10 key themes

Global antitrust in 2022

Freshfields Bruckhaus Deringer

Global antitrust in 2022

Welcome to our annual review of the 10 biggest trends in the antitrust world.

We are living through an era in which antitrust enforcement and the external business environment are more closely intertwined than at any point in history. The COVID-19 pandemic has increased society's expectations of business and accelerated trends toward digital transformation, placing a premium on resilience for countries and businesses. Our politics are increasingly polarized, sparking a wave of developments in law and enforcement that makes operating across borders more challenging. Governments are playing a more active role in markets and intervening to protect domestic industries and consumers. And all of this is taking place as our window to tackle climate change narrows, with new forms of collaboration urgently needed to achieve the transition to Net Zero.

Expansive antitrust

Each of these forces has a direct line to antitrust, where the rapid pace of change is driving governments to take a more expansive approach through new laws and by asking enforcers to address a wider set of goals from economic growth to innovation, productivity, consumer protection and carbon reduction.

> **"Antitrust and foreign investment considerations are increasingly important to our clients' business-critical challenges, whether they're executing cross-border deals, digitizing their operations, responding to climate change or reshaping their workforces in the wake of the pandemic. As our firm's Senior Partner, I couldn't be prouder of our top-ranked antitrust group. We hope you enjoy their take on what to expect in the year ahead."**
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> 
> **Georgia Dawson**
> The Senior Partner

Tech in the crosshairs

In the US, President Biden has made assertive antitrust enforcement a priority of his administration, appointing progressive leaders to the federal agencies and calling for antitrust laws to be enforced with "vigor." It is perhaps little surprise therefore that US tech finds itself in the spotlight.

Beyond the US, the European Union (EU), the UK Competition and Markets Authority (CMA), Germany's Bundeskartellamt and the Chinese State Administration for Market Regulation (SAMR) have introduced (or are planning) new powers to regulate digital businesses, with a complex interplay of antitrust, IP, data and consumer laws being deployed to achieve a range of objectives from tackling misinformation to keeping personal data safe.

Industries in transformation

The technological transformation of financial services, manufacturing and energy is similarly in focus as the antitrust/consumer protection lens is turned on companies' collaboration arrangements, data ownership practices and use of government financing. Many of these businesses are also facing new regulatory hurdles as they adapt their practices to support carbon reduction goals.

Focus on life sciences and other innovative sectors

Antitrust is also being deployed as a tool to promote innovation, with authorities considering wider theories of harm as they investigate whether deals and collaborations are stifling creativity. This trend is most keenly felt in tech and life sciences as regulators walk a fine line between intervention and encouraging innovation and investment.

The evolution of merger review

These dynamics are reshaping merger review. We're seeing heightened antitrust scrutiny of certain deals and sectors and more skepticism that mergers are beneficial (or at least neutral) to competition.

At the same time, governments are strengthening their powers to scrutinize investments on national security grounds amid the ongoing power struggle among nations. 2022 has already seen a new regime come into force in the UK, while across the world, governments are paying greater attention to investments in dual-use and emerging technologies deemed critical to both military and economic strength.

Taken together, these forces are combining to create a less predictable M&A environment where deals take longer to close; in turn this is driving dealmakers to litigate against both procedural and substantive decisions by regulators.

Climate change in focus

Finally, the past year has seen unprecedented international attention on climate change, from the UN's "code red for humanity" report to the COP26 climate conference in Glasgow. Antitrust will play a critical role in this space, leading authorities to think hard about whether current competition and consumer enforcement concepts should be flexed to address environmental challenges.

"We have the privilege of advising at the forefront of many of these regulatory transformations and engaging with agencies around the globe as they introduce new rules and fine-tune the application of existing rules that will impact businesses in the year ahead. We look forward to continuing to work alongside our clients on their strategic and sustainable approaches to these rapidly evolving laws and policies – ensuring an innovative and commercial approach to investment decisions and risk management globally."

Rafique Bachour
Global Managing Partner
and Antitrust Partner

Global antitrust in 2022 explores all these themes as well as the impact of competition law on the post-pandemic labor market and more traditional antitrust concepts such as the evolution of cartel enforcement. In the months to come, we will be hosting a series of events to debate these fast-moving issues, so if you're interested in joining please speak to your usual contact in our antitrust, competition and trade team.

On behalf of everyone at Freshfields, we wish you a happy and healthy 2022.

Thomas Janssens
Global Head,
Antitrust, Competition
and Trade Group

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01. Expansive antitrust – a tool to cure all ills?

Antitrust at an inflection point

Antitrust has been flung into the spotlight in recent years as policymakers, enforcers and academics have debated whether years of perceived underenforcement have resulted in higher consumer prices, larger corporate profits, weaker small businesses, lower employee wages and greater income inequality. Initial studies suggested that US industries had grown increasingly concentrated in the absence of robust antitrust enforcement and that large companies had capitalized on their unchecked market power to extract increasing profits at the expense of consumers and workers. Critics of the status quo argued that antitrust had lost its way and that enforcers too often favored corporations over competition. While some evidence of these trends existed at the global level, the evidence was far more mixed and often showed more stable concentration levels in the EU and UK. This further fueled concerns that US enforcement was out of step.

