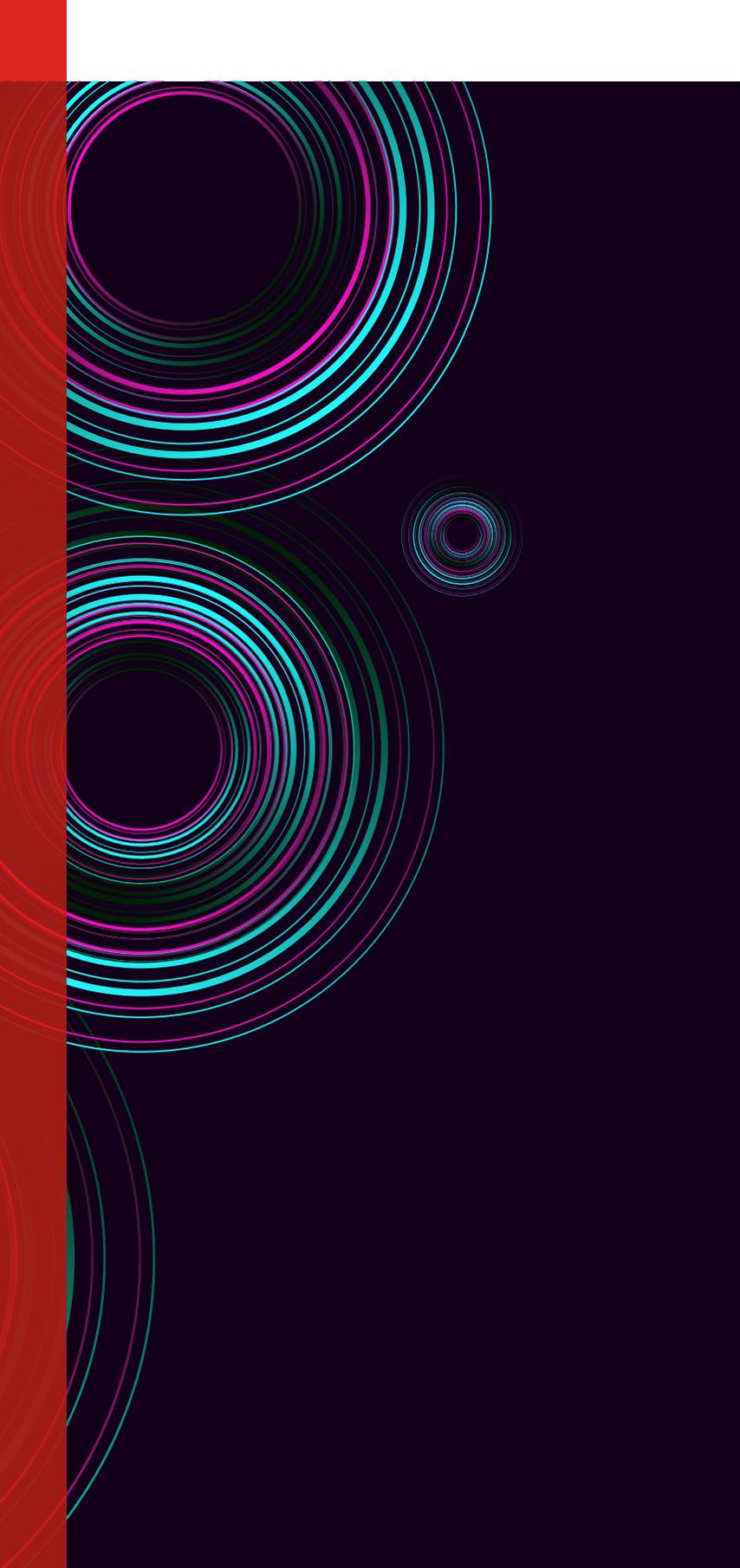


Global antitrust and competition trends for 2020





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Preface

We are living through the most dynamic period in antitrust and competition policy for decades – with pressure for change coming from different directions and likely to generate concrete proposals and political controversy in 2020, plus the global COVID-19 (coronavirus) pandemic adding unprecedented complexity and uncertainty. Against this challenging backdrop, we identify significant trends and developments that your business should be aware of in six important areas: (i) COVID-19; (ii) digital; (iii) technology and documents; (iv) merger control; (v) cartels and investigations; and (vi) litigation.

COVID-19

We highlight the key antitrust issues and risks arising from the COVID-19 crisis. Ranging from state aid to potential competitor collaboration or even “crisis cartels”, exploitative conduct and implications for merger control reviews, all areas of antitrust are relevant. We set out key points for businesses to keep in mind during the crisis.

Digital

Not a day seems to go by without a new development regarding antitrust and digital markets. Significant reforms are on the horizon. While there may be a temptation to think digital issues are for the big tech companies alone, potentially all businesses are affected given the growth of e-commerce. We outline recent developments and explain the complex interlocking issues.

Technology and documents

An aspect of the current digital focus concerns the role of new technologies in antitrust. An area where technology has an increasingly important role is gathering documents – especially for merger control. We explain the growing reliance on parties’ internal documents in merger reviews, including a Q&A with Andrea D’Ambra, who heads our US e-discovery and information governance team. Andrea shares key insights for responding to document requests using e-discovery tools, drawing on her extensive experience.

Merger control

M&A deals face an increasingly challenging context. Not only are digital transactions subject to greater scrutiny, there is broader heightened political interest, with calls to reform traditional regimes and approaches. We analyze whether intervention is increasing and provide advice and updates on important developments, including gun-jumping enforcement.

Cartels and investigations

We assess whether data supports the view that leniency applications are declining, as many commentators suggest. In doing so, we examine some of the reasons why leniency may be becoming less attractive – the rise of antitrust damages actions is an important issue but are there other factors at play? We also include advice for businesses contemplating applying for leniency this year.

Litigation

Antitrust damages litigation continues to become more prominent, with damages actions now normal for major cartel cases and also increasing for dominance infringements. We look at important case and legislative developments globally over the past year, assessing whether these are pro-claimant or pro-defendant. We also provide practical advice for businesses to help develop their litigation strategy if bringing or defending a claim in the near future.

Our 2019

Our antitrust team worked extensively with clients around the world in 2019. We acted on 18 M&A deals as “hired guns” – standalone antitrust counsel – and on 31 deals with in-depth reviews; we

advised on 50 major cartels and investigations and secured immunity and other successful outcomes for clients in a range of jurisdictions; we acted on four dawn raids, using our in-depth knowledge of digital forensic investigations to protect our clients’ interests; and our litigators were involved in 26 high profile cases.

We are ranked 10th in the world in *Global Competition Review’s* Global Elite for 2020 and 4th for mergers. Our aim is to help you navigate an increasingly complex and uncertain global regulatory environment in 2020, offering practical advice and robust strategies to protect and promote your business.

To help you manage your risk around the world we have developed a global antitrust risk map – a comparative guide to antitrust risk in over 140 countries. For more details, see: [globalantitrustriskmap](#).

We would be happy to meet with you and your colleagues to discuss any trends. Our contact details are at the back of this review.

Robin Adelstein
Global and US Head of Antitrust and Competition
Norton Rose Fulbright

Global antitrust and competition

We are ranked by *Global Competition Review* among the top 10 competition practices of the Global Elite. The Global Elite is part of GCR 100, an annual guide to the most trusted firms for competition work. The guide covers hundreds of firms from more than 50 jurisdictions around the world. As stated in the introduction to GCR’s 2020 edition:

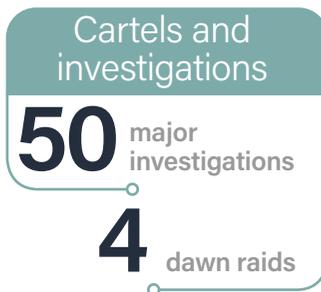
For two decades now, the GCR 100 has provided a quantitative and qualitative analysis of the law firms and economic consultancies doing the most important antitrust work around the world.

We rewrite our Global Elite questionnaire every year to pinpoint the most difficult matters – the deals and conduct that arouse enforcers’ concern; the private litigation that flares up – that best demonstrate the quality of a competition practice. We use this information to update and revise the Global Elite, along with top-10 rankings for three areas of work on which competition practices focus: mergers, cartels and litigation. We believe our research results in the most thorough list of the best multinational antitrust practices, based on their performance over the past year.

We give the greatest weight to matters that have been active in the past year. But we also take into account other aspects of a firm’s antitrust practice, including who has left, joined and been promoted at a firm, as well as the number of partners and counsel who have significant experience from working at competition authorities. Our sister publication, *Who’s Who Legal: Competition*, publishes a list of the very best antitrust lawyers each year based on the views of hundreds of lawyers and clients. This provides a sense of individual lawyers’ reputations.

Introduction

GCR 100 Global Elite, 2020 edition



GCR Global Elite merger ranking 4

34% of Partners/Counsel in *Who’s Who Legal*

10% of our lawyers have previously worked for an antitrust authority



COVID-19: Implications from an antitrust and competition law perspective

Global trends 2020

The current COVID-19 (coronavirus) crisis sweeping the world is having a hugely disruptive impact on society and business, and our first thoughts and best wishes are with our clients, colleagues and their families who are facing this unprecedented public health challenge. While we all focus on ensuring everyone stays healthy and safe, we are very conscious of the need for businesses to focus on the immediate challenges they face with government-imposed lockdowns, attempting to mitigate disruption to travel and supply chains, and potential illness and remote working issues within their teams. As companies address these concerns, there will be important implications from the perspective of global antitrust and competition enforcement in 2020 and potentially over a longer period of time.

We have already seen suspension of competition rules in a number of contexts to ensure essential services continue. In addition, businesses will require state support to survive as towns and cities are “locked-down” and business stalls. There are also risks around competitors collaborating during the crisis, potentially leading to “crisis cartels” or other antitrust infringements. Antitrust authorities will also see their resources stretched, with knock-on effects for investigation timetables and how authorities prioritize cases. We discuss these key issues below.

As a global pandemic, the impact of COVID-19 is unprecedented in recent times. Health and welfare are naturally the focus, but there are also significant legal and economic consequences, not least regarding antitrust and competition. Antitrust regimes also have a potentially important role to play in protecting health and welfare at this challenging time.

State aid

A critical role for antitrust enforcement during the crisis is state support for businesses in financial distress, and the individuals they employ. State support can take various forms, such as crisis loans, state guarantees and tax waivers or deferrals. It can distort markets, giving recipients of aid an unfair advantage when competing against other businesses – infringing state aid or anti-subsidy rules. But aid can also be approved if it is proportionate and meets the criteria for exemption.

The European Commission has already announced measures to streamline the usual EU state aid approval processes so that governments can move quickly enough to grant businesses the critical support they need. And exemptions for rescue and restructuring aid or exceptional circumstances, in particular, have been flagged as likely to apply.

Considerable financial support has already been proposed. In France, for example, President Emmanuel Macron has declared “war” on COVID-19, guaranteeing that no French business will face bankruptcy with “unlimited” state financial aid available. UK support – although no longer an EU Member State – remains subject to the EU state aid regime until the Brexit transition period ends (expected to be December 31, 2020). The European Commission also has four years after the end of the transition period to start investigating any UK aid granted during that period.

Exploitation

Another area where antitrust authorities are known to be taking an active role during the crisis is monitoring potentially excessive prices (or “price gouging”) and misleading practices – such as high prices for hand sanitizers or deceptive claims about the benefits of protective equipment – exploiting consumers.

