'

Ninette Dodoo
Antitrust Partner,
Beijing

New distribution rules coming up in Europe

The EU is currently reviewing the regulation and guidelines that govern distribution practices to make them fit for the next decade. The review is still at an evaluation stage (a staff working document is expected in Q2/2020). This is a huge project and the specific changes will not be known for some time. But it is highly likely that there will be revised and new guidance in a broad range of areas, many of which concern e-commerce and platforms. They include:

- RPM: some argue for the rules to be more generous;
- price parity clauses or 'MFNs': national approaches have diverged and EU guidance is needed;
- agency: when can a platform benefit from the rules that take agency arrangements outside the scope of antitrust review?
- 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; and
- dual distribution: what if a supplier competes with its retailers, and what are the implications for flow of information between them?

'Businesses still have time to make views known to the European Commission, and this will be welcomed if they bring new information or arguments to the debate.'

Tone Oeyen
Antitrust Partner,
Brussels

New European settlement procedures

The European Commission recently formalised a new settlement procedure for non-cartel cases, under which companies receive often significant fine reductions for co-operation in the infringement proceedings. In 2019, this benefited a number of companies and should be factored in as a possibility when a company uncovers wrongdoing or is faced with investigation.

Some EU member states such as Austria and Germany go further, offering full immunity (at least informally) where a company discloses an infringement such as RPM, presenting complicated strategic choices to a potential whistleblower if it is not clear which authority will take jurisdiction.

2020 may see a move towards convergence here, though the ECN+ Directive unfortunately does not address this point and only requires EU member states to have leniency programmes for horizontal restrictions.

'The European Commission's new settlement procedure for non-cartel cases is a great step forward, but it should now move to also offering full leniency, providing for a level playing field also for these types of infringements.'

Tobias Klose
Antitrust Partner,
Düsseldorf

Looking ahead in 2020:

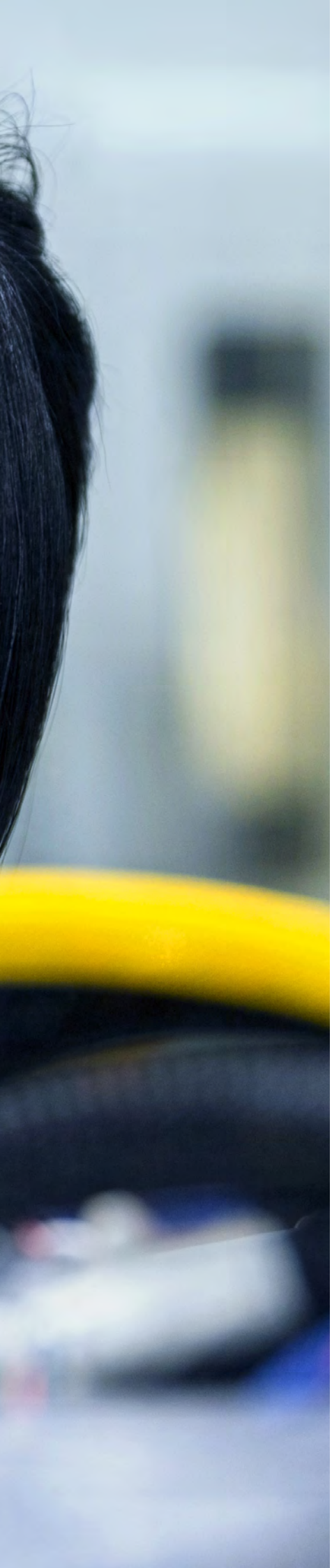
- **Be aware of procedural options:** be familiar with the potential for fine reduction or even full immunity in different jurisdictions if you discover possibly illegal conduct or come under investigation.
- **Keep an eye on EU law reform:** stay abreast of developments as the revised regime takes shape and make any concerns known to the Commission.
- **Delay internal revision exercises:** any major review of corporate distribution policy will be more useful once the future shape of the EU rules is clear, which may not be until shortly before they enter into force in June 2022 (without prejudice, of course, to infringements of the current law having to be terminated without undue delay).
- **China has arrived:** compliance and risk management now need to be taken as seriously in China as in Europe – use new guidelines to review your contracts and practices.
- **Abuse of superior bargaining position:** watch out for jurisdictions such as Japan and Korea, as well as some European countries, where this concept may extend the range of prohibited conduct beyond the usual categories of antitrust infringement, particularly for big tech.

We have contributed to the European Commission's ongoing review of its distribution rules and will continue to engage in discussions through 2020.