Scholars responded by pointing out that the initial studies said little about competition because they measured concentration at broad sectoral levels rather than at product levels. Later studies sought to further undermine the popular narrative by showing that what in fact was occurring in the US economy was that businesses were embracing technology and innovation to gain scale and to expand geographically into a greater number of markets, leading to more efficient businesses and increased competition. While modest adjustments, such as increased funding for authorities might still be justified, these studies suggested that a wider overhaul of the antitrust laws was unwarranted.

But politicians and antitrust enforcers around the world nevertheless have signaled a need for bold action and have embraced calls to reinvigorate antitrust enforcement to address industrial and public policy concerns. Many also have advocated for using antitrust to tackle broader social and economic issues beyond consumer welfare, including income and racial inequality, the decline of small business and sustainability objectives. To the extent current antitrust tools are perceived as not up to the task, legislatures are also considering reforms that would give enforcers greater power to pursue their missions, particularly with respect to policing competition in the fast-paced digital economy.

Precisely how these changes will play out in the coming years will need to be seen. What is clear, however, is that antitrust is at an inflection point. No longer is the question whether antitrust will change but rather by how much.

> **"The increased attention being given to competition policy globally is driving more frequent cooperation and exchange among key competition regulators seeking to enforce their laws vigorously. It will be increasingly important for businesses to match that coordination and to deliver clear and consistent narratives across all jurisdictions."**

Deirdre Trapp
Antitrust Partner,
London

What to expect with a more ambitious enforcement agenda

Irrespective of any potential enhancement of their procedural tools, antitrust authorities around the world already have begun to implement more ambitious antitrust agendas that are certain to carry over into 2022. Enforcers are giving greater weight to concerns that traditionally have been lower priority. There is renewed interest in vertical mergers that combine companies at different levels of the supply chain (as opposed to deals between direct competitors). Enforcers also have their eyes on practices that may eliminate nascent rivals that could offer disruptive new products and challenge incumbents if only given time to succeed. And while much of the public discourse clearly has been focused on pursuing a more activist antitrust enforcement agenda in the tech sector, healthcare, life sciences, agriculture and financial services are also squarely within the new antitrust crosshairs.

In the US, President Biden campaigned on a platform that promised more assertive antitrust enforcement. Since taking office, he has issued a sweeping Executive Order directing a "whole-of-government approach" to address "overconcentration, monopolization, and unfair competition." He appointed reform-minded enforcers to lead the two US antitrust agencies. Both Lina Khan, the new Chair of the US Federal Trade Commission (FTC), and Jonathan Kanter, the new Assistant Attorney General of the Department of Justice (DOJ) Antitrust Division, signaled in their confirmation hearings an eagerness to enforce the antitrust laws more aggressively. The Biden Administration has started by shaking up the US merger review process with reforms to several long-standing procedural features. The FTC later announced it would significantly broaden its merger investigations to consider a much wider range of potential harms. The FTC also withdrew its support for the Vertical Mergers Guidelines, issued just one year prior, in part because the guidelines had a "flawed" view on merger efficiencies.

Shortly thereafter, the FTC filed suit to block Nvidia's proposed $40bn acquisition of Arm, the second vertical transaction challenged by the Biden Administration in less than a year. In a similar development, the DOJ challenged Penguin Random House's acquisition of rival publisher Simon & Schuster based on a novel labor monopsony theory that the transaction would harm authors. Increased enforcement in the US has not been limited to the merger space. The DOJ successfully defended its first criminal wage price-fixing case against a motion to dismiss. Meanwhile, the agencies have pursued high-profile monopolization cases in the healthcare and tech sectors. These trends are expected to continue into 2022.

> **"We are witnessing the most significant change in US antitrust policy in the last 50 years. But while heightened scrutiny clearly requires companies to consider seriously the potential antitrust implications of their M&A activity and other strategic plans, we have seen that companies can successfully navigate these challenges with the right planning."**
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> 
> **Jan Rybnicek**
> Antitrust Counsel,
> Washington, DC

In the EU, the European Commission (EC) has reset expectations about its jurisdictional authority to review transactions it believes may harm competition. In September 2021, the EC opened an investigation into Illumina's $7bn acquisition of Grail despite the fact that the transaction did not meet EU or Member State notification thresholds.

> **"The European Commission is continuing to bolster and modernize its enforcement toolkit with a view to better addressing perceived market failures. Businesses should keep a close eye on these forthcoming changes in order to remain compliant with antitrust regulation."**
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> 
> **Uta Itzen**
> Antitrust Partner,
> Düsseldorf

Likewise, in its first year as a standalone competition regime following its departure from the EU, the UK has shown that it will continue to play a key role on the world competition stage. The CMA has quickly emerged as one of the most assertive antitrust enforcers internationally. In particular, it has taken an increasingly expansive view of its jurisdictional authority to review transactions with limited or no connection to the UK.

Trends toward greater antitrust scrutiny extend also to China, where antitrust enforcement has moved higher on the government's agenda. Urged on by President Xi, China's SAMR has made headlines this year through more stringent enforcement, including record high fines and a prohibited transaction in the internet sector. China also officially launched a new National Anti-Monopoly Bureau in November 2021. The new agency houses three bureaus – two enforcement and one policy coordination with more than double the previous headcount – intended to help better police anti-monopoly conduct.