Regimes differ, but exploitative conduct could potentially infringe abuse of dominance or monopolization rules, or consumer protection laws. A number of global authorities have issued warnings about this type of behavior, raising the possibility of enforcement actions to come if those warnings are ignored.

It is possible that algorithmic pricing could lead to price spikes without any deliberate attempt by companies to take advantage of the situation, adding complexity to whether there is an infringement in such circumstances.

Collaboration

Businesses that normally compete may also come under pressure to work together during the crisis – for example, food retailers or pharmaceutical

companies – to ensure essential supplies reach those in need. Such collaboration may be encouraged by politicians or governments. We have seen competition rules suspended already in Norway (as between airlines), the UK and Germany (as between food retailers) and the US (as between medical suppliers and other industries that provide for the national defense). In all cases, these suspensions have been intended to allow production and/or supply of vital services during the crisis.

Nonetheless, businesses should not unilaterally decide to enter such arrangements to address perceived needs. They need to assess the competition risks before collaborating, and put appropriate safeguards into place. Absent a state compulsion defense (which is hard to prove), formal waiver or passage of relevant legislation, businesses need to satisfy themselves about the risks of collaboration, and not engage in conduct that continues to remain prohibited.

Safe harbors and existing guidance are available for certain types of collaboration that may become particularly relevant during the crisis – such as joint purchasing and specialization agreements under the EU regime. Businesses can utilize this to mitigate the effect of the crisis while remaining compliant with competition rules.

Before the crisis, the EU was also already reviewing its rules on horizontal collaborations and signaling a willingness to give more guidance to allow more collaboration in appropriate cases. Businesses should consider approaching the European Commission and other antitrust authorities for guidance where novel issues arise in these extreme circumstances.

Given the unprecedented scale of the crisis, we may see antitrust rules being relaxed in a way not seen before. In the Norwegian example, a three-

month exemption from competition rules has been announced for airlines and other transport companies to allow them to coordinate to ensure critical services are maintained, but any agreement must be notified to Norway's competition authority. To the extent similar approaches are adopted in other jurisdictions or sectors, it is vital the businesses concerned meet any qualifying requirements.

Businesses should also generally ensure that any legitimate collaboration does not spill over into problematic areas. Risks include going beyond what is necessary to achieve the beneficial aims, such as unrestricted exchanges of competitively sensitive information impacting how the parties will compete after the crisis or competition in other areas of their businesses.

Financing arrangements

An area where lenders in particular will need to work together is refinancing of syndicated loans. These arrangements are critical for banks to share risk in order to finance larger or riskier projects, but syndicated loans naturally involve close cooperation between banks – and the European Commission has recently looked at the risks that these discussions could give rise to anti-competitive conduct.

The main antitrust concern in refinancing or restructuring facilities in times of difficulty is the extent to which banks can discuss and potentially agree proposals to change or restructure loans. If banks work together, particularly in the context of a distressed borrower, this could lead to unequal bargaining power or inappropriate exchanges of competitively sensitive information. These risks can be managed through safeguards, but what is appropriate to share or discuss will depend on the circumstances of each case.

Crisis cartels

Another concern is so-called “crisis cartels” – competitors agreeing amongst themselves how to limit the impact on their businesses to survive the crisis. Competitors might, for example, agree not to undercut each other's prices or agree how to reduce excess capacity while facing considerably reduced demand.

However, antitrust authorities do not typically treat crisis cartels any differently than other types of cartels – meaning there remains a risk of an antitrust violation with significant fines and other sanctions, including potential criminal violations in applicable jurisdictions. The general position is that businesses must continue to act independently and compete even during a crisis: this creates a high hurdle to justify a crisis cartel.

Merger control

While some M&A activity is on hold for now, lower share prices as a result of the crisis may trigger a spike in M&A deals – and therefore merger control filings. In the meantime, global merger reviews that are ongoing or about to commence will continue, but may face delay.

Antitrust authorities (like other employers) are managing disruption to their workforce as a result of the crisis – making completion of merger reviews within prescribed deadlines, or collection of information from parties affected by the crisis, more difficult.

The European Commission is asking parties to delay merger filings, as are a number of other antitrust authorities, and has used “stop the clock” powers to delay three Phase 2 investigations where parties have not responded to information requests. Such practices may become more prevalent. The US

antitrust authorities have introduced a temporary eFiling procedure, and suspended possible early termination of Hart-Scott-Rodino waiting periods while it is in place.

Some businesses may seek mergers or joint ventures with competitors to help survive the crisis. These deals remain subject to merger control review, but “failing firm” or “flailing firm” analyses may permit some transactions that otherwise would have been prohibited.

Prioritization

As well as discouraging new merger filings, progress on other types of enforcement cases will generally slow where authorities are not tied to statutory case timetables. Authorities may also face difficult decisions about which cases to take forward (or potentially close) as they manage increasing resource constraints.

Some of the potentially significant proposed antitrust reforms that were expected in 2020 may also be pushed back while the focus is on dealing with the crisis.

In the context of the global COVID-19 crisis, the following are key messages for business regarding antitrust and competition:

- **Do not** neglect antitrust compliance during the crisis. Problematic conduct may not be investigated immediately, but could come to light once the crisis is over.
- **Do not** engage in hardcore conduct that remains prohibited – and avoid any competitor attempts to involve your business in a crisis cartel.
- **Do not** be tempted to circumvent merger control filings/approvals during the crisis – “gun-jumping” (implementing a deal before required approvals) will remain a priority area for antitrust authorities.
- **Do** be aware that authorities are watching for exploitative practices, such as excessive price increases. Although supply and demand dynamics will change, businesses should consider how large price increases might be perceived and whether they might trigger an investigation.
- **Do** consider permissible activities such as joint purchasing agreements to mitigate the effect of the crisis, utilizing applicable guidance and safe harbors.
- **Do** seek formal competition law waivers where governments suggest or encourage competitor collaboration. In novel cases, consider asking authorities for guidance.
- **Do** explore the availability of state support (or state aid in the EU). Consider how best to lobby for state support for your business or sector – but take care that joint lobbying efforts do not raise antitrust concerns.
- **Do** ensure that long-stop dates for M&A deals are sufficient and factor in that merger control approvals may take longer than expected during the crisis.



A wind of change is blowing through the antitrust world. The power of digital giants is at the forefront of the political agenda, and political leaders are pushing antitrust authorities to rein them in. In the EU, for example, Margrethe Vestager now has an unprecedented dual mandate as the European Commission's Executive Vice-President for a Europe fit for the Digital Age, while remaining as Competition Commissioner – having launched one of the most ambitious studies into antitrust and the digital economy under her original role. But what are the key digital issues? We discuss these below.

Antitrust authorities have in fact been studying the antitrust implications of the digital economy since at least 2016, when the French and German authorities released a ground-breaking study and the OECD held a conference on competition law and “big data.” The wave of official studies crested in 2019, with major reports published around the globe, from Australia to the US to the UK to the EU, among many others.

2019 saw the Australian Competition and Consumer Commission (ACCC) conclude its “world first” inquiry into the impact of digital platforms on competition in media and advertising markets. In the UK, the Competition and Markets Authority (CMA) launched a similar market study as well as a new digital strategy. However, much of the focus in 2019 was around three broader EU, US and UK reports setting out various digital proposals – namely the EU Special Advisers’ report, US Stigler report and UK Furman report.

In the coming years, antitrust authorities will begin implementing the recommendations from these studies. All jurisdictions are grappling with variations of the following questions:

- Does collection of big data by businesses risk creating or strengthening dominant positions, enabling abuses of such positions, or raising barriers to entry? If so, can existing antitrust tools address this?
- Does use of algorithms to process big data – in particular, to guide pricing decisions – raise novel antitrust issues? When should antitrust rules apply to pricing decisions by algorithms without human intervention?
- How should antitrust rules apply to online platforms? Can existing tools address possible anti-competitive behavior by online platforms?

- How should merger control deal with so-called “killer acquisitions” – large firms buying start-ups with high valuations but low sales? Should notification thresholds be changed to catch more such deals? What presumptions or theories of harm should apply if overlaps are limited?

As these questions have become politicized, highly technical antitrust issues have become intertwined with a debate over the role of antitrust in controlling global corporations. Broader issues are also at play – such as foreign state intervention in political elections and “fake news.” Faced with this unfamiliar pressure, antitrust authorities have several options:

1. step up antitrust enforcement using existing tools and theories of harm;
2. develop new tools and theories of harm to address the new challenges; and/or
3. support new regulation as an alternative or complement to antitrust enforcement.

What road will antitrust authorities choose? We are mindful of baseball legend Yogi Berra’s warning that it is tough to make predictions, especially about the future. Nonetheless, we offer observations below on the likely direction of travel in four interlocking areas: (i) big data and market power; (ii) algorithms and collusion; (iii) online platforms; and (iv) killer acquisitions.

Big data and market power

A consensus has emerged over the past five years on the key role of big data for competition, and hence for antitrust enforcement. But authorities also recognize that the significance of big data varies – by type of data, collection and use. Thus, while some commentators favor broad-based obligations for competitors to share their data, this seems unlikely to receive wide support from antitrust authorities.

Instead, we expect authorities to explore new theories of harm, or changes to existing theories, to support “data access mandates” (i.e. requiring companies to give access to data) as potential remedies on a case-by-case basis. As with “essential facilities” cases, this will likely be applying abuse of dominance/monopolization theories – meaning companies required to give access to their data will likely be limited to those found to have market power. The beneficiaries will be companies needing access to compete in markets that are complementary or downstream to the markets in which the data-holder has market power. However, authorities may also develop new theories to support imposition of data access mandates in circumstances where traditional essential facility criteria are not met.

With or without greater antitrust enforcement, some legislators will likely propose regulatory data access requirements. Some commentators support broad-based data sharing under the supervision of a new regulator, but it is difficult to impose a one-size-fits-all framework given the wide variety of types, sources and uses of big data. Regulatory data access mandates therefore seem more likely to be imposed on a sectoral basis or for certain types of data, such as data generated by publicly funded research. Either way, legislators would be well advised to work closely with antitrust authorities in designing any new regulations – given their experience designing remedies to address access issues while respecting intellectual property rights and incentivizing investment.

A related issue when it comes to collection of vast amounts of data concerns consumers giving up their data “for free.” Does this reflect that all consumers are now vulnerable, perhaps not fully understanding the value of their data, or at least lacking the time to give appropriate thought to this? Do consumers

feel powerless when it comes to their data, or simply not care as long as access to a website is free? However, as the CMA for one has noted, in a well-functioning market, consumers might be paid for their engagement online, or offered a choice over the amount of data they provide.

Algorithms and collusion

Use of algorithms can also raise antitrust concerns, especially when companies use algorithms in pricing decisions. Computer algorithms may serve as messengers, helping cartel members to implement a cartel and monitor and punish deviations (the “messenger scenario”) or as central hubs to coordinate competitors’ pricing or other activities (the “hub-and-spoke scenario”). In these scenarios, the use of algorithms does not change the antitrust analysis – although their use may create new challenges in detecting and prosecuting cartels.

More difficult issues arise in the scenario where each firm unilaterally chooses to use an algorithm knowing that industry-wide use may facilitate tacit collusion in oligopolistic markets. In the most challenging scenario, access to ever-growing volumes of data and increasingly sophisticated artificial intelligence may extend tacit collusion beyond price, beyond oligopolistic markets and beyond easy detection.

Perhaps surprisingly, the potential for anti-competitive use of algorithms has so far been less of a focus for antitrust authorities than big data. This may be because the use of algorithms in cartels does not raise new conceptual issues in the messenger and hub-and-spoke scenarios, while the other scenarios are still too speculative to require urgent action.