Follow developments with us:
distributionrules@freshfields.com

07
Innovation

Mitigating regulatory risk when competing to innovate



Agency focus on industry collaborations to bring innovative products and services to market

Industry 4.0 and sustainability developments require companies to collaborate more closely than ever before with (actual and potential) competitors, suppliers and distributors to bring innovative products and services to market. Yet these ties can raise competition concerns that are new and innovative compared to the theories of harm that authorities have investigated in more traditional sectors in the past.

> **'Increased scrutiny from antitrust agencies is now a fact of life – particularly in sectors whose innovations are driving the global economy. Businesses need to be circumspect and forward-looking so as to manage potential antitrust risks in their innovation projects – particularly those that involve collaborations with actual or potential competitors.'**

Rod Carlton
Antitrust Partner,
Brussels and London

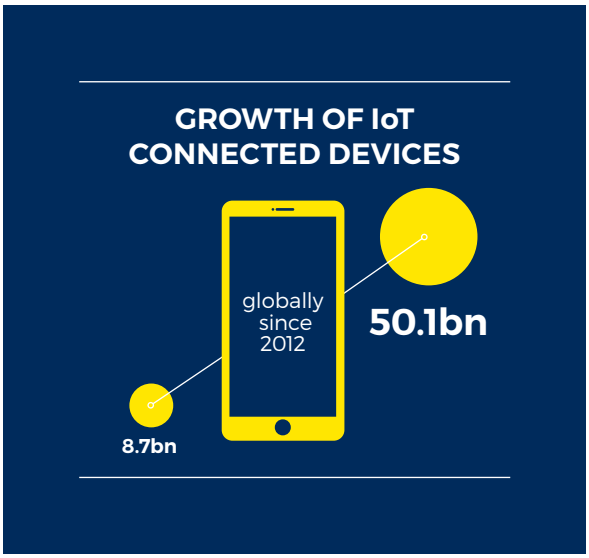
For example, in the *Car Emissions* investigation, the European Commission is investigating whether a collaborative effort among automobile manufacturers to co-ordinate on the development of clean emissions technology amounted to collusion to *limit* development. In the US, the Department of Justice has opened an investigation into whether automobile manufacturers violated antitrust law by agreeing to meet California emissions regulations, and Assistant Attorney General Makan Delrahim has emphasised that collusion among implementers of technological standards can push down patent licensing rates, thereby diminishing incentives to innovate.

Investigations such as this carry a serious risk of 'chilling' dynamism in rapidly advancing technological landscapes, as often no legal precedent or regulatory guidance exists to provide comfort that a collaborative effort can be structured in a way that is compliant with competition law. This is particularly true if competition regulators look to challenge R&D efforts as collusive under a theory that an even higher level of innovation could have been achieved than resulted from the collaboration. Furthermore, the European Commission strongly believes that sustainability is fostered by competition and does not readily accept that consumers' reluctance to pay for more expensive sustainable technology may contribute to the lack of such competition.

'It is crucial to bear in mind that authorities take agreements preventing competition to the benefit of the environment very seriously. The authorities expect that companies should individually aim to overachieve environmental regulations. Any agreement to promote an industry standard, even if higher than required by the relevant legislation, may, therefore, be considered anti-competitive.'

Uta Itzen
Antitrust Partner,
Düsseldorf

Big data and the internet of things: innovation in the face of increased antitrust challenges



Manufacturers of a range of physical objects have been embedding these products with sensors and network connectivity that allow them to collect user data. The complex pattern of interactions between the players involved in the Internet of Things (IoT) and the data created and collected through these objects creates a number of novel and complex antitrust challenges.

A key area for discussion arising in the sector relates to the obligations of companies that amass vast amounts of data from connected devices. Certain groups, such as the European Consumer Organisation, have called for companies with extensive, high-value datasets to share access to these datasets with competitors to avoid foreclosure of competition and 'data dominance'.

One important battleground in 2020 for 'data dominance' and the IoT is likely to be in the 'connected car' industry. Manufacturers of cars that include connected devices have an incentive to keep the data collected by these devices to themselves and not share it with, for example, suppliers of replacement parts, repair services or companies offering new services further down the value chain and in aftermarkets. In other situations, there may be questions about who the data belongs to, for example data collected by a sensor on a tyre may belong to the automobile manufacturer, the tyre manufacturer or both.

Ongoing litigation between *Daimler*, *Nokia*, *Sharp* and *Conversant Wireless* is also set to steer how licensing for connected cars will be managed. Judges are hearing arguments in Europe's first standard essential patents (SEP) dispute concerning connected cars, with much of the fair, reasonable and non-discriminatory (FRAND) arguments centred on the question of where in the value chain the connected technology should be licensed. The principles established in these (4G) cases will be applied to behaviours in the 5G era in the automotive industry and beyond.