Strengthened enforcement – legislative reform looms

Several jurisdictions have introduced legislative proposals to strengthen antitrust enforcement. A slew of bills has been introduced in the US Congress in the last year. This includes legislation that would shift the burden of proof to the parties to show that their merger is not anticompetitive, increase merger notification filing fees to help fund the antitrust agencies and prevent tech companies from self-preferencing (see theme 4). In 2022, the European legislature is set to adopt the EU Digital Markets Act (DMA), which establishes certain obligations for online "gatekeepers" to help technology start-ups compete in the online platform environment. In China, the most eye-catching reform has been the announcement of a second draft Amendment to the Anti-Monopoly Law. The draft seeks stronger penalties for violations, reforms to the merger control regime and further guidance on anticompetitive conduct, reflecting a firmer enforcement posture consistent with global trends. The Australian Competition and Consumer Commission is also consulting on significant proposed reforms, including changing its "voluntary" merger review regime to a "mandatory and suspensory" regime.

"SAMR is boosting efforts to crack down on anticompetitive practices. The establishment of a new enforcement body, expansion of the antitrust enforcement taskforce and the proposed increase of fines for antitrust violations continue to signal tougher enforcement in the years to come."

Hazel Yin
Antitrust Partner,
Beijing

Looking ahead in 2022:

How businesses should prepare for the future of antitrust

- Despite the dramatic shift in the global regulatory landscape in the last year, businesses continue to pursue bold strategic plans. Although antitrust enforcers are scrutinizing M&A activity more closely in the current climate, we are also seeing a record number of transactions notified to the authorities, indicating that companies are not waiting on the sidelines but instead are trying to **find ways to successfully navigate the new antitrust realities**.
- Key to this approach is recognizing that investigations inevitably will be lengthier as enforcers explore a broadening set of issues as part of their analysis. It also requires **thinking creatively about novel types of harms** enforcers may try to pursue and **early planning in developing and substantiating defenses**.
- Equally important is **proper international coordination**. As enforcers converge around a more assertive antitrust agenda and increased inter-agency cooperation, it will be critical for companies to **present a consistent message to agencies around the world**. Moreover, in the US, because the antitrust agencies cannot unilaterally enjoin commercial practices or transactions but rather must go to court, it is also important for businesses to signal that they have the **time and resources to litigate** against the agencies, particularly where the agencies pursue cases that may push the boundaries of established precedent.

With thanks to Kailun Ji and Iris Zhou for their contributions to this theme.

02. M&A – optimizing growth strategies in the new world of antitrust

Tougher merger control enforcement across the globe has now taken center stage within deal planning and dealmaking, as pressure mounts on antitrust authorities to play an even more active role in protecting consumers, while at the same time taking account of broader societal interests and industrial policy goals. Companies need to prepare for:

- an enhanced prospect of divergent outcomes across major jurisdictions (despite increasing cooperation between authorities);
- heightened scrutiny of a broad range of transactions driven by expansive (and more unpredictable) approaches to jurisdiction and a tougher stance in the competitive assessment – with more transactions at risk of being blocked and/or subjected to tougher remedies;
- the growing number of active merger control regimes globally, particularly in Asia Pacific where there are now more than 15 such regimes; and
- additional regulatory burdens brought about by the growing importance of foreign direct investment and/or subsidy control regimes (see theme 3).

To manage these risks effectively, parties need a *flexible* and *global* regulatory strategy and deal documentation that accurately reflects possible outcomes, risk allocation and respective obligations to navigate any hurdles that could be encountered along the road.

Merger control in mainstream political debate

Gone are the days of broad consensus that mergers are typically benign and merger control primarily a timing issue. Some academics and commentators have linked widening income distributional effects in key economies to increasing market concentration, and there is renewed agency focus on market structure and on the number and size of competitors (see theme 1). In key jurisdictions, like the US, EU and UK, antitrust authorities are under political pressure to tackle perceived concerns about overly concentrated markets and underenforcement. A wider range of factors – including geopolitical concerns (see theme 3), access to essential products in key sectors (such as tech and life sciences) (see theme 5), sustainability (see theme 8) and the effects of mergers on labor markets (see theme 10) – are now increasingly being considered in merger review. Against this backdrop, companies can expect antitrust authorities (many of whom are benefiting from more public funding) to double down on their active approach to intervention in deals in 2022.

> **"Everyone now seems to have an opinion on antitrust. Companies can expect greater political focus on important deals, translating into more active participation from external stakeholders – not just competitors but also politicians, unions and other interest groups. This adds a layer of complexity in an environment where regulators are already tightening the screws and requires advisors to closely consider the wider context when designing merger clearance strategies."**

Sascha Schubert
Antitrust Partner,
Brussels

More deals within scope of merger control review

In 2022, companies will need to navigate the extended reach of antitrust authorities, which are able to use alternative and broader thresholds to claim jurisdiction over transactions that might pique their interest.