Indeed, for a number of years there has been debate about artificial intelligence and the possibility of algorithms themselves “deciding” to collude. Would the required elements of an anti-competitive “agreement” be met? And who should be liable – the competitors using the algorithms, the technology providers or both?

However, infringements involving technology have so far been cases where people have decided to commit an infringement, using technology to facilitate this. Several jurisdictions (including the US, EU and UK) have pursued such cases – usually involving monitoring software to check prices have not deviated from the agreed level. A recent UK example in the energy sector included a consulting company being fined in 2019 for supplying software used to facilitate a market sharing infringement.

Another set of concerns relates to the potential use of algorithms for behavioral discrimination; to better target consumers with personalized marketing, pricing and products. Although algorithms can and have been used for personalized pricing, no strong trend has emerged in this direction. Authorities have long appeared uncomfortable pursuing enforcement action for price discrimination, so this may prove less of a priority area.

In this context, there appears to be less pressure for changes in antitrust law and regulation in relation to companies’ use of algorithms than in relation to big data. However, antitrust authorities are well aware of the need to develop expertise and tools to detect and assess the role of algorithms. A number have set up dedicated digital units to develop necessary expertise. As authorities grow their expertise and companies come up with ever more creative ways to use algorithms, this area may become a greater target for regulatory change in future.

Online platforms

Online platforms display characteristics familiar from other markets – such as network effects, multi-sided markets and non-monetary markets – yet are seen as raising new challenges for antitrust enforcement that many authorities (and experts advising them) believe cannot be addressed solely with existing tools.

Future work in this area seems likely to focus on defining markets and market power in the context of online platforms and examining potential anti-competitive behaviors in broader “ecosystems”, including related online markets. For example, authorities may consider defining online platform markets more broadly to this effect. Indeed, in 2020 the EU will be reviewing the approach to market definition it has followed since 1998. However, authorities will need to be wary of possible unintended consequences if new approaches result in special obligations being imposed on large numbers of online platforms, instead of a few “super-dominant” platforms. An alternative approach could be to examine how players with market power in narrowly defined markets may leverage that power into other markets through practices such as self-preferencing, tying and bundling.

Much of the debate about the risks of online platforms revolves around their collection and use of personal data. In Germany, the Bundeskartellamt’s 2019 Facebook decision, currently on appeal, blurs the line between antitrust enforcement and enforcement of data protection laws. As with data access, some commentators have called for a new regulatory framework for online platforms. However, it seems more likely that data protection authorities will step up their scrutiny of online platforms that collect personal data. Antitrust authorities may be more involved in issues around whether lack of payment for data indicates a market failure, as mentioned above.

“Killer acquisitions”

Many commentators have urged far-reaching changes to global merger control regimes to address the phenomenon of large technology companies buying start-ups – often requiring no review because the target is too small to meet (usually turnover-based) filing thresholds.

The “killer acquisitions” label is borrowed from the pharmaceutical industry, where the producer of a profitable drug may buy a rival engaging in R&D on a potentially competing pipeline drug with the aim of closing this down. But in the technology sector, the label is inappropriate, because technology acquirers commonly acquire start-ups to incorporate a promising new application or technology or simply to hire their engineers – not to shut them down.

The debate over large technology companies hoovering up start-ups raises two distinct questions: (i) should notification thresholds be revised to capture more such transactions; and (ii) should changes be made to the substance of merger review (such as the standard of review) or to authorities’ analysis of such transactions?

With respect to notification thresholds, a few countries (in particular, Austria and Germany) have introduced transaction value thresholds to capture deals involving targets below turnover-based thresholds. But even when such deals are notified, they normally raise few or no issues under traditional theories of harm, due to little or no overlap between the parties. Perhaps for this reason, other jurisdictions that considered revising their thresholds have not done so. Some countries (notably the US and Canada) can review deals even if below their thresholds.

On substance, in some jurisdictions (including the UK), recommendations propose changing the standard of review and/or introducing statutory presumptions – raising the bar for large companies acquiring start-ups. However, legislators would need to draw clear lines between deals to which the change would/would not apply. Doing so with sufficient precision is difficult, and legislative changes tend to move slowly. In practice, we expect most jurisdictions to explore ways to strengthen their review processes and update theories of harm instead.

Officials from a number of authorities have opined that they may have been too lenient for certain deals in the past, suggesting that small targets might have grown into significant competitors had they remained independent or been acquired by someone else. True or not, this is said with the benefit of hindsight – and there was no basis to challenge these deals under traditional approaches if overlaps were limited.

Authorities globally are scrutinizing such deals more closely. In terms of theories of harm, there are two main possibilities in existing toolkits – harm to potential competition and innovation competition. Examining potential new entrants when analyzing a deal's impact is not new, but challenging transactions on this basis seems speculative. How could an authority show that a small target would likely have become a serious competitor? Over what timeframe? Could other start-ups also become serious competitors?

Innovation competition analysis can also be controversial. For example, if an acquirer plans to increase a target's R&D, how could an authority demonstrate the deal would reduce innovation competition? Merger reviews highlighting innovation concerns have proved controversial in the past – not least the *Dow/DuPont* agrochemicals merger in 2017 where the EU required remedies for clearance, in part to address harm to innovation (whereas the US remedies did not target innovation).

In the UK, the CMA is increasingly considering dynamic counterfactuals – measuring a deal's impact against how the market is likely to develop in future. Indeed, more speculative counterfactuals were proposed in the Lear report in May 2019 – commissioned by the CMA to evaluate past UK merger decisions in digital markets. Speculative counterfactuals may fall short of the required burden of proof to block a merger, but the Lear report suggests the CMA may need to test the boundaries of its legal tests and constraints to achieve more effective merger enforcement. The suggestion is that the nature of digital markets may justify greater risk-taking – but is also likely to mean more decisions challenged on appeal.

Other authorities are also looking at previous transactions in the tech sector – the US Federal Trade Commission (FTC), for example, issued Special Orders in February 2020 to collect information on certain deals over the past ten years that did not require notification under the Hart-Scott-Rodino Act.

All businesses, not only technology giants, should keep an eye on developments regarding digital issues and reforms. Key points to note are:

- Change is coming to antitrust – driven by many antitrust authorities believing enforcement in the digital economy has been too lax in recent years, plus unprecedented political focus on very large online companies and their impact on consumers.
- Antitrust authorities in the political crosshairs may themselves get more change than they bargained for. For example, several studies propose new digital regulators – should these be standalone or part of antitrust authorities?
- As well as antitrust authorities advocating for an important role in the new digital environment, all jurisdictions (not only the established powers) are jostling to play a leading role. To the extent approaches differ, complexity is likely to increase.
- Digital issues are clearly relevant for large technology companies. However, all businesses are potentially affected as technology moves from being a specific sector to a fundamental part of every business model. Issues related to algorithms, for example, have relevance for all businesses given the growth of e-commerce. New approaches to analysis for digital markets will also creep into other markets.

Technology and documents



A global trend that will only increase is the role of technology in antitrust enforcement. A key aspect concerns e-discovery tools and requests for documents, which are increasingly prevalent in merger control reviews. Authorities want to test whether parties' internal documents support the case for clearance or contain "smoking guns", revealing competition concerns – and are also using their full range of powers to sanction misleading or incomplete submissions. We discuss this trend with insights from Andrea D'Ambra, who heads our US e-discovery and information governance team and has assisted a range of clients on documentary submissions for global merger filings.

In recent years, "dawn raids" have switched from being paper-based to focusing on forensic IT tools and techniques, reflecting how business has changed. E-discovery tools have similarly become more important for businesses responding to information requests during a cartel or dominance/monopolization investigation. But particularly notable over the past year or so is the growing importance of e-discovery tools for merger control submissions.

Long a feature of US merger reviews, extensive document requests are also now an established part of many other regimes. However, the specific requirements, including the stage when documents are required, can differ significantly. Given more than 140 jurisdictions have merger control regimes, managing document requests for deals triggering multiple global filings is increasingly complex.

Items 4(c) and (d) of the US's Hart-Scott-Rodino Premerger Notification and Report Form require documents analyzing the transaction in question. Section 5(4) of the European Commission's Form CO is similar but goes further by requiring documents dating back two years relating to the markets in question even if not related to the transaction, as does the CMA's Merger Notice in the UK.

Scrutiny of documents in the US becomes much more extensive if parties receive a Second Request – requiring considerable additional information. Canada is similar, having adopted the US-style approach in 2009. Many other jurisdictions likewise only require extensive documentary material if a deal proceeds to a more in-depth (or Phase 2) investigation. But some authorities, including the European Commission and the UK's CMA, can require extensive documents even in pre-

notification. We have also seen recent examples of certain authorities requesting significant volumes of documents even after clearing a deal.

Interest in merging parties' internal documents is understandable given these can reveal parties' unfiltered views about their rationale for the deal, how it may affect competition and the competitive landscape more generally. Internal documents can confirm parties' intentions and their view of the future, which is more challenging for enforcers to predict where business models and markets are evolving – CMA Chief Executive, Andrea Coscelli, for one has emphasized the importance of internal documents in this regard.

More broadly, the importance that authorities are placing on parties' internal documents and the accuracy of submissions is reflected in the size of fines imposed in a number of recent cases for misleading or incomplete information – particularly in Europe. The benchmark remains the European Commission's €110 million fine on Facebook in 2017 for misleading information during the Commission's review of its acquisition of WhatsApp in 2014 – a deal the Commission cleared unconditionally and where the misleading information did not affect its competitive assessment.

The Commission imposed another significant fine in 2019 – €52 million on GE regarding its acquisition of LM Wind for stating it did not offer wind turbines greater than 6 megawatts, whereas information from a third party revealed GE was offering 12 megawatt turbines. Again, an eye-watering fine was imposed despite there being no impact on the Commission's decision to clear the transaction, given GE resubmitted its notification with the correct information.

Perhaps surprisingly the largest fine for failure to provide information in 2019 was by Poland's Office of

Competition and Consumer Protection – €40 million (PLN 172 million). This reflects a trend of even smaller/less established authorities becoming more aggressive in sanctioning procedural infringements – countries imposing fines for misleading or incomplete submissions in recent years include Bulgaria, Hungary, Latvia and Slovakia.

Having fined companies for misleading information in more than 20 cases since 2014, Ukraine is particularly active in this regard, although individual fines in Ukraine are low (<€10,000). The UK is also increasingly active, with the CMA fining three companies in 2019 for failing to provide requested information, as well as publishing new guidance on its requirements for requests for internal documents in merger investigations. In one of these cases the CMA's fine even in part related to documents requested during its informal "pre-notification discussions" stage, i.e. prior to the CMA starting the clock on its formal review. Another involved too many documents excluded as privileged.

Leaving aside procedural matters, the substantive potential risk for M&A parties is that the actual content of documents submitted could raise competition concerns. Such documents could severely hinder a deal's prospects of clearance, or at least cause delay and require careful explanation. There are also examples where material submitted during merger reviews has revealed serious cartel conduct to authorities, leading to fines and other sanctions (including in the US and UK).

Business executives and competition authority officials inevitably apply different lenses when looking at documents, so there is a risk that out-of-context comments can lead to problematic interpretations. It is therefore particularly important that individuals know to avoid ambiguous and exaggerated statements in documents – even if a deal is not contemplated.

Highest fines in individual cases for misleading, inaccurate or incomplete submissions, 2014-2019



Q&A with Andrea D'Ambra

Given the increasing focus on document requests in merger control and related risks, engaging e-discovery specialists can be particularly helpful to assist in managing the process for collecting, filtering and analyzing internal documents requiring submission. Andrea D'Ambra, who heads our leading e-discovery team, has significant experience assisting clients on documentary submissions to a range of authorities for merger control reviews. Andrea shares key insights below:

Q: How many documents are involved when it comes to document requests?