In Europe, Executive Vice-President Vestager focused on technology in her first term as Competition Commissioner, and this focus will only be intensified in her new dual role, particularly as France and Germany call for further protection of the EU's 'technological sovereignty'.

In the UK Supreme Court, *Huawei* and *ZTE*'s challenge to the UK court's setting of a global FRAND portfolio rate for SEPs will be relevant for all businesses seeking to innovate and to license IoT-related SEPs on FRAND terms. Depending on the outcome, the UK may become the single go-to destination for court determination of a global rate. Breaches of commitments to license IoT-related SEPs on FRAND terms could amount to anti-competitive conduct and whilst patent pools offer some benefits, questions may be raised about their enforcement strategies.

'FRAND litigation is fast-moving and a global battle is underway as to whether it is right for any jurisdiction to decide FRAND terms with global reach. Owners of SEPs are leveraging creative legal strategies to seize their venue of choice and implementers need to prepare their defence strategies in advance.'

Laura Whiting
IP Counsel,
London

Companies that build their business models using algorithms and AI should be aware that they will be held accountable for algorithm-based antitrust infringements.

Artificial Intelligence (AI) in price setting continues to raise antitrust issues

The increasing use of AI is set to be one of the biggest value-adds for innovative companies, encompassing smart advertising and online marketing, the identification of new trends and fashions, and even dynamic pricing according to demand and supply. This brings AI under close scrutiny from antitrust authorities across the world.

Respondents to the European Commission's e-commerce inquiry

53%

track online prices of competitors

67%

of those track prices with software

78%

of those subsequently adjust prices

Companies that build their business models using algorithms and AI should be aware that they will be held accountable for algorithm-based antitrust infringements.

Recent years have already seen fines against companies in connection with so-called 'classic' digital cartels that use pricing algorithms to execute an unlawful price-fixing agreement, such as the *Posters* case in the UK and the US. Pricing algorithms can also give rise to a 'hub-and-spoke' scenario where competitors (the spokes) use the same third-party provider's pricing algorithm (the hub), which has the effect of equalising prices and/or causing prices to increase or decrease in concert among companies using the same algorithm.

This type of conduct is the subject of the EU Court of Justice's *Eturas* judgment, which involved the administrator of an online travel booking system sending an electronic notice to its travel agents informing them of a new restriction that capped discount rates. The Court held that all travel agents who were aware of the message could be presumed to have been participating in the cartel, unless they pro-actively distanced themselves from the message.

Moreover, European authorities also maintain that even if no human has access to strategic information, machine-to-machine (M2M) communication could lead to collusive behaviour. Autonomous algorithms could learn to behave in an actively collusive way and charge higher prices, and companies may be held liable for the outcome.

'Companies should take care in designing and deploying algorithmic pricing and similar types of artificial intelligence, as antitrust enforcers around the world are developing deeper expertise with technology and appear eager to probe deeply into this area.'

Andrew Ewalt
Antitrust Partner,
Washington DC

Looking ahead in 2020:

- **Be cautious when co-operating in pursuit of 'green' innovation:** companies should ensure that legitimate co-operation does not spill over into anti-competitive collusion, as it is clear that authorities are not taking a more lenient approach with agreements with a 'green' agenda. Asking the authorities for guidance bears the risk of triggering a full investigation because the agencies may use it to prove their own 'green' profile.

- **Act smarter and sooner to develop your data strategy:** consider whether it would be strategically sensible to join specific standard-setting organisations and/or to contribute to standardisation efforts to influence the direction in which relevant standards are heading. Companies should stay abreast of upcoming marker cases in the sector, and prepare for increased antitrust scrutiny in 2020 by adjusting their commercial data strategies accordingly.

- **Prepare for increased antitrust scrutiny of AI:** companies using pricing algorithms should implement 'compliance by design' – algorithms should be programmed to exclude any risk of digital collusion (even without human intervention). Companies should understand how their AI systems work and be aware of their outcomes, acknowledging that they may be responsible for any anti-competitive practice arising from the use of AI.

We are engaging with the European Commission on the current review of its horizontal co-operation rules.

Contact us if you would like to know more:
horizontalcooperation@freshfields.com

08

Antitrust in court

The future for class and collective actions

New legislation in Europe to facilitate mass claims

The EU continues its initiatives to facilitate mass claims before national courts. The proposed Directive on Representative Actions enables qualified entities to bring claims for compensation on behalf of groups of consumers who have suffered harm when a trader has breached certain EU legislation. There are concerns that some of the proposals, with different treatment of domestic and cross-border actions such as on funding, will lead to forum shopping and claims being brought in the country with the least safeguards. However, following adoption of a formal position by the Council on 28 November 2019, the new regime is looking likely to become law in 2020.