- In the US, parties entering into consent agreements with the FTC may be required to seek prior approval for any future transactions affecting a relevant market even if HSR thresholds are not met.
- In the EU, the EC has started making full use of its revised referral policy under Article 22 of the EU Merger Regulation (EUMR) to review deals even where national jurisdictional thresholds are not met (referral to the EC of transactions falling below the EC's jurisdictional thresholds by EU Member States in whose jurisdiction

the transaction was not notifiable was not explicitly foreseen under the original Article 22 EUMR referral policy). While "killer acquisitions" in innovation-focused industries are center stage (see theme 5), the EC has made clear that these tools can be used in any sector where it is warranted.

- In the UK, we can expect the CMA – emboldened by judgments of the Competition Appeal Tribunal (CAT) that have upheld the CMA's expansive approach and wide discretion – to continue to intervene in deals, even where there is limited UK nexus.
- New national merger control regimes are being created and existing regimes are becoming more active, particularly in Asia Pacific (e.g., China, Australia, Singapore, Japan, South Korea); national legislators have developed new jurisdictional thresholds to catch deals in dynamic markets that previously escaped scrutiny (e.g., in Germany, Austria, Japan, South Korea) (see theme 4).

Companies involved in deals in sensitive or dynamic sectors – irrespective of small target revenues – will need to consider the alternative scenarios that may play out in terms of the various authorities now empowered to review the deal and the timetables inherent in those processes.

Stricter and more forward-looking substantive assessment by regulators

We also expect antitrust enforcers worldwide to apply more detailed and more skeptical scrutiny to transactions, particularly (but not only) to those involving innovation, data and digital markets.

- Nascent/potential competition is no longer a secondary consideration but a key focus of the substantive analysis (see theme 5).
- Attempts to reverse the burden of proof or amend the standard of proof for merger reviews are likely to mark a significant departure from past practice. For example, in the US, proposals include shifting the burden of proof for mergers leading to high market shares or increased concentration levels, acquisitions of start-ups by companies with significant share and acquisitions of potential or nascent competitors. Likewise, in the UK, there are proposals to lower the threshold for phase 2 review for deals involving digital companies designated with "strategic market status" from whether a substantial lessening of competition is "more likely than not" (i.e., based on the balance of probabilities) to whether there is a "realistic prospect" of that lessening of competition occurring.

"In a world where regulators are more interventionist, companies need to get advisors on board who will not shy away from going beyond the already complex merger control approval process: experience in designing merger control litigation strategies on both sides of the Atlantic can be key in getting a deal done."

Meghan Rissmiller
Antitrust Partner,
Washington, DC

- We can expect agencies to be ready to invoke increasingly novel theories of harm outside of traditional antitrust analysis and to consider in their review broader topics such as data power, innovation, sustainability and effects on labor markets.
- Vertical theories of harm, traditionally a European concern, have now crossed the Atlantic and merger parties should expect close scrutiny of vertical concerns in the US.

"The expectation of stricter scrutiny in deals has inevitably led parties to think more deeply about the terms of their transaction agreements. While this will obviously be assessed on a case-by-case basis, businesses will have to give careful consideration to things like longer outside (or longstop) dates to take account of more protracted regulatory reviews. It also brings the operating covenants in a potentially longer sign-to-close timetable into focus in light of the gun-jumping rules in many jurisdictions that preclude the purchaser interfering with the commercial conduct of the target company pending regulatory clearances. Additionally, while transaction documents have historically contained terms around regulatory risk allocation through the level of 'efforts' or remedies the acquirer is willing to sign up to, parties have to think about those provisions very carefully in light of potential scenarios. Finally, parties need to have frank discussions about whether litigation is a necessary tool to try to get a deal done, and what the transaction agreement says about the parties signing up to a commitment to litigate."

Damien Zoubek
Co-Head of US Corporate and M&A,
New York

- We are seeing some antitrust authorities take a novel approach to the likely prospects for competition absent the merger (known as the counterfactual), including second-guessing the outcome of a seller's sales process and assessment of possible purchasers, which raises additional obstacles for the merging parties to address.
- While behavioral remedies will continue to be accepted by a number of antitrust authorities in particular cases (conglomerate or vertical effects), others have become more skeptical than in the past. The US, UK, Australian and German authorities have expressed their determination to block mergers outright if necessary to preserve effective competition where appropriate structural remedies are not available. This should be factored in when considering commercially acceptable remedies at the deal planning stage.

Divergent outcomes despite increasing cooperation

Multilateralism is back, and we can expect cooperation between authorities to be a strong feature of merger control in 2022, with many authorities having recently signed up to enhanced cooperation frameworks. Merging parties should assume that information disclosed to one authority may be shared with other authorities around the world and that theories of harm developed in one jurisdiction will inspire others. Establishing a consistent, global advocacy strategy from the outset is therefore imperative for merging parties.

However, increasing cooperation will not always lead to more consistent outcomes. Ultimately, it only takes one authority to block a deal. With the increasing number of parallel reviews by agencies with different legal frameworks and different political priorities, divergent outcomes are likely to be a key trend that is set to continue into 2022.