A: The numbers can vary greatly depending on the transaction. In general, asset purchases require fewer documents, while merger investigations have a broader scope in terms of subject matter, number of custodians, timeframe and data sources – so result in the production of more documents. We have seen productions of as little as 2,500 documents targeting a discrete issue in a merger and as much as 1.6 million for broad requests in a US\$5 billion merger.

A trend we have noticed over recent years is that authorities are asking for more documents than in the past – we believe because they themselves now have electronic search technology at their disposal to sift through more voluminous productions. However, the amount of documents may be limited through robust dialogue with the regulator to reduce the scope of seemingly broad requests to target the exact documents they really want. For example, in a recent transaction the authority was particularly interested in discussions around the drafts of certain key documents. Using “near duplicate” analysis, we could identify close duplicates of the key documents and submitted those documents and the emails discussing them.

Q: How familiar with or accepting of e-discovery tools are antitrust authorities? Is this changing?

A: Mostly what we are seeing at this point is a difference in regulators' comfort level in the way documents are identified as responsive to their requests. Broad pre-trial discovery rules in the US have necessitated early adoption of sophisticated search and culling technologies – so US regulators are generally more comfortable with the use of Technology Assisted Review (TAR) that leverages advanced computer algorithms to identify responsive documents. We are just now seeing authorities elsewhere start to permit TAR and other advanced tools, and have found that taking the time to educate a particular investigatory team on the processes by which documents will be identified can yield significant dividends, narrowing scope and cost savings.

In a recent transaction, for example, we persuaded the European Commission to permit the use of TAR to identify responsive documents, by providing them with a detailed outline of the process and emphasizing that the US Department of Justice (DOJ) also accepted the use of the technology for this purpose. We have seen other regulators, such as the Canadian Competition Bureau also taking their cues from the US because of US regulators' depth of experience in this area.

Overall, we have found that the key to getting a regulator's approval to use these advanced technologies is to take the time to explain in layman's terms how they work and what processes will be used to validate their effectiveness.

Q: How does document production in the context of a merger control review differ from discovery in antitrust or other litigation?

A: Document productions in the merger control context are different in many ways compared to litigation matters. In the litigation context, for example, parties have much more flexibility on timing and can negotiate with each other on numerous aspects of the review. Merger control reviews, in contrast, are extremely time sensitive.

Depending on the context, M&A parties may have at most 90 days to identify, collect, process, cull, review and produce hundreds of thousands, if not millions of documents – and timing and compliance with deadlines in merger reviews is paramount. Not only does the ability to close the deal rely upon timely submission of requested documents, but delays can result in costly (and time consuming) "refreshes" of document collections and productions. A refresh requires going back and re-collecting documents created since the last collection, so the regulator has documents created within a sometimes negotiable time period (usually 60-90 days) of the substantial completion date.

Regulators also often demand greater transparency about the review process itself, such as in the use of "email threading" for the review. In addition, they have detailed specifications and requirements for the format of the production and the privilege log. It is critical to review the production specifications prior to forensic collection, processing and review to confirm your ability to comply. Any questions or issues in this regard should be raised with the authority before collecting and processing documents for review.

Q: Legal privilege rules are notoriously complex and can differ significantly between jurisdictions. How can this affect the documents produced?

A: Privilege is a thorny issue, particularly for multinational companies whose deals may face merger reviews in multiple jurisdictions. Parties must ensure they are applying the right privilege analysis for the jurisdiction and that they take appropriate measures to protect any documents that might be privileged in one jurisdiction, but not in the requesting jurisdiction.

Document review lawyers are generally trained to default to marking a document as privileged in an abundance of caution and with the thought that when the document is logged a more senior reviewer will make the final call. The danger is that reviewers may overstretch the bounds of a defensible privilege call and things that are objectively not privileged end up on the log. The entire log is called into question if a regulator finds it includes obviously non-privileged documents, often then stopping the clock until challenged documents are produced or justified.

The US antitrust authorities and European Commission, in particular, tend to scrutinize privilege logs. However, spending the time to train and test reviewers on their understanding of privilege – and emphasizing that over-coding for privilege is as big a problem as missing privilege – can help to prevent any issues.

Q: Data protection and privacy rules are another consideration – how do these affect the approach taken?

A: The proliferation of data protection rules across the world has added an additional challenge to document production in the merger control context. These rules are intended to protect the personal information of data subjects from disclosure or misuse. Non-compliance can have serious civil and even criminal penalties in some jurisdictions – so it is important to seek legal advice from knowledgeable practitioners in the jurisdiction where the information resides.

Although requirements vary across jurisdictions, measures we have taken in the past include: (i) reviewing potentially relevant information in country and only exporting clearly relevant documents (“data minimization”); (ii) redacting personally identifiable information; and (iii) coordinating production of documents through local regulators.

Q: Are there any common pitfalls, or particular issues that can be challenging to manage?

A: Pitfalls abound in these merger control reviews, which is why it is important to have experienced counsel to navigate the issues. The biggest pitfall we see is the over-marking of privileged documents, as discussed above. Other key issues include:

- **Negotiating with the authority:** Whether it is about the scope of requests or the process used to identify responsive documents, too often we see counsel on the other side of a deal immediately capitulate to the regulator’s demands for fear of engendering disfavor or due to their own lack of expertise in this area. Pushing back on initial demands with a thoughtful, well-reasoned, and proven alternative can often address the regulator’s underlying concern while reducing the burden on the parties.

For example, in a recent case, we proposed use of search terms to reduce the document universe before processing it through TAR. The regulator had a written policy forbidding use of search terms in conjunction with TAR, but after stepping the investigatory team through our search term calibration process, they approved our approach. This resulted in significant time and cost savings during the review.

- **Timing:** We have seen challenges running the gamut from custodians who delay in turning over their devices or have multiple devices, to hurricanes, gas leaks at the review site and even internet outages. Timing is key – if you have 90 days to produce documents, by the time that negotiations over custodians and culling methodology are finished, collections are complete and the review platform has processed the data, there might at best be only 45 days left for review. In that time the team must identify relevant documents, identify any which are potentially privileged, redact documents for both privilege and personally identifiable information, generate a privilege log and process the documents for production.

And, of course, no plan survives first contact with the data – something always comes up that could not be anticipated. Key strategies for unexpected occurrences include leveraging technology and sampling to make informed decisions about various types of documents, and building in extra time for the unexpected. For example, if you think a first level review will take 20 days with 50 people, add another ten reviewers to allow for the unexpected.

- **Quality control:** Quality checking the review is another area where many teams falter. These reviews move at breakneck speed so quality checking should start the day after the first

level review begins. Waiting until the review is complete (or even a week in) means thousands, even hundreds of thousands of documents have been reviewed with no feedback from the subject matter experts. This can result in valuable time on the back-end to locate and fix incorrectly coded documents. Early and consistent feedback on the review yields fewer errors and less clean-up work.

- **Unusual documents:** Developing a plan for “misfit” documents should not be overlooked. If there are foreign language documents in your production, you may have an obligation to provide translations, which can take time and significantly impact cost. What about documents that cannot be searched, such as image or video files or low text documents? Sampling these files (in a statistically valid way) can aid defensible decisions about whether they contain substantial amounts of potentially relevant information. Dealing with password encrypted files can also be a challenge. Technology vendors can sometimes break the encryption, but many times cannot – requiring other solutions.

Q: Parties rarely welcome document requests, but are there any upsides?

A: The cost and burden of these reviews are significant, but there are a few advantages. In the process of responding to an information request parties might find key documents that can be strategically leveraged to support the case for the merger to be cleared. In addition, the absence of “smoking gun” documents can be a positive factor in arguing for clearance. And if questionable or even seemingly bad documents are located, identifying these during the review gives counsel time to assess and put them into context if raised by the regulator.

Q: What are the key messages for companies to think about in their merger planning in terms of potential document requests from antitrust authorities?

A: Broadly there are three key messages:

- **Start your planning early:** If a merger is likely to draw regulatory scrutiny, do not wait for the Second Request or other formal document requests to be issued. Instead, issue a “preservation hold” and use organization charts to begin identifying custodians and data sources likely to have relevant information. Direct counsel to interview IT personnel early on to identify challenging data sources or foreign data.
- **Engage experienced e-discovery counsel early in the process of negotiating with regulators:** The earlier they are involved, the better they can address key issues such as document identification and culling, use of advanced technologies, sampling methodologies and production requirements. Addressing these issues proactively with the authority not only reduces time/cost to complete the review, it also builds credibility with the investigative team, with dividends when they assess adequacy of the production.

- **Proactively train employees on appropriate business communications:** Documents containing ambiguous or exaggerated language, in particular, can readily trigger an authority's suspicions. Training employees on basic “do's” and “don'ts” to avoid inappropriate language in the documents they create – even when a particular M&A deal is not in contemplation – helps mitigate this risk.

Also, discourage employees from routinely marking documents as privileged and confidential, or subject to non-disclosure agreements or export control restrictions. Employees tend to think such designations shield documents from disclosure, but these broad designations are often wrong and clutter the expensive and time-consuming quality control process with documents that have no risk of disclosing protected or restricted information.



Securing clearances for M&A deals appears to be getting harder. Over recent years the number of active merger control regimes has increased considerably, there are new thresholds to capture so-called “killer acquisitions” and foreign investment and national security rules have been implemented or strengthened in a number of jurisdictions. Authorities are also increasingly targeting procedural infringements, such as “gun-jumping” and in some cases moving the goalposts. Below we discuss how this more challenging climate for transactions has developed further in 2019 and provide key practical advice for parties doing deals this year and beyond.

Perhaps the most high profile prohibition globally in 2019 was the European Commission’s decision to block *Siemens/Alstom* after a Phase 2 review. This proved hugely politically sensitive – French and German politicians in particular argued the deal should have been cleared to allow the creation of a European “champion” able to compete against China’s state-owned operator. This was despite the Commission’s detailed analysis finding significant competition issues and limited Chinese competition, as well as a number of EU national authorities flagging concerns.

Since then joint French, German and Polish proposals have notably called for reform of the EU merger control regime, such as ministers having the ability to veto merger control decisions and analysis having a greater focus on global markets, with more flexibility regarding market definition and use of remedies other than divestiture. These proposals fit

alongside political concerns about whether antitrust regimes more broadly remain relevant and fit-for-purpose, especially in the context of fast-moving digital markets and worries about foreign state-backed competitors.

Generally, enforcers and politicians globally appear aligned in desiring increased scrutiny of digital transactions. In contrast, greater consideration of industrial policy and political factors in merger control seems more about flexibility – enabling political intervention to achieve the “right” outcome even if competition analysis indicates concerns. However, a range of ideas are being floated. The Dutch Government, for example, does not favor merger control reform but has proposed a new area of law to allow regulatory intervention if a company receives government support or has an unregulated dominant position outside Europe.

Within the EU institutions themselves, lawmakers have suggested the EU Parliament should have a greater role in competition enforcement, including merger control. Reappointed for an unprecedented second term as Competition Commissioner and with a new dual digital role, Margrethe Vestager is against mixing public policy considerations and merger control. However, change appears to be coming given merger control reform is part of Commissioner Vestager's "mission letter" from Commission President Ursula von der Leyden – who is advocating a "more sectoral" approach and was part of the German Government in 2019 when Germany and France pushed for changes to make it easier for EU champions to merge. This is a development to watch.