> **'Mass claims, including in the competition sphere, are being encouraged in the EU and will continue to be risks that companies will need to take into account.'**

Onno Brouwer
Antitrust Partner,
Amsterdam and Brussels

The Commission is also due to publish its evaluation of the impact of the Antitrust Damages Directive. It has, in the meantime, enacted guidance for national courts to help them deal with such claims. The latest is the draft communication on the protection of confidential information for the private enforcement of EU competition law by national courts, which will most probably be adopted early in 2020.

The UK's regime will develop apace as key cases are decided

In the UK, all eyes are on the Supreme Court appeal in the seminal *Merricks v Mastercard* case, to be heard in May 2020. That case, in which we are defending Mastercard, will decide fundamental issues that will influence the future direction of UK collective proceedings under the UK's Consumer Rights Act 2015 regime, including the threshold for certification of claims and whether class action aggregate damages awards need to reflect the compensatory damages principle. Other UK class actions (relating to trucks, rail tickets and FX instruments), currently stayed, will revive after the *Merricks* decision and the regime will move forward.

The rail tickets case is the first UK class action that does not rely on a prior infringement finding of a competition authority and the first UK class action relating to an alleged abuse of dominance. The case seeks to expand the boundaries of antitrust class actions as it is based on alleged mis-selling to consumers, not a conventional antitrust breach. This trend is likely to continue, for example by claimants seeking to frame alleged data privacy breaches as antitrust infringements.

'Whatever the result of the *Merricks v Mastercard* appeal, competition class actions are here to stay and there will be a rush of activity in late 2020 as the stayed cases all revive. We can expect the regime to develop apace thereafter.'

Mark Sansom
Antitrust and Dispute Resolution Partner, London

German claims models put under scrutiny

In the absence of a true class action regime in Germany, plaintiffs' lawyers have set up special purpose vehicles to which potential cartel damage claims have been assigned. In some cases, the special purpose vehicles pursue claims on behalf of more than 3,000 assignors in consideration of a significant share of the outcome of the litigation. Defendants have challenged such business models which are now under detailed scrutiny by the courts, for example in Munich and Hanover.

In 2020, we might also see whether a model declaratory action (*Musterfeststellungsklage*), introduced in 2018 to allow collective redress by consumers, will be brought in the context of cartel damage claims, which so far has not been the case.

'2020 will be an exciting year for class actions in cartel damages cases in Germany as we will hear the courts' views on the business model of bundling thousands of claims in special purpose vehicles by way of assignments.'

Roman Mallmann
Dispute Resolution Partner, Düsseldorf

Claimants gearing up for the new Dutch regime

From 1 January 2020, new Dutch legislation (*Wet Afwikkeling Massaschade in een Collectieve Actie* (WAMCA)) will modernise and improve the current regime for collective actions. Claims vehicles will be able to claim monetary damages on behalf of injured parties and not mere declaratory judgments as before.

But claims vehicles will be subject to stricter requirements in terms of governance, objective, representation and funding. The court will appoint a US-style quasi-lead plaintiff (exclusive representative) and there must be a sufficiently close connection with the Netherlands based on the residency of the majority of the class, the seat of the defendant or the location of the damage event.

Class members domiciled in the Netherlands may opt out whereas an opt-in regime applies for those who are domiciled elsewhere. Claimants are reportedly gearing up for the introduction of the legislation.

'Major revisions of the regime for collective actions in 2020 are expected to bring more mass claims to the Netherlands. The new law will enable damages claims on behalf of the injured parties, so improving the position of claimants seeking redress.'

Ulrike Verboom
Dispute Resolution Principal Associate, Amsterdam

High stakes for class certification in the US

In the US, federal courts have ruled against class certification in several highly visible cases, primarily due to the inclusion of uninjured class members in the class definition. If, during class certification, claimants offer no method to show injury and causation on a class-wide basis by common evidence or to exclude uninjured claimants, US courts are increasingly likely to deny class certification. *In re Asacol* (1st Cir. 2018) and *In re Rail Freight* (D.C. Cir. 2019) suggest that US courts consider the existence of more than *de minimis* uninjured class claimants to be a serious hurdle to class certification. Going forward, class counsel is likely to propose a method for dealing with uninjured claimants to certify a class.

'US courts of appeal have again followed the Supreme Court in resolving significant evidentiary issues before certifying a class action. Counsel need to appreciate the heightened stakes at the certification stage and will come prepared to deal with uninjured claimants.'