"Our experience of complex cross-border transactions from 2021, particularly now that we are dealing with parallel US, EU and CMA reviews, has illustrated that a strategy to manage the timing of reviews has become key. Navigating both the practical difficulties of parallel proceedings as well as effectively dealing with substantive concerns in large cross-border deals means merging parties need to think across jurisdictions. Merging parties should take any opportunities to use this more global approach to antitrust as a way to support rather than hinder their overall strategy."

Alastair Chapman
Antitrust Partner,
London

In 2021:

85%

of deals reviewed in parallel by the EC and UK CMA were also reviewed in the US; and

64%

of those involved an in-depth investigation or remedies by one or more authority

Looking ahead in 2022:

- **Prepare for increasing uncertainty and longer timelines:** kick the tires on your antitrust assessment early, comprehensively and globally to avoid unwanted surprises further down the line that could result in a longer deal timetable or even derail your transaction. This also means:
  - engaging in a thorough analysis of whether an antitrust authority could be interested in reviewing a deal before signing;
  - considering approaching authorities early (even informally where permitted) to preempt disruption at a later stage, weighing the pros and cons in each case; and
  - being mindful that longer timelines mean that M&A deal teams may be more eager to monitor target activities and enforce interim operating covenants (due to risk of deterioration of target value/attrition): brief your team early on risks of gun-jumping and involve your antitrust counsel early in deal planning.
- **Merging parties must be prepared to overcome additional hurdles,** requiring increasingly persuasive evidence and advocacy to displace the authorities' growing mistrust of mergers (particularly in certain sectors), including:
  - a pro-competitive transaction rationale and explanation of deal valuation, including evidence of any synergies and consumer benefits, which need to be clearly supported in internal transaction-related documents;
  - consistent ordinary course internal documents to support merging parties' submissions, considering the focus of authorities on internal documents (particularly when assessing nascent/potential competition concerns) and their increasingly broad document requests (which typically result in hundreds of thousands of documents to be reviewed and can extend to over a million);
  - a strong understanding of the likely market and public reaction to the transaction to be able to proactively address any concerns that are likely to be raised; and
  - strong economic evidence.
- **Be ready for the increased practical coordination required in multiple parallel reviews:** proactively considering different privilege rules and ensuring document production processes are run in an efficient manner for multiple jurisdictions can streamline reviews and mitigate the risk of non-compliance with authorities' document requests (and associated fines).
- **Look beyond merger control:** coordination with foreign direct investment (and – in the future – EU foreign subsidy) reviews is becoming more and more important, particularly when certain key elements of such review for specific transactions (e.g., the state-owned character of certain acquirers/targets) can play a significant deal-disrupting role in both types of proceedings.

With thanks to Bertrand Guerin and Megan Yeates for their contributions to this theme.

03. National security or protectionism – a wider net catching more investments

2021 saw the continued proliferation of investment screening regimes globally, with some jurisdictions implementing new regimes and others strengthening existing ones. Moreover, the pandemic has contributed to heightened sensitivity that economic security and national security are two sides of the same coin, leading to a growing perception, and indeed risk, that some decisions by these investment screening bodies may be motivated as much by domestic political and economic concerns as by tangible risks to national security.

2021 – proliferation and consolidation

In the US, the first year of the Biden Administration has demonstrated that the Committee on Foreign Investment in the United States' (CFIUS') approach to certain types of investment during the Trump Administration was more evolution than aberration. In 2020, CFIUS reviewed 313 filings from over 40 jurisdictions, but it continues to apply particular scrutiny to Chinese investments, including calling in deals post-closing and considering risks that principally arise from non-US activities. For non-Chinese investors, CFIUS' China concerns can still impact a deal if the investor has significant connections to China.

Today, 18 EU countries have an active foreign direct investment (FDI)/national security screening mechanism in place, and the EC considers that it is only a matter of time until this is true of all EU Member States. Between January 1, 2019 and March 31, 2021, 24 out of 27 EU Member States adopted a new national security screening mechanism (e.g., the Czech Republic); amended an existing one (e.g., Germany); or initiated a process to adopt or amend a screening mechanism (e.g., the free trade advocates, the Netherlands and Belgium).

The EU's FDI screening regulation, which established an EU-wide framework in which the EC and the Member States can coordinate their actions on foreign investments, has now been fully operational for over a year with its first year seeing 11 Member States submitting 265 notifications under the cooperation mechanism (although more than 90 percent of those came from just five countries: Austria, France, Germany, Italy and Spain, all significant beneficiaries of foreign investment and countries that have the most active FDI regulators in Europe). The main sectors involved in the cases notified were manufacturing, information and communication technologies and financial services. In total, 1,793 cases were reported to national screening authorities in Europe. The EC intends to streamline procedures under the cooperation mechanism by launching a comprehensive review of the EU notification process.

"Foreign investment review regimes continue to proliferate across the EU and it is likely only a matter of time before all Member States have some type of mechanism in place. Within this patchwork of national-level regulations, the principal challenge for the European Commission is ensuring that the EU's now one-year-old, bloc-wide foreign investment screening regulation is implemented by Member States in a way that leads to more harmonization and does not add to the already increasing regulatory complexity of multijurisdictional deals."