An effective way of determining whether merger control is becoming more intrusive and deals inappropriately blocked is to analyze relevant data. EU statistics show that, after blocking no deals in 2018, the European Commission prohibited three in 2019 – the most in a single year since 2001 when five deals were blocked. Indeed, 2019 is only the third year since 1990 when the Commission has prohibited three or more deals.

However, the number of prohibition decisions in any year can be skewed by whether M&A parties decide to abandon their deal if referred for an in-depth (Phase 2) review – parties often prefer to abandon their deal than face the cost and delay of an in-depth investigation. Likely to be at least a factor in the higher number of prohibitions in 2019 is that no deals were withdrawn by parties at Phase 2. Contrast this with 2018 when no deals were prohibited at Phase 2 yet two were abandoned at that stage.

Around 300-400 M&A deals are notified to the European Commission each year – and the vast

majority cleared. In 2019, 382 deals were notified, with 343 cleared unconditionally at Phase 1 plus another ten with remedies. Even deals referred to Phase 2 have a good prospect of clearance, either unconditionally or on terms acceptable to the parties. For example, of nine Phase 2 decisions in 2019, six were conditional clearances (i.e. cleared with conditions that the parties accepted) – so two-thirds of deals subjected to a Phase 2 review were approved even taking into account three prohibitions. In 2018, four deals were cleared unconditionally at Phase 2, six cleared with conditions and none prohibited. These sorts of figures do not support the degree of political concern and desire for reform arising from *Siemens/Alstom* – although perhaps suggest too many unproblematic deals require notification.

Across the Atlantic, the vast majority of deals notified in the US are also unproblematic and cleared. US data for FY2018 (1 October 2017-30 September 2018) shows only 2.2 per cent of notified transactions (45 of 2,111) received a "Second Request" – the equivalent of a Phase 2 review under the EU and similar regimes. This matches the 2.1 per cent of deals notified to the European Commission in 2019 and referred to Phase 2 (eight of 382), down from 2.9 per cent in 2018 (12 of 414).

Particularly striking from US data is how it is becoming increasingly important to avoid a Second Request. 39 of the 45 deals receiving a Second Request in FY2018 – 87 per cent – were challenged by the FTC or DOJ. This compares to an average of 69.6 per cent for fiscal years ending during the George W Bush administration and 83.2 per cent during the Obama administration. Over just a few years, deals receiving a Second Request have therefore become more than 14 per cent more likely to be challenged – indicating a more onerous approach.

Just over half the challenged transactions (20 of 39) were resolved via settlement, about 15 per cent were brought to federal or administrative court, in nine cases parties decided to abandon their deal after being challenged and four deals were restructured to resolve concerns.

Back in Europe, 2019-20 has been a particularly challenging year for deals reviewed in the UK. The CMA – which reports data for April-March each year – had already referred more deals for a Phase 2 review by the end of 2019 (12 referrals) than in the whole of 2018-19 (11 referrals), prohibiting two and requiring a divestment remedy in one. Indeed, only four times over the past 16 years has the CMA or its predecessor, the Office of Fair Trading (OFT), referred more than 12 deals to Phase 2 – with two prohibitions the most in any year.

All the more notable is that in all four previous years when more than 12 deals were referred for a UK Phase 2 review this was out of 100-210 Phase 1 reviews. However, the CMA completed only 47 Phase 1 reviews from March-December 2019, indicating a quarter of all CMA merger reviews during this period resulted in a reference to Phase 2. Contrast this to 2005-06, when the OFT referred 18 deals to Phase 2 but out of 171 Phase 1 reviews (10.5 per cent).

Also significant is how many fewer deals are being reviewed annually in the UK than even seven or eight years ago when around 100 Phase 1 reviews was the norm. An important reason is that very few deals are now called-in by the CMA and “found not to qualify” – i.e. do not meet the test for a UK review. After 69 “found not to qualify” reviews in 2005-06, there were 23 in 2012-13, halving to 12 in 2013-14 with two or less in every year from 2015-16.

While deals reviewed by the CMA now statistically face a greater chance of being referred for a Phase 2 review, there is therefore also a much lower

risk of deals being called-in for an unnecessary review and incurring related wasted cost and delay. This suggests an improved focus on deals raising the greatest risk of concerns – something that will become even more important in 2021 when the CMA's case-load is expected to increase considerably as a result of Brexit and the end of the “transition period” (after which the UK will be outside the EU merger control regime).

Improved CMA intelligence gathering is a factor in this improved focus, but the CMA is also showing greater willingness to listen to parties' views about why a review is not needed. A key strategy for parties seeking to avoid a UK review can now be to approach the CMA with a briefing paper explaining why their deal raises no concerns. There used to be a perception that such an approach would inevitably trigger a CMA review, but we have had considerable success for clients adopting this approach – even for large tech deals.

Like the CMA, Canada's Competition Bureau has a dedicated mergers intelligence function. In May 2019, Canada's Competition Commissioner announced that the Bureau would increasingly gather intelligence on deals raising concerns but below the thresholds for mandatory notification. Whereas the Bureau focuses on mandatory notifications, it can review any deal even if below the thresholds – and in September 2019 its new Merger Intelligence and Notification Unit began encouraging parties to voluntarily notify problematic transactions below the thresholds.

Alongside this development the Bureau has been seeking information about concentration in digital markets, so any greater Canadian review of smaller deals may focus on killer acquisitions, given acquisitions of start-ups often fall below the thresholds for merger control review. As mentioned in our digital article, Germany and Austria have already introduced transaction value thresholds

to be able to review such deals and a number of authorities have also been considering similar proposals.

France's Senate proposed a new bill in January 2020 recommending that digital giants be required to notify all transactions, regardless of their size. While only a "minimum" notification is envisaged to limit the burden, this could catch a large number of deals. For example, the Lear report commissioned by the CMA in 2019 found just three of the large tech players acquired 300 companies combined from 2008-2018.

Germany has also proposed further reforms – some intended to reduce the number of notifications by raising the relevant thresholds and exempting deals by SMEs, recognizing that too many unproblematic transactions are subject to review (1,300 per year). But other reforms are intended to make it easier to review mergers in concentrated markets by lowering the notification thresholds for such deals.

These various reforms demonstrate the challenge in designing thresholds to capture the most problematic deals while not casting the net too wide. Ireland, for example, saw a 52 per cent decrease in merger filings in 2019 after increasing its notification thresholds to reduce the burden of notification for smaller deals.

Another increasingly challenging aspect of merger control we have seen over the past year is certain authorities, mainly newer African enforcers, moving the goalposts and pushing the boundaries of their powers – such as attempting to call-in transactions not meeting the relevant thresholds or requiring multiple copies of filings from all subsidiaries in a corporate group (triggering multiple filing fees). These scenarios can raise difficult questions about whether to comply or push-back – especially for deals with tight timetables or where parties know they may soon have to deal with the same authority on a future deal.

Foreign investment and national security reviews

Alongside traditional merger control reviews, foreign investment or national security reviews continue to become more prominent for M&A deals – contributing to the overall sense that merger control is becoming more onerous.

Countries such as the US, Canada and Australia have long-established foreign investment regimes. The US significantly strengthened its CFIUS regime in 2018 and the likes of China, Germany, France, South Africa and the UAE have also strengthened or introduced their own regimes in recent years.

In the UK, after a recent lull in developments, extensive long-term national security reforms are now expected to progress – plans for a National Security and Investment Bill were confirmed following the General Election at the end of 2019. If the new regime closely follows proposals in 2018, around 200 deals may be notified for a review each year with 100 requiring a full assessment. However, short-term reforms in mid-2018, significantly lowering the thresholds for a national security review in three key sectors (items for military or dual-use, aspects of computing hardware and quantum technology) have not led to a slew of cases.

At EU level, a new framework for foreign investment review was approved in 2019 and becomes effective in October 2020. This primarily establishes a cooperation mechanism for EU Member States and the European Commission to exchange information and raise concerns about specific investments. It also sets minimum procedural requirements for national regimes, but aside from this does not require Member States to harmonise/introduce regimes.

Gun-jumping

Part of the broader trend of authorities pursuing procedural infringements, around 20 jurisdictions sanctioned “gun-jumping” in 2019 – fining M&A parties for implementing deals before required filings or approvals.

The benchmark global fine remains the European Commission’s €125 million fine on Altice in 2018. The Commission imposed another significant fine in 2019 – €28 million on Canon for a “warehousing structure” used to acquire Toshiba Medical Systems in 2016. The EU fine came shortly after Canon and Toshiba settled similar US charges for US\$5 million.

The infringing structure had two steps – first, an interim buyer acquired 95 per cent of the target for €800 with Canon paying €5.28 billion for the other 5 per cent and options over the interim buyer’s shares and, second, Canon exercised its options to obtain full ownership after securing regulatory approvals. However, the EU deemed both steps a single notifiable transaction – so the first step (prior to notification and clearance), was partial implementation and an infringement. Similarly, the US alleged the purpose was to avoid the Hart-Scott-Rodino waiting period.

It is not only high profile global enforcers pursuing cases. Slovenia imposed the highest gun-jumping fine in 2019 – €53.9 million on Agrokor for failing to notify a deal in 2016, with Agrokor’s former chairman/owner fined €5,000 as well. Slovenia’s Competition Protection Agency has since seized shares owned by Agrokor in an attempt to ensure payment – while a restructuring of Agrokor in 2018 is also under investigation for gun-jumping in Serbia.

Another sizeable gun-jumping fine in 2019 was BRL 57 million (US\$13.4 million) imposed on IBM in Brazil in December regarding its acquisition of Red Hat. This was very close to the maximum BRL 60 million penalty allowed.

2019 also saw several “firsts” – Australia imposed its first ever fine for gun-jumping (\$A1.05 million). Ireland also pursued its first ever criminal prosecutions for gun-jumping, albeit resulting in the relevant parties being required to make small charitable donations.

Greater focus on gun-jumping is also prompting authorities to consider whether their powers need strengthening. South Africa, for example, introduced new gun-jumping guidelines in 2019 with higher penalties, including for delay in notifying an infringement once uncovered.

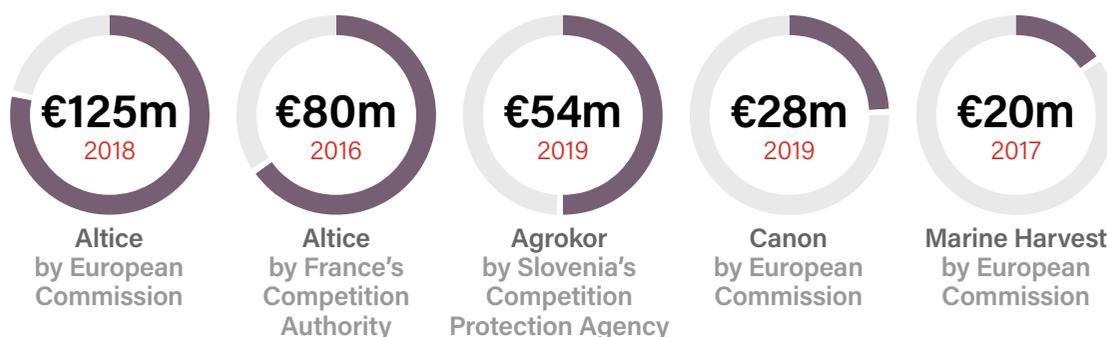
Largest total fines imposed for gun-jumping or failure to notify, 2014-2019



M&A parties should keep in mind the following points to help minimize merger control risks for their deals in 2020 and beyond:

- Merger control can impact considerably on deal timetables and cost – even being a deal-breaker in some cases. Early analysis of whether/where filings are needed and the extent of any substantive issues is vital.
- As well as formal review periods, ensure the deal timetable allows sufficient time for the preparation of filings – which can require detailed information, certified copies and translations of key documents.
- So-called “pre-notification discussions” also need to be factored in – during which authorities satisfy themselves they have sufficient information to start their formal review. The time taken can be many months or more, depending on the issues.
- Do not overlook foreign investment/national security filings, as well as traditional merger control reviews.
- A Second Request/Phase 2 review means significant cost, disruption and uncertainty. Where possible consider strategies to secure earlier clearance, especially in borderline cases. If a Second Request is likely, develop a plan to collect and review documents as early as possible.
- Ensure analysis of filing requirements and deal conditionality takes account of Brexit and the end of the “transition period” – will the UK be within the EU merger control regime when the deal is being notified?
- Establish appropriate confidentiality protections and “clean team” arrangements from the outset to protect against gun-jumping and infringing general competition rules. This helps prevent both inappropriate exchanges of competitively sensitive information and deal-planning straying into prohibited early implementation.