Eric Mahr
Antitrust Partner, Washington DC

Looking ahead in 2020:

- **EU:** while the European Commission continues its work to facilitate antitrust damages and collective consumer actions across the EU, member states are keen not to dilute their own, sometimes recently adopted or improved, collective consumer claims legislation. Either way, we will see many more of such claims arising in Europe.
- **UK:** given the lead that the UK has within Europe in the development of antitrust class actions, we can expect such claims to be a prominent feature of the UK competition landscape post-Brexit, given that there will remain clear advantages to bringing such claims in England.
- **US:** litigating uninjured claimant issues is now a threshold factor in US class actions, forcing defendants to confront the complexity and costs of economic experts before class certification. Courts have certified classes that include up to 6 per cent uninjured claimants but have refused to certify classes with 10 per cent or more uninjured claimants, taking into account both the ratio and the total number of uninjured claimants.

09

Antitrust and the consumer

The role of consumer protection in antitrust investigations and remedies

Competitive markets that benefit consumers

The core objective of most antitrust regimes around the world is to promote a competitive marketplace that benefits consumers through lower prices, higher-quality products and services, more choice and greater innovation.

A closely related issue that is gaining more attention is whether businesses are engaging in unfair or deceptive commercial practices that, while not strictly anti-competitive, may nevertheless undermine consumer confidence in markets with knock-on consequences for market competitiveness in the longer term. Indeed, some have expressed concern that such practices may be more common in highly competitive consumer-facing markets where margins are tight and firms may be tempted to 'race to the bottom'.

Many antitrust authorities – including in Australia, Italy, the Netherlands, Singapore, the UK and the US – already have concurrent consumer protection and antitrust powers because of the complementary nature of the issues. However, spurred on by perceptions about the impact on consumers of corporate growth and increased digitisation, many jurisdictions are now asking whether their current toolkits are up to the job or whether their powers should be strengthened in order to protect consumers irrespective of the state of competition in a market.

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Rising pressure for more to be done to protect consumers is having a number of consequences for businesses' risk agendas.

Blurring the lines – antitrust authorities are paying more attention to consumer protection issues in investigations and remedies

A wider range of issues than would traditionally be thought of as falling within the realm of consumer law, data protection or public policy are being assessed during antitrust reviews as potential adverse effects of a deal, market practice or commercial conduct. Some antitrust authorities have said, for example, that reduced privacy protection could be viewed as a competition problem if it results from an increase in market power that arises due to a loss of competition.

As a result, antitrust authorities are exploring a broader array of potential consumer concerns as part of their investigations and market studies rather than focusing more narrowly on traditional competition issues. They are also considering these issues when designing remedies.

In Europe, Executive Vice-President Vestager is expected quite soon to make more use of sector inquiries to identify harmful practices in certain markets. These inquiries tend to be wide-ranging in scope and are conducted without the legal constraints of a formal competition infringement investigation.

In the UK, the Competition and Markets Authority (CMA) already has a combined competition and consumer role, but it is strengthening its consumer protection role by taking advantage of a more developed enforcement toolkit and by taking action to address consumer concerns, either as part of a wide-ranging market study or on a stand-alone consumer law basis.

> **'Protecting vulnerable consumers is a strategic priority for the UK's CMA, which also recognises that anyone can be vulnerable in different contexts. Consumer-focused solutions will therefore be market- and context-specific.'**
>
> 
>
> **Sarah Jensen**
> Antitrust Counsel,
> London

Similarly, the recently appointed Chairman of the Italian Antitrust Authority (IAA) underlined that '… it must be clear that free competition is not in itself an absolute value over and above, but a value that must be co-ordinated and harmonised with other general interest objectives. We should, for example, consider that consumers are also workers and tax-payers, which means that we must always fully assess the effects of any envisaged decision to ensure that it does not in fact cause more harm than good to citizens…'

Through 2020, we are likely to have greater clarity on the scope and nature of any competition and consumer-related proposals that may result from these studies and investigations. Developments should be watched closely by companies in all sectors.

Governments are strengthening their consumer protection laws

A growing perception among politicians and regulators that markets might be competitive but still produce outcomes that harm consumers, and that antitrust tools alone are not sufficient to remedy the problem, is leading more countries to strengthen their consumer protection laws and the sanctions for consumer law breaches.

> **'Governments are strengthening their consumer protection laws and regulators are using these tools more often, either because there is no underlying competition problem or because it is quicker and easier to pursue a consumer law action and achieve changes to business practices.'**

Andrew Austin
Dispute Resolution Partner,
London

In Europe, newly appointed Justice Commissioner Reynders has already signalled greater emphasis on effective enforcement of consumer laws across the EU, following adoption of a draft directive in November 2019 (as part of the Commission's 'New Deal for Consumers' package) and strengthened consumer law regimes across the EU.