Frank Röhling
Antitrust Partner,
Berlin

Across the Channel, in April 2021, the UK passed legislation introducing for the first time in the UK a mandatory and suspensory regime for the screening of certain investments on national security grounds in 17 sensitive sectors. The National Security and Investment Act 2021 came into force on January 4, 2022 and the UK government expects it to affect up to 1,800 transactions per year, although officials expect only a very small number of them to require remedies as a condition to clearance. Unlike the UK's merger control regime, the new regime will be mandatory and suspensory for certain sectors/transactions. The UK government will also have extensive powers to review any acquisition of "material influence" in a company, regardless of technology or sector.

"While the UK government has stressed that its new nationality-agnostic national security screening regime does not represent any change in the UK's approach to foreign investment, investors will be watching closely to see if the UK's promise of a quick and efficient review process for the thousands of transactions required to be notified each year will be delivered. For those transactions that may give rise to national security concerns, getting the national security analysis right early in the deal planning process will be critical to effective execution."

Michele Davis
Antitrust Partner,
London

China is now the leading country for inbound FDI globally, reflecting the Chinese government's strategy to open up more parts of its economy to foreign businesses and widening the application of "national treatment" provisions. However, China has at the same time tightened its national security review regime, imposing mandatory notifications and setting up a formalized mechanism for the security review of foreign investment (both direct and indirect) in defense and related sectors (including land near military facilities) and sectors of importance for national security.

"China is opening up more of its economy to foreign investment while simultaneously tightening its investment screening regime, including calling in deals for national security review post-closing. The increasing use of these powers makes performing a national security sensitivity analysis an important component of deal planning for companies seeking to take advantage of China's more open foreign investment environment."

Alastair Mordaunt
Antitrust Partner,
Hong Kong

The Australian Foreign Investment Review Board remains very active, with significant reforms introduced in 2021 and a busy applications docket – it approved 8,221 applications in the most recent reported year (2019/20) with over 40 percent of those decisions made subject to conditions. Activity levels are expected to stay high with most reviews likely to be extended past the initial 30-day statutory period. Similarly, New Zealand's Overseas Investment Office remains active in FDI screening. While the New Zealand government revoked the COVID-19 temporary emergency notification regime in June 2021, it also introduced a new "call-in" regime for investments in "strategically important businesses."

Remedies and mitigations

FDI concerns can typically be mitigated by behavioral rather than structural remedies. Theories of harm are, however, often less clearly articulated and FDI authorities have a different approach to negotiations than in the merger context, so knowing the process and engaging with government stakeholders is often key.

In the US, CFIUS has broad authority to negotiate or impose mitigation remedies as a condition of clearing a transaction. CFIUS required mitigation remedies in approximately 12 percent of notices filed in 2020 (down slightly from 14 percent in 2019). Although remedies in specific cases are not published, examples of remedies adopted in 2020 include: limiting access to sensitive intellectual property, US government supply assurance agreements, network segregation, prior US government approval of business activities (e.g., vendor selection), onshoring requirements, equity caps, governance restrictions and targeted divestiture of sensitive assets.

Although for the most part there is substantive convergence between agencies on the issues arising in a particular transaction, governments may take different approaches to publicizing commitments. In most EU Member States, Australia and New Zealand, FDI decisions are not generally published, while in the UK notices of final orders made by the UK government will be published (subject to certain caveats).

Commitments might include maintaining domestic production capacity, protecting domestic R&D, protecting projected investment, ensuring compliance with existing contracts with public bodies and strategic companies and/or entering into commitments around security of supply for key products for governments. In the UK, previous national security interventions under the public interest regime have resulted in parties giving statutory commitments on board composition nationality requirements, information security commitments, continuity of supply and site security requirements. Prospective purchasers have also offered economic

commitments (e.g., to maintain the location of the target's headquarters, share listings and core operations, and to protect jobs) outside of the scope of the national security regime, particularly in relation to public deals.

In 2020:

EU – Member States formally screened **362** investments

12% were cleared with conditions

2% were prohibited

US – CFIUS reviewed **313** filings*

9% of Notices cleared with conditions

4% of Notices were abandoned/ withdrawn

* 187 Notices and 126 Declarations

National security or something more?

Two interrelated geopolitical issues are likely driving the increase in investment screening regimes: increasing trade tensions and a rising tide of economic nationalism. The scale and speed of China's rise has fueled concerns about eroding technological leadership across much of the rest of the developed world, notably the US and Europe. The US has engaged foreign partners to align investment screening policies vis-à-vis China in particular. While the US has a more distinct view of China as a geostrategic and military competitor, general concerns over China's trade practices and unique brand of state capitalism are more widely held and have been a driver of investment screening policy changes in other jurisdictions with economic security becoming increasingly equated to national security.

"Given that the Biden Administration shares the Trump Administration's view that economic security is national security, companies – including non-Chinese companies – looking to invest in technologies relevant to long-term economic competitiveness or to economically important supply chains may come under greater scrutiny, beyond the traditional factors of transfer of military and dual-use technologies, government supply security and impact on critical infrastructure."