Highest fines in individual cases for gun-jumping or failure to notify, 2014-2019



2019 review

Merger control

Our global antitrust and competition group had another successful year advising parties to some of the largest global M&A deals in 2019. We acted on 31 in-depth reviews and as hired guns (standalone antitrust counsel) on 18 deals.

Consistently ranked in GCR's Elite top 10 global merger control practices, we are ranked 4th for 2020. GCR observed that "[c]reative lawyering and important engagement with enforcers" comes with instructing firms, like ours, ranked in its Elite. GCR also noted the difficult context in 2019, including differing approaches to merger control throughout the world.

We provide services at all stages of the merger control process: analyzing the likely impact and risk of a proposed transaction; efficient, centralized coordination of global filings; compliance issues in relation to the transaction structure, including joint ventures and strategic alliances; handling in-depth responses to merger control investigations worldwide; and obtaining multi-jurisdictional clearances and negotiating remedies.

Our teams work collaboratively across multiple regions to achieve successful outcomes for our clients. Beyond our global offices, our network is complemented by strong relationships with leading local law firms to provide complete coverage across all important merger control regimes.

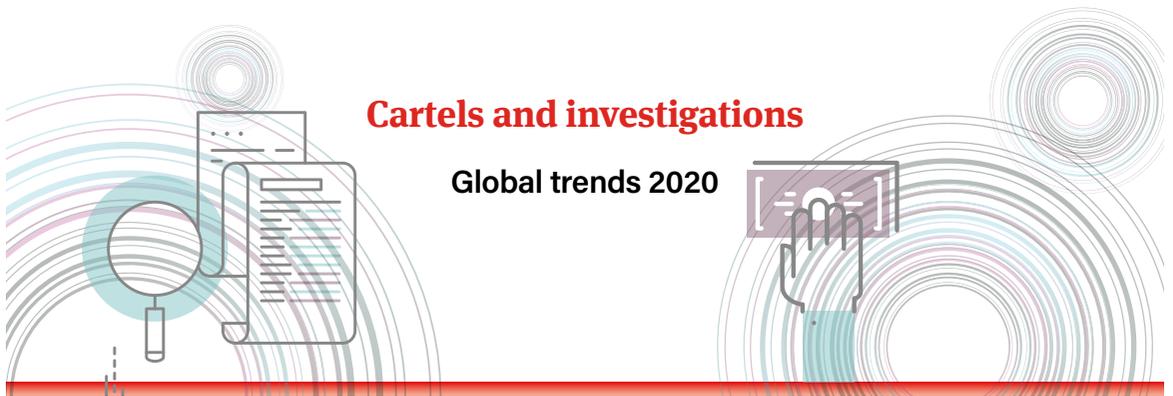
Highlights

We achieved unconditional UK Phase 2 clearance for PayPal's US\$2.2 billion acquisition of iZettle – having been instructed by PayPal at Phase 2 in place of its Phase 1 advisers. This was a high profile transaction in a challenging context given the current focus on digital markets, the CMA adopting an innovative approach in its analysis and possible "killer acquisition" concerns.

We represented Gemalto, a leading digital security company, on its acquisition by Thales. This US\$5 billion transaction involved filings in more than ten jurisdictions, including the US, EU and China, and was the first case in which the European Commission accepted use of TAR – Technology Assisted Review – for responses to requests for parties' internal documents.

We have acted for Delta Air Lines on a variety of transactions, involving merger filings in a large number of global jurisdictions. This includes Delta/China Eastern taking 10 per cent stakes in Air France-KLM and Air France-KLM purchasing 31 per cent of Virgin Atlantic Airways from Virgin Group (Delta owns 49 per cent of Virgin Atlantic).

We acted for Parmalat on its C\$1.6 billion acquisition of the natural cheese business of Kraft Heinz Canada, securing unconditional clearance in Canada. The case involved a Supplementary Information Request and first use of court orders requiring evidence under oath from the merging parties.



Cartels and investigations

Global trends 2020

Leniency is dead... long live leniency? Immunity/leniency applications are a well-established way for antitrust authorities globally to learn about suspected cartels, with many authorities placing significant reliance on their leniency regimes to generate cases. Successful applicants have much to gain in terms of protection from fines, but there are also potentially significant downsides – especially given the growth of antitrust damages actions, from which leniency applicants receive little or no protection. Has the pendulum now swung against seeking leniency, with the downsides outweighing the benefits? We discuss this below with practical advice for businesses that may be implicated in an infringement and contemplating leniency.

“Certainly not increasing... probably decreasing” was the view of senior European Commission official, Cecilio Madero Villarejo, when asked in 2019 whether leniency applications to the Commission are decreasing. Indeed, over recent years Mr Madero has consistently highlighted that EU leniency applications are “not going up”, and this is supported by data reported in GCR’s Rating Enforcement guide, showing 17 applications in 2018 compared to 18 in 2017, 24 in 2016 and 32 in 2015.

In terms of national authorities, Germany is particularly notable for having seen a large decline in leniency applications in recent years. In his annual review of the year, Bundeskartellamt President, Andreas Mundt, announced 16 companies had made use of the authority’s leniency program in 2019. But this is a significant decrease on the 76 applications received in 2015, and even the 37 applications received in 2017 – suggesting applications in Germany are halving every two years.

In the UK, press reports in May 2019 highlighted that calls to the CMA’s “cartels hotline” rose 18 per cent in 2018 to 556 – up from 471 the previous year and more than two and a half times the number reported in 2014 – according to data obtained by Thomson Reuters. This followed a CMA campaign targeting cartels and encouraging whistleblowers to come forward.

But this does not necessarily tally with an equivalent increase in UK leniency applications, noting the CMA’s cartels hotline is for whistleblowers who are witnesses (potentially entitled to receive up to £100,000 for providing information about a cartel), whereas the CMA has a separate phone line for cartel participants who wish to seek leniency. Indeed, GCR reports that the CMA received 17 leniency applications in 2018, down from 25 in 2017.

There is some suggestion that any decline in leniency applications may be primarily a European trend. In Asia, for example, Japan's Fair Trade Commission is not believed to have concerns in this regard – having received more than 100 applications in each of the three most recent financial years for which it has published data. However, even outside Europe there are signs that leniency is becoming less desirable. Canada's Competition Bureau, for example, granted 31 immunity and 12 leniency markers in 2015-16, compared to three immunity markers and no leniency markers in 2018-19.

In the US, the DOJ's Antitrust Division announced a historic shift in policy in July 2019 that it will now consider providing credit in the charging and sentencing stages of an antitrust criminal investigation to a company that maintains a robust and effective antitrust compliance program. But a key requirement to receive such credit is that the company "promptly self-reports" the potential cartel violation. The suggestion is that the requirement for self-reporting is linked to decreasing US leniency applications.

An element of care is needed when analyzing leniency data given leniency applications often come in waves. Data can potentially be skewed by one or two industry-wide global cartels – which can trigger multiple leniency applications across numerous jurisdictions. Different considerations are also at play when there is no pre-existing investigation and a party is contemplating being the "first-in" (or "type A") applicant, as opposed to applying for leniency at a later stage when an authority is already known to be investigating.

Identifying overall trends for first-in applications is harder as specific figures are less readily available. However, data for certain key jurisdictions suggests a decline. Canada and France received fewer first-in applications in 2018 and 2017 combined than in 2016 alone, and a decrease between each year (31 for

Canada in 2016, eight in 2017 and three in 2018; 12 for France in 2016, six in 2017 and four in 2018). First-in applications in Germany were the same in 2017 and 2018 (12) – but much lower than the 22 received in 2016 and 28 in 2015.

In the UK, first-in applications in 2018 (12) were significantly lower than all three preceding years (21 in 2017, 17 in 2016 and 22 in 2015), but it is too early to tell if this was an unusually low year or the start of a trend. Indeed, data for Australia shows that first-in applications can recover after a seemingly significant decline – 16 first-in applications were made in Australia in 2018 just one less than the 17 made in 2015, compared to only 11 in 2016 and ten in 2017.

Regardless of whether the available data shows a general downward trend in leniency applications, it does appear that seeking leniency is becoming less attractive or at least a more complex decision. But why is this? The main reason typically given is the increasing risk of private damages actions – and we have seen evidence of this. While leniency applicants receive full or partial protection from fines, and where relevant protection from sanctions for their key individuals, they do not receive equivalent protection from damages actions.

In the US, under certain circumstances, a leniency candidate can receive criminal immunity and avoid treble damages in related US federal civil litigation. In the EU, the Damages Directive provides limited protection to leniency applicants. However, this does not come close to full protection from damages claims – with levels of damages claimed often far exceeding fines avoided through leniency. In this context, it may be desirable to adopt a "wait and see" approach (rather than rushing for leniency) if potentially problematic conduct is identified – especially where an infringement or evidence might not be entirely clear-cut or the conduct is close to being time-barred.

Increasing use of settlement procedures may also be a relevant factor in some jurisdictions. Under the EU regime, for example, parties that do not secure a discount in their fine for leniency may nonetheless secure a discount for settlement. And cases often now show parties securing discounts for both settlement and leniency. Cooperating and securing a reduced fine when it is clear that an authority has a strong case may be commercially preferable to triggering an investigation – even if being first-in would secure full immunity.

Another consideration is the management time and cost that must be devoted to any investigation. Regimes can differ, but after securing an initial immunity/leniency “marker,” applicants typically then face a period lasting many years when they must provide continuous and complete cooperation before their immunity/leniency protection is finally confirmed.

Whereas authorities such as the CMA (or its predecessor, the OFT) in the UK were once willing to formalise an applicant’s leniency at a relatively early stage, a concern that this may dull the applicant’s subsequent cooperation means this is now done much later during an investigation. Reforms to the leniency regimes in Canada and Japan approved in 2019 place greater emphasis on cooperation by applicants. Time will tell how this impacts on the number of leniency applications in each country – a closer link between the extent of cooperation provided and the leniency benefit received may be viewed as fairer, encouraging leniency applications. On the other hand, potential applicants may be discouraged if they perceive that more is expected of them.

Another relevant consideration is whether the conduct is international or even global in scope, raising the stakes. If so, a decision to apply for

leniency is likely to mean multiple applications in different jurisdictions (increasing cooperation obligations), and securing full immunity in every potentially relevant jurisdiction is typically challenging. But the broader the scope of the conduct, arguably the greater the risk of this coming to light – making leniency applications all the more important.