In the UK, Lord Tyrie, the Chair of the CMA, has called for the authority to be given direct powers to allow it to impose financial penalties in consumer protection cases without having to pursue cases through the courts, as is currently required. He also proposes more stringent duties and responsibilities for the CMA, including an overriding statutory duty to treat consumer interests as paramount.

In the US, Congress is debating data and privacy legislation that would provide the Federal Trade Commission with new powers to fill perceived enforcement gaps and strengthen the agency's ability to regulate the collection and use of consumer data and impose stricter penalties for violations.

> **'In 2019, the US Federal Trade Commission concluded a series of hearings examining whether new and evolving business practices might require changes to US antitrust and consumer protection laws. The agency is expected to release a report in 2020 that discusses, among other things, consumer protection and competition issues related to big data, privacy regulation and innovation.'**

Jan Rybnicek
Antitrust Counsel,
Washington DC

Authorities are developing more flexible toolkits and co-ordinating more closely in order to intervene more effectively on competition, data protection or consumer law grounds

As antitrust, data protection and consumer law increasingly converge, regulators are updating their toolkits across the full range of legal powers and taking action to remedy perceived harms by using the most appropriate tool for the job.

As noted, many major authorities already hold combined competition and consumer law powers, and more agencies are arguing the case for these tools to be consolidated into a single agency or at least for closer co-operation between authorities to facilitate a more joined-up and targeted approach.

In the EU, Executive Vice-President Vestager's new dual role of competition enforcement and digital policy-making signals a more joined-up approach across Europe's digitised economy. In addition, the new Consumer Protection Cooperation (CPC) Regulation, which comes into force in January 2020,

will both enhance national enforcement powers and provide a more effective framework for authorities to co-operate cross-border. New tools include the power to suspend and take down websites, to impose interim measures and to impose penalties proportionate to the cross-border dimension of the relevant practice.

'From January 2020, the Commission will have a more prominent co-ordinating role in cross-border consumer investigations, which we expect it to seize as part of Executive Vice-President Vestager's digital mandate.'

Alvaro Pliego Selie
Antitrust Counsel,
Amsterdam

We are also seeing more signs of close collaboration between antitrust, consumer and data protection authorities across many jurisdictions. For instance, the Italian competition, communications and data protection authorities recently published guidelines and policy recommendations in relation to big data. This followed an inquiry opened jointly by the three authorities in order to better understand the impact of the digital economy overall on data protection, privacy, competition and consumers.

'The complementarity between enforcement instruments does not just apply to digital markets, where we have seen authorities pursue both dominance and consumer protection cases on issues such as the way digital players might disclose personal data for profiling purposes. Another key area is markets undergoing liberalisation.'

Ermelinda Spinelli
Antitrust Counsel,
Milan

Authorities are using powers to intervene more quickly to prevent consumer harm pending full investigation

In the UK, Lord Tyrie called for the CMA to be able to impose interim measures during market studies to stop behaviour that is suspected of resulting in consumer harm pending full investigation, and to be able to order remedies at the end of an investigation that address consumer detriment without having to demonstrate an adverse effect on competition.

This reflects the fact that rapidly changing market conditions have heightened the demand for regulators to be able to intervene more quickly to stop commercial practices that are suspected of causing consumer detriment which may be difficult to reverse pending full investigation.

Looking ahead in 2020:

As these developments gain more momentum and sharper teeth through 2020, business should take a number of steps to prepare for more consumer-centric enforcement ahead:

- **Audit your business practices:** ensure that you can show that you are on the right side of rapidly changing consumer protection laws.
- **Compliance and training:** ensure your internal procedures address consumer law issues as well as antitrust and other corporate risks (see theme 10).
- **Think creatively on remedies:** designing remedies that meet consumer protection concerns and that are workable and minimise unnecessary disruption to the business can be challenging. In at-risk sectors, consider undertaking feasibility assessments early on and building an evidence base to demonstrate the effectiveness of remedies designed to improve transparency or facilitate switching without requiring structural changes in a market.

Our cross-practice consumer skills group identifies the key issues for businesses seeking to mitigate regulatory risk in the face of stronger consumer protection.

To learn more, contact:
consumerrisk@freshfields.com

10 Corporate compliance programmes

Are your compliance programmes fit for purpose in 2020?

Identifying illegal conduct and risk areas in your business

As antitrust authorities use increasingly sophisticated tools to uncover suspected anti-competitive behaviour, it is essential for companies to tackle risk areas within their businesses with effective compliance systems.

Detecting potential infringements at an early stage can protect companies from large and costly investigations and follow-on litigation. It both increases the chance of securing immunity from, or a reduction of, fines, and – more importantly – enables the company to prevent or stop certain conduct before it becomes a serious infringement.