Aimen Mir
CFIUS Partner,
Washington, DC

Even before the COVID-19 pandemic, an undercurrent of economic nationalism was driving discussions about onshoring critical supply chains and protecting the domestic technology and innovation base through a variety of public policy interventions. Many countries viewed new or enhanced investment screening regimes as an effective tool for maintaining control over critical infrastructure and fostering emerging industries. The pandemic exacerbated these concerns by reinforcing perceptions about the importance of resilient domestic supply chains and, by implication, the undesirability of foreign investment in certain critical industries and sectors.

Looking ahead in 2022:

The increasing prevalence of stringent foreign investment regimes policed by active authorities across the globe means investors should:

- **Consider purchaser organizational structures –** direct or indirect involvement of any parties with strong connections to "hostile" states, regardless of their control rights, may complicate or delay foreign investment processes.
- **Carry out detailed due diligence –** purchasers should gather extensive information on any activities that may be considered sensitive to anticipate risk and assist with deal planning.
- **Include foreign investment filings as a primary factor in deal planning**, including:
  - understanding where filings will be necessary or advisable, whether the reviews may raise substantive risks and/or cause pinch-points in the deal timeline;
  - staying informed as to the possibility of new regimes coming into force post-signing and requiring notifications, and providing contractual protection for this;
  - understanding how foreign investment regimes may affect the success rate and attractiveness of the deal; and
  - considering the interaction between merger control and foreign investment filings and competing demands (e.g., information gathering).
- **Devise mitigation strategies early on** (including remedies, "front foot" commitments, etc.) and **ensure consistent messaging** across all jurisdictions and channels (e.g., around investment rationale).
- **Understand geopolitical tensions and keep an eye on new developments –** "national security" is broad-brush and authorities' concerns may not be obviously security related.

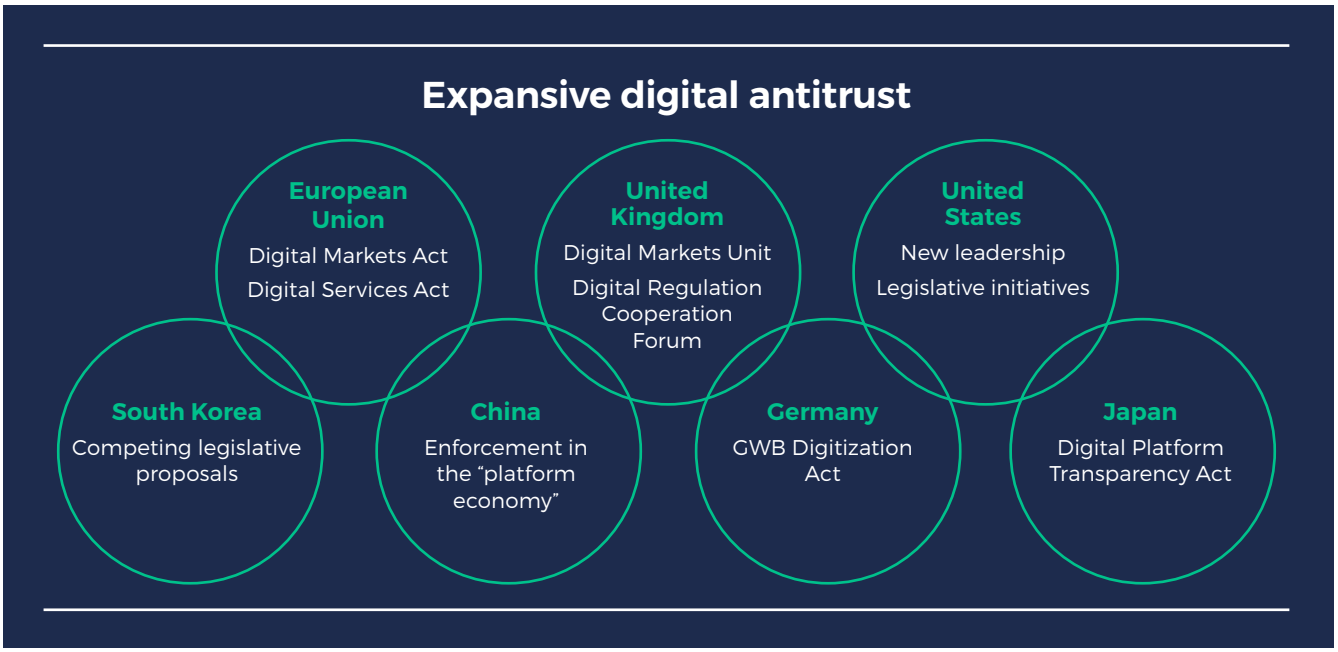
With thanks to Colin Costello and Iona Crawford for their contributions to this theme.

04. Digital antitrust – managing the wave of new rules and regulators

As governments and enforcers around the world continue to focus on bolstering the efficacy of the tools at their disposal to regulate digital and innovation-heavy businesses, 2022 looks set to expand the antitrust and regulatory "toolkit."

With the complexity and scale of antitrust enforcement growing, the current antitrust rule book is being stretched and cross-disciplinary mission creep is becoming more pronounced, including competition law touching on areas such as data privacy and consumer protection. In parallel, governments around the world are aligned in their desire to go further.