In some cases – especially where potentially problematic conduct has a connection with newer antitrust regimes – there may be concerns about fairness or transparency under the relevant procedures. For example, Kenya has struggled to establish an effective leniency regime, with a senior official highlighting in 2019 that key factors include a general mistrust of governmental agencies and no guarantee for leniency applicants that they will not be prosecuted by Kenya’s public prosecutor.

Regardless of any drawbacks of leniency or data suggesting leniency applications are declining, companies should not mistake this as suggesting authorities are deprioritizing cartel enforcement. Indeed, many authorities are becoming more creative, seeking new ways to generate cases or introducing leniency reforms.

As mentioned, the US introduced a new “credit for compliance” program in 2019 which aims to encourage greater self-reporting, and Canada and Japan are significant countries reforming their leniency regimes. The European Commission introduced eLeniency in 2019 – a new online tool to make it easier for leniency applicants to submit statements and documents electronically (24 hours a day, seven days a week), with the same protections as oral applications in person. Even newer enforcers are showing creativity – Zambia, for example, announced a six-month amnesty program in 2019 in addition to its existing leniency regime.

Such developments follow similar reforms over recent years. For example, the European Commission launched an anonymous whistleblower tool in 2017 to encourage individuals to report cartel conduct. Also in 2017, the CMA provided a digital screening tool to help UK procurement professionals identify suspected bid rigging, and Canada established a tip line to help identify fraud and bid rigging in public procurement. In 2018, Spain's National Authority for Competition and Markets announced a new unit to detect cartels, and a number of other authorities have similarly been using economic intelligence units for some time.

As well as reforms and new technologies, advocacy is another relatively simple option for authorities. The CMA, for example, now regularly conducts campaigns and surveys like the one mentioned earlier to raise and test awareness of the UK competition rules, while at the same time promoting its leniency and whistleblower programs. Businesses therefore cannot rest easy regarding antitrust risk.

In this overall context of seemingly declining leniency applications, authorities are nonetheless becoming more creative in generating cases. As such, there are a number of important messages for business:

- Do not misinterpret any suggestion that leniency applications are declining as meaning that antitrust compliance is becoming less important. Cartel enforcement remains a priority area for antitrust authorities.
- Antitrust compliance is arguably more important than ever in a climate where damages actions are increasing and authorities are more creative in generating cases. Authorities are also under increasing political pressure to demonstrate they are effective enforcers.
- Key to effective antitrust compliance is establishing an overall culture of compliance, supported by the board and senior management. Companies should adopt a risk-based approach, with appropriate training and procedures to monitor and review compliance.
- Deciding to seek leniency – especially if there is no pre-existing investigation – is an increasingly complex decision. Time is of the essence to secure full immunity, but appropriate consideration should be given to all relevant factors before rushing in.
- Businesses need to take decisions that are right for them, depending on the relevant circumstances. Even if leniency applications are declining, many businesses are still seeking leniency, reflecting that this is right for them.
- To the extent certain jurisdictions raise issues of procedural fairness, the International Competition Network's efforts to raise the bar in this regard – notably its Framework for Competition Agency Procedures announced in April 2019 – should help in time, as well as providing a possible forum to raise concerns.

Change in number of leniency applications in a selection of jurisdictions

	Australia	Canada	European Commission	France	Germany	UK
2018	16	3	17	6	25	17
2017	12	11	18	6	37	25
2016	12	37	24	15	59	21
2015	19	51	32	8	76	24

% change from 2015-2018

-16%	-94%	-47%	-25%	-67%	-29%
▼	▼	▼	▼	▼	▼

Change in number of "first-in" ("type A") leniency applications in a selection of jurisdictions

	Australia	Canada	France	Germany	UK
2018	16	3	4	12	12
2017	10	8	6	12	21
2016	11	31	12	22	17
2015	17	33	8	28	22

% change from 2015-2018

-6%	-91%	-50%	-57%	-45%
▼	▼	▼	▼	▼

2019 review

Cartels and investigations

As well as assisting clients to develop and implement effective compliance programs, we continue to be involved in the most high profile global cartel investigations including a number of cases in the financial services sector, such as FOREX and Euribor.

Our international cartels and investigations team delivered some notable results for clients over the past year. In several cases we secured case closures without penalties and obtained significant reductions in fines through negotiations, legal submissions and appeals.

Our holistic approach to managing investigations, combined with our ability to advance complex legal arguments and our tactical skill, help to drive our success in protecting and defending our clients' interests.

A key strength is our considerable experience in dawn raids and digital forensic investigations. We assisted on multiple confidential cases across all regions in 2019, attending a number of dawn raids.

Notable in recent years is the decreased number of leniency applications we have made – reflecting the trend discussed in our cartels article above. This is mainly due to the increased threat of private litigation.

In contrast, there is growing demand from clients for assistance in circumstances where individuals are exposed to allegations of having engaged in anti-competitive conduct. Working closely with our white collar crime practice, we help clients develop and implement crisis management response plans, and internal investigation protocols.

Highlights

Retail

We are advising a major grocery retail chain in response to the Canadian Competition Bureau's investigation of alleged price fixing of packaged bread and in response to related follow-on class actions in multiple Canadian provinces.

Agribusiness

We are acting for a leading Asian agribusiness group on an investigation in South Africa. This includes complex and ground-breaking litigation regarding access to documents and validity of warrants.

Information technology

Our Asia team successfully defended a client in the IT sector in the first enforcement action and litigation before Hong Kong's Competition Tribunal, relying on the (very difficult to prove) rogue employee defense.

Benchmarks

We continue to advise a large financial institution on the European Commission's investigation into the alleged manipulation of Euribor, successfully overturning a fine before the EU General Court for insufficient reasoning by the Commission.

Our South Africa team is advising a large investment bank in connection with a highly complex FOREX price fixing investigation, helping them to achieve immunity through cooperation with regulators.

Complaints

We are acting for clients as third parties on a number of investigations, including as lead complainants successfully persuading the relevant authorities to take forward investigations.



Antitrust damages litigation is increasingly important on the global stage, with the number of damages claims rising significantly over recent years. No longer primarily a US phenomenon, damages actions are now common in Europe, especially in the UK, Germany and the Netherlands (fueled by the EU Damages Directive), as well as increasing across the globe in jurisdictions not traditionally known for claims. This trend follows greater recognition that victims of anti-competitive conduct should not bear financial harm, with jurisdictions introducing reforms to encourage antitrust damages actions, as well as seeking to make their courts more attractive to foreign claimants. In this article we explain some of the key developments over the past year with advice for businesses facing or contemplating bringing a claim.

As the number of antitrust damages claims rises, so does the importance of establishing an effective litigation strategy. A key aspect is identifying important developments and trends and ensuring these are built into that strategy. Our global presence allows us to track and gain insights into major developments around the world – below we cover important developments over the past year that are likely to impact on litigation in the coming years.

EU

A ruling by the EU Court of Justice in December 2019 provides important confirmation that, under the EU competition regime, a party can claim damages for loss caused by a cartel even if it is not a supplier or customer on the market affected by the cartel.

This pro-claimant ruling related to a request for guidance from Austria's Supreme Court – where the state of Oberösterreich was seeking compensation from five lift/escalator companies involved in a cartel. The claimant had not made purchases from the cartelists but had granted subsidies (promotional loans to finance construction projects affected by the cartel) in a higher amount than would have been the case absent the cartel, given the cartel increased construction costs. The claimant argued this prevented it using the difference more profitably.

Austrian law did not allow such a claim, but the Court of Justice ruled that the claim must be permitted under Article 101 TFEU – which confers a right on any person who has suffered loss due to

a cartel to claim compensation. However, it was for Austria's Supreme Court to determine whether the applicant had the possibility to make more profitable investments and a causal connection for its loss.

While it was already clear that indirect (as well as direct) purchasers could claim damages, this is the first time the EU Court of Justice has confirmed that a party not active in the cartelised market can establish a claim – likely encouraging further similar claims in future.

Another development worth noting over the past year is that the European Commission adopted its "Passing-on Guidelines" in July 2019, providing national courts with guidance on estimating the share of a cartel overcharge passed-on to indirect purchasers.

UK

Courts in England and Wales – not only the specialist Competition Appeal Tribunal (CAT) but also the High Court – are increasingly accustomed to hearing competition damages claims, but a number of important issues are still being decided.

The UK saw its first cartel follow-on damages action reach trial and judgment in 2018, whereas previous cases settled outside the public eye. That landmark case was *BritNed v ABB* in which the amount of damages awarded – €11.7 million – was considerably lower than the €180 million originally sought. The case shows that, at least in the English system, not every antitrust infringement will lead to vast damages, as well as the importance of grounding damages assessments in factual evidence. A novel aspect of the damages awarded was the inclusion of an amount for "cartel savings" (i.e. for savings made by the cartel, as opposed to loss the applicant suffered). However, this element was overturned on appeal, reducing the award.

When it comes to UK collective actions, all eyes are on *Merricks v Mastercard*, which is set to be heard by the Supreme Court in 2020 on appeal from the Court of Appeal. This is a £14 billion claim brought by Walter Merricks CBE on behalf of 46 million consumers who used a Mastercard between May 1992 and June 2008 and the first test of the Collective Proceedings Order (CPO) regime introduced in 2015 – a new opt-out collective action regime.

The Supreme Court will rule on the appropriate legal test for certification of claims for a CPO and the level of scrutiny which must be adopted regarding the distribution of an aggregate award when certification is considered. The CAT refused to grant a CPO in 2017, but the Court of Appeal sent the case back to the CAT having found the CAT's approach too strict. However, the case has since been further appealed to the Supreme Court.

In the meantime, decisions on certification in other actions involving CPOs are being held up pending the Supreme Court's judgment in *Merricks*. This includes a number of damages actions regarding the European Commission's 2016 *Trucks* cartel decision. However, in a significant ruling in October 2019, the CAT dismissed arguments that a litigation funding agreement involved "claims management services" and an unenforceable and unlawful "damages-based agreement".

Had the CAT ruled the other way, this would potentially have undermined the entire CPO regime given the importance of third party funding for CPOs. Indeed, the CAT appears acutely aware of the importance of litigation funding for CPOs, generally coming down on the side of claimants when issues arise.

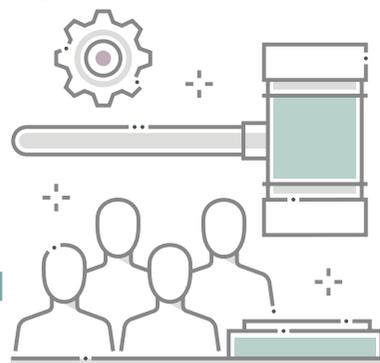
Merricks v Mastercard in numbers

Claim is on behalf of all individuals – over the age of 16 and resident in the UK for a continuous period of at least three months – who purchased goods or services between May 1992 and June 2008 from businesses in the UK which accepted Mastercard



On behalf of
46 million
consumers

16 year period



United States

In the US, a judgment of the Supreme Court in May 2019 is considered one of its most important antitrust rulings in recent years, expanding the class of people with standing to pursue a claim.

The *Illinois Brick* precedent from 1977 restricts antitrust damages claims to direct purchasers only. However, in *Apple Inc v Pepper* the Supreme Court applied a more expansive interpretation of “direct purchaser” – with potentially significant implications for online platforms and other parties such as travel agents who often consider themselves to be intermediaries in transactions.

The claim alleged that Apple forced iPhone owners to pay above competitive prices for apps by making its App Store the only place to buy apps and charging a 30 per cent commission on sales. Apple disagreed – arguing the plaintiffs were indirect purchasers as iPhone owners purchase apps from app developers who decide whether to pass-on

Apple’s commission. The Supreme Court dismissed Apple’s claims, finding that iPhone owners purchase apps directly from Apple – the key issue is whether there is an intermediary between seller and buyer (which there was not on the facts); who sets the price is irrelevant.