However, there is no 'one-size-fits-all' compliance programme:

- companies must tailor the programme to their activities and risk profile;
- programmes must evolve and adapt to changes in the company or the market; and
- training must be continually updated to reflect developments in the law and the business.

Effective risk mapping and tailored training are the key pillars in the fight against misconduct. Companies need to ensure that their compliance training is effective, is up to date and also allows employees to understand the more complex conduct risks. In order to provide a targeted compliance training, a company needs to know which employees require training and on what subjects. The employees should be tested afterwards on their understanding of the training.

'Audits and training are obviously essential but what is often missing in many organisations is an efficient follow-up process on identified issues. Companies must make sure that the issue is not only identified but also solved for the future. Compliance is not only a task for legal and compliance teams – it is a top management obligation and their engagement is a prerequisite for success.'

Katrin Gaßner
Antitrust Partner,
Düsseldorf

Agency guidance on the elements of an effective compliance programme

As more authorities publish guidance on the essential elements of an effective compliance programme, a few common themes emerge:

- as noted above, employees must be properly trained with regular refresher sessions;
- compliance needs to be monitored closely; and
- causes of wrongdoing must be analysed.

'Companies that are serious about antitrust compliance should implement effective compliance programmes. Antitrust agencies are in fact sceptical about classic compliance programmes, which do not include concrete elements and safeguards.'

Gian Luca Zampa
Antitrust Partner,
Rome

Recent examples include guidance published by authorities in the US and Italy:

- guidance issued by the US Department of Justice (DOJ) sets out how the DOJ looks at the design of the programme, how effectively the programme is implemented and whether the compliance programme works in practice; and
- the Italian guidelines note that a compliance programme must be designed and implemented consistently with the characteristics of the company concerned and must take account of the market environment. Compliance must be an integral part of corporate culture and policy and must be backed up by effective training and a system that manages processes exposed to risk.

'Recent DOJ guidelines establish a baseline for evaluating an effective antitrust compliance programme – at least in the US. This provides an opportunity for companies to meet this standard and potentially benefit from it going forward, but it also puts companies on notice that failure to meet DOJ standards will be a mark against them in seeking a positive resolution in a criminal cartel investigation in the US.'

Bruce McCulloch
Antitrust Partner,
Washington DC

Credit for effective compliance

More authorities and courts are considering whether to credit compliance efforts when imposing fines, but only when compliance programmes are well designed and effectively implemented:

- the DOJ's updated policy for assessing antitrust compliance programmes in the context of criminal investigations signals the importance of compliance programmes to the DOJ and is intended to incentivise compliance by rewarding companies that have effective programmes in place. The most significant change is that the DOJ will now evaluate compliance programmes when considering whether to charge companies for criminal antitrust violations, which it has declined to do in the past;
- the UK already allows for a reduction of up to 10 per cent where adequate steps have been taken with a view to ensuring antitrust compliance;
- the German Federal Court of Justice held that effective compliance programmes can lead to a reduced antitrust fine;
- the Italian Antitrust Authority issued its official guidelines for compliance programmes, setting out in detail the minimum content that a compliance

programme must have to qualify for a fine reduction and the conditions that must be met to obtain a fine reduction ranging from 5 per cent to 15 per cent; and

- Australia operates a similar system as the UK whereby the existence of an effective programme may be a mitigating factor.

'It's good to see competition authorities following the approach of other prosecuting agencies in giving credit for effective compliance. Whilst the detailed guidance may differ across authorities, at its heart it is about culture and conduct. An organisation needs to convince colleagues and agents that it wants them to behave in a compliant manner, not just create the appearance of doing so. A holistic approach that focuses on behaviours is key.'

Ali Sallaway
Dispute Resolution Partner,
London

The growing role of AI and data analytics in antitrust audits and investigations

More companies are using tech solutions to verify antitrust compliance. This can be done in many ways: from automating periodic antitrust audits of leadership staff to (near) real-time analysis of correspondence and documents to ensure compliance and increase the likelihood of preventing or detecting potential infringements.

The digitisation of workplaces and new channels of work-related digital communication lead to an ever-growing number of documents. As a result, AI supported tools may soon become the gold standard in antitrust compliance.

AI and data analytics tools may be able to help manage misconduct risk and deal with the amount of data. Proper integration of AI tools into your workflow is therefore key. As the authorities invest more in innovation in the 'regulatory tech' space, companies need to think about solutions that match the data potentially available to authorities to train algorithms.

'The future gold standard for antitrust compliance is certainly AI-enabled and looks at communication and documents in real or near-real time. It will check findings against other data sources (HR, finance) to make results more accurate.'

Andreas von Bonin
Antitrust Partner,
Brussels

Looking ahead in 2020:

- **Review your compliance programmes to meet the new higher standard:** compliance programmes must map out the antitrust risks associated with the company's specific activities and allow the company meaningfully to measure their effect and the degree to which employees follow their rules. Evidence is key when persuading authorities that employees have been properly trained.
- **Identify IT and AI-enabled solutions that work for your company:** a bespoke compliance system that is continually updated is key for successfully monitoring risk. AI and machine learning supported tools are likely to become the gold standard in the near future.
- **Understand which tech solutions are being developed by the authorities:** as authorities invest in tech and computing power to detect markets where competition is not working and conduct investigations, companies should be ready to meet the challenges that tech-enabled investigations bring.

Nine factors the DOJ will consider when evaluating an antitrust compliance programme

1

Design and comprehensiveness: is it integrated into the business, updated regularly and accessible by employees?

2

Culture of compliance: do senior management's actions reflect the importance of the programme?

3

Responsibility for the compliance programme: do those with responsibility for the programme have sufficient autonomy, authority and seniority within the company's governance structure? How does the programme compare to other company functions in terms of structure?

4

Risk assessment: is the programme tailored to the company's business to account for antitrust risk?

5

Training and communication: is the programme understandable by employees? Do the appropriate employees receive training effectively and often?

6

Periodic review, monitoring and auditing: how often is the programme updated? Does the company have monitoring and audit mechanisms in place to detect antitrust violations?

7

Reporting: are employees able to report antitrust violations anonymously or confidentially without fear of retaliation?

8

Incentives and discipline: are employees appropriately incentivised to comply and disciplined for committing antitrust violations?

9

Remediation and role of the compliance programme in the discovery of the violation: recognising that compliance programmes may not detect every antitrust violation, what remedial efforts and improvements have been made to prevent recurrence of a violation?

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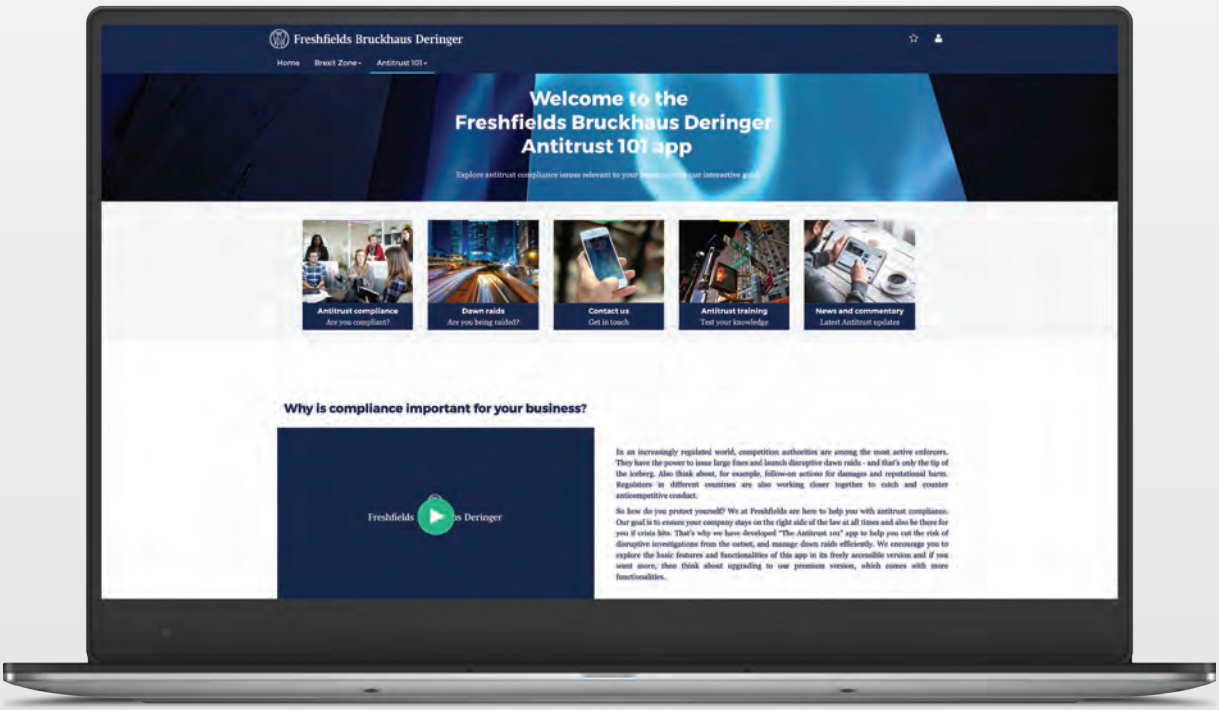

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