In 2019, we have also seen signs of US courts seeking to widen the scope of discovery in antitrust cases. Although federal civil procedure rules state that disclosure must relate to the elements of the claim, in an ongoing antitrust damages case on which we are instructed a US court granted a disclosure request that went well beyond that, ordering defendants to disclose both responsive and non-responsive documents and then claw back the non-responsive documents. Only excluded from the scope of disclosure was legally privileged or personal sensitive material – meaning competitively sensitive information was required to be disclosed. Reflecting the seriousness of the issue, as of the time of writing, defendants have sought an interim appeal to the US Supreme Court.

Canada

Canada's Supreme Court decided a number of important issues regarding competition damages actions in September 2019 – most notably regarding umbrella purchasers and certification. In *Pioneer Corp v Godfrey*, the Supreme Court confirmed that, in addition to direct and indirect purchasers of a cartel's products, "umbrella purchasers" (i.e. consumers who purchased products from non-conspiring competitors of the cartellists) can bring claims – thereby expanding the scope of potential liability in damages actions to the benefit of claimants.

On certification, the Supreme Court affirmed that, at the certification stage, a court only needs to be satisfied that the plaintiff has shown a plausible methodology to establish that the loss reached one or more claimants at the purchaser level – a relatively low threshold. If at the subsequent common issues trial, the court is unable to determine from expert evidence which class members had suffered a loss and which had not, further individual issues trials may be required. Thus, by pushing determinations on commonality of loss from the certification judge to the judge at the common issues trial, this potentially opens the door for certification of price fixing class actions in cases where liability cannot ultimately be determined at a common issues trial.

Germany

Our German antitrust and competition team secured a landmark judgment in relation to an antitrust damages claim before Germany's Federal Supreme Court in December 2018. Public transport company VBK had brought a claim against our client, a German rail construction company, Schreck-Mieves, in respect of harm allegedly suffered from participation in the rail infrastructure cartel.

German courts have developed a practice in cartel damages claims of allowing claimants to rely on *prima facie* evidence – meaning defendants are required to disprove that specific transactions were affected by the cartel and that harm occurred. The EU Damages Directive also establishes a rebuttable presumption that cartels cause harm, but the case in question pre-dates the Damages Directive.

We successfully challenged the *prima facie* evidence in this case, shifting the burden of proof away from the defendant and back to the claimants. This is the first time that Germany's Federal Supreme Court has examined the issue of *prima facie* evidence in a cartel damages claim – with significant implications for similar damages claims in other sectors and potentially discouraging claims relating to markets where it is difficult to prove harm.

The past year also saw deployment of a German law passed at the end of 2018, implementing a new instrument for collective redress – the Model Declaratory Action (*Musterfeststellungsklage*). This seeks to facilitate claims by a large number of consumers harmed by a business practice. Although widely considered a positive development for consumer protection, the law is restricted in scope. In particular, it provides for only a declaratory decision binding on issues of fact and law – meaning consumers who wish to obtain damages after such a decision must file separate and individual proceedings for their specific damages claim. Despite its limitations, this new mechanism may spur further antitrust damages actions in Germany.

The Netherlands

In a pro-claimant development, a new law passed by the Dutch Senate in early 2019 makes it possible

for injured parties to claim damages in collective action procedures. Although class actions are well established in the Netherlands, these did not previously allow a class representative to claim damages on behalf of the class. The new legislation facilitates recovery of competition damages on a large scale by allowing opt-out claims to be brought by representative organizations – thereby reducing the cost of bringing a claim by allowing injured parties to obtain damages without having to file separate claims following a declaratory decision.

Italy

A substantial reform to Italy's class actions rules in 2020 has the potential to make Italy a considerably more attractive jurisdiction for antitrust damages claimants. The new rules, entering into force in April 2020, extend the scope of class actions and create significant procedural incentives for claimants, such as allowing class members to join an action even after the court has issued a first decision on the merits. These permissive rules have raised concern that they may encourage opportunistic behavior by claimants while creating uncertainty for plaintiffs. However, the significance of this development may depend on how courts apply the new regime going forwards.

Australia

Recent changes to the Australian Competition and Consumer Act 2010 (ACC) in July 2019 are intended to bring competition claims within the reach of smaller businesses lacking the financial means to bring claims. The Commonwealth Parliament amended the ACC to allow claimants in competition damages cases to seek an order from the court recognizing that they are not liable for the legal costs

of the respondent regardless of the outcome of the claim. This is naturally likely to encourage claims.

Class action reform more broadly is a hot topic in Australia. Australia's High Court ruled in December 2019 that common fund orders (CFOs) are not permitted in class actions – a type of court order providing for a litigation funder's remuneration to be calculated as either a percentage of a successful class action judgment/settlement or a multiple of the costs incurred in litigating the proceedings (and usually entitling the funder to be paid before any amount is distributed to group members).

There remains the option of funding equalisation orders (FEOs) whereby the litigation funder receives only what it is entitled to from group members who have entered into funding agreements. However, many class action claims may be less attractive as funders need to engage in time-consuming "book building" – identifying, contacting and signing-up as many group members as possible to funding agreements. Access to justice for unfunded group members is also likely to be reduced with funders likely to prefer "closed" class actions, including only claims of funded members.

Brazil

In Brazil, a legislative proposal which seeks to double the amount of damages that can be awarded against companies that breach competition law is one step closer to being enacted by Congress after it was approved by a commission of the House of Representatives in 2019. If enacted into law, it will increase the incentive for claimants to file claims for competition damages, and may well lead to a significant increase in damages claims in Brazil. This is a development to watch.

In this overall context of increasing damages actions, there are a number of important points for businesses to consider:

- Keep an eye out for antitrust investigations and infringement decisions involving your suppliers and the sectors in which they operate. This is typically the first indication that your business may have been harmed by anti-competitive conduct – and therefore that you may be able to bring a damages claim.
- Do not assume that antitrust damages actions are limited to cartel conduct. Increasingly claims are also being brought regarding abusive conduct by dominant firms. This is an important point for both potential claimants and defendants.
- Businesses potentially implicated in an infringement, whether because they are under investigation or a whistleblower or internal audit has triggered a concern, should consider their litigation strategy at an early stage. This will be an important consideration in any decision to seek immunity/leniency, settle or fight on – factoring in the strength of the evidence.
- An effective litigation strategy requires consideration of legal privilege rules and avoiding the creation of non-privileged documents that are unhelpful and potentially disclosable in damages litigation. Privilege rules are complex and differ between jurisdictions – it cannot be assumed that a document will be privileged in every relevant jurisdiction.
- Whereas US litigation used to be the primary risk for a business found to have committed an infringement, a US settlement no longer brings finality and can trigger copycat claims elsewhere.
- Mechanisms to achieve “global peace” against all potential claims are attractive for defendants wishing to settle – bringing finality and not overpaying. There are also advantages for claimants – securing payments through efficient settlements and without the expense of issuing proceedings and litigating in multiple jurisdictions.

2019 review

Litigation

Our antitrust and competition group is notable for its strength in antitrust litigation worldwide, and is one of the few global antitrust practices to have powerful litigation teams on each side of the Atlantic.

In 2019, we were involved in 26 high profile antitrust disputes in which major events occurred in more than 20 different jurisdictions – including cutting edge litigation for a number of clients.

Our North American antitrust litigators acted on multiple complex high value cases and have significant experience in key industry sectors such as energy, financial services, life sciences and healthcare. In Europe, our experienced team remains busy acting for both claimants and defendants, enabling us to offer in-depth insights into the strategies of opposing counsel.

In Asia Pacific, the ACCC often relies on our team as external litigation counsel and we successfully defended our client in the first competition court case in Hong Kong. In Africa, our instructions include litigation in Namibia for a global sportswear company.

Our team combines antitrust experience with robust and commercially-focused litigation skills. Our litigators regularly appear before the courts and specialist competition tribunals in the US, Canada, Latin America, Europe, Asia and Africa, as well as the European Courts in Luxembourg and in international arbitration.

Our experience in private litigation, combined with our skill helping clients defend antitrust investigations, means we are often sought after to assist clients where novel procedures or complex questions arise. This includes high court litigation regarding access to documents and resisting the validity of warrants for search and seizure operations.

Highlights

We represent Vodafone in its claim for follow-on damages in the UK High Court arising from the smart chip cartel decision by the European Commission.

We are representing Orange against accusations from the administrators of Phones4U that a number of the major mobile network operators colluded to force Phones4U out of the UK retail market.

We are advising HSBC in respect of claims arising from the European Commission's investigation into investment banks' alleged manipulation of FX rates.

We are representing a global electronics manufacturer in defending follow-on class actions in Canada in connection with alleged price fixing in the global LCD panel market.

We are representing a disposable contact lens manufacturer in defending consolidated US class actions regarding alleged horizontal price fixing and vertical resale price maintenance.

We represent a global pharmaceutical company in defending consolidated US class actions alleging that generic drug manufacturers colluded to fix, stabilize and raise prices and allocate markets of generic drugs.

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Partner promotions, 1 January 2020

Our global antitrust and competition group has more than 60 partners following partner promotions in 2020.



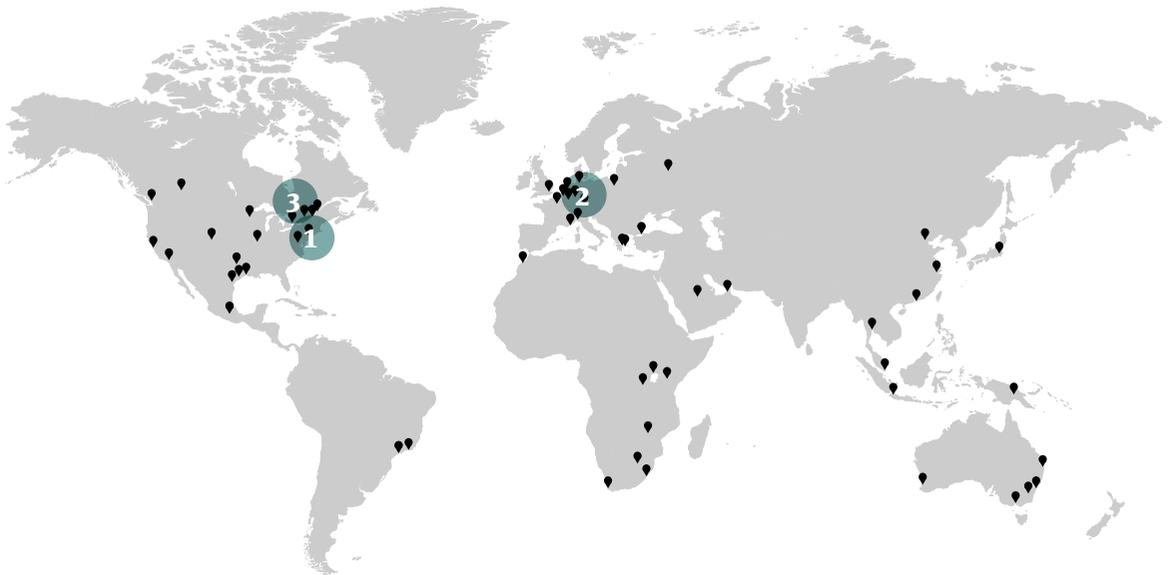
Gerald Stein
Partner, New York



Tim Schaper
Partner, Hamburg



Stephen Nattrass
Partner, Ottawa



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