With extensive reforms proposed in the US, the EU, the UK and Korea, and with changes already having been enacted in Germany, China and Japan, a key challenge for companies will be to keep abreast of the relevant changes and understand the areas of expansion, convergence and divergence for their businesses. We summarize a few examples below.



Privacy "plus"?

The introduction, in recent years, of extensive privacy-enhancing legislation such as the California Consumer Privacy Act (CCPA) and the EU General Data Protection Regulation (GDPR) has required businesses around the world to invest in making significant changes to the way in which they manage their collection, use and sharing of personal data. Yet despite this, there are further new proposals and interventions on the horizon.

The proposed EU DMA includes, for example, further granular consent requirements that prohibit designated digital "gatekeepers" from combining personal data obtained from their "core platform services with personal data from any other services offered by the gatekeeper

or with personal data from third-party services ... unless the end user has been presented with the specific choice and provided consent." It also proposes mandating regulated platforms to provide "continuous and real-time access and use of aggregated and non-aggregated data" to third-party businesses, "when the end user opts into such sharing with a consent."

> **"More privacy laws around the world are giving individuals the right to choose whether a company can share their personal data for use by third parties, whether by requiring the company to obtain opt-in consent (as under the GDPR) or by requiring the company to allow individuals to opt out of the sale of their personal information (as under the CCPA). These regulatory trends are requiring companies to reassess and refine their approaches to data sharing."**
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> 
> **Christine Lyon**
> Global Transactions Partner,
> Silicon Valley

In parallel, the UK government's proposed powers for the newly established Digital Markets Unit (DMU) include, for example, a focus on open choices, fair trading, and trust and transparency for consumers, with an ability for the DMU to impose, if required, measures on businesses requiring enhanced consumer choice. The UK government has also proposed to empower the CMA with strengthened consumer law enforcement powers equivalent to those currently available to it under the competition law regime, including the ability to enforce consumer law directly (rather than through the civil courts), with powers to impose fines of up to 10 percent of worldwide turnover directly on businesses.

> **"Many of the global proposals to reform antitrust laws and to introduce new regulation have, at their core, not only a focus on whether consumers have been presented with a choice, but also on how and when those choices have been offered. The effect is a growing convergence between the current antitrust, privacy and consumer protection legal frameworks, as more businesses will be required to focus more closely on adopting a 'privacy-first' approach."**
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> 
> **Sharon Malhi**
> Antitrust Partner,
> London

The burden of navigating the multiplicity and complexity of the various proposals currently on the table in several jurisdictions around the world – and particularly their application to global products and services – is likely to sit firmly with businesses.

Requirements to ensure compliance within a certain number of months and/or that, in some instances, go to the heart of companies' business models (e.g., in relation to subscription contracts and/or where they are likely to impact service design and future innovation) throw up many questions as to the practicability of harmonizing the different (and sometimes conflicting) legal frameworks.

It is also unclear whether the flexibility that businesses currently enjoy to design their processes in a compliant manner, while also ensuring the continued competitiveness and attractiveness of their products and services, can continue.

> **"Proposals to introduce granular consent requirements, particularly when understood in the context of current regulatory developments worldwide, all point toward a need to adopt a more holistic approach toward assessing individual processing activities and compliance with data privacy laws more broadly. This brings new challenges for businesses and calls for a cross-disciplinary approach to meeting data protection requirements in an increasingly complex global regulatory landscape."**
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> 
> **Christoph Werkmeister**
> Dispute Resolution Partner,
> Düsseldorf

Convergence or divergence?

There is no doubt that governments and agencies around the world are united in their desire to introduce additional powers and safeguards to strengthen enforcement against "digital markets."

In the US, the Biden Administration has urged antitrust agencies to increase their focus on "killer" acquisitions, as well as aggressively addressing consolidation and conduct in markets occupied by allegedly dominant companies. Additionally, several pending bipartisan legislative initiatives propose a litany of varying measures designed to address perceived gaps in US antitrust laws. As is being proposed in Europe, several of these initiatives

specifically target technology companies such as prohibiting a "dominant online platform" from owning another line of business that presents an "irreconcilable conflict of interest," and requiring data interoperability and portability. While it remains to be seen whether any of these measures will be enacted into law or if their diverse objectives can ultimately be rationalized into a coherent policy approach, the US FTC and DOJ are flexing their muscles with enhanced scrutiny and enforcement actions across the board, modifying long-standing practices, and – at the FTC – considering administrative rulemaking initiatives that could have a material impact on markets even without legislative action.

> **"The ever-increasing and proliferating focus on merger control as a tool needed to address perceived prior failures of antitrust as well as current and forward-looking competition issues presents a challenge for businesses considering M&A in today's environment. This challenge is exacerbated by the somewhat unpredictable nature of actions taken by certain authorities in practical implementation of investigatory review. Firms contemplating M&A should consider antitrust review across jurisdictions, including the US, the UK, the EU and Asia, as one of the critical workstreams to be assessed and developed as part of the commercial process, and to ensure appropriate contingency strategies to achieve merger control clearance in an efficient and effective manner."**
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> 
> **Justin Stewart-Teitelbaum**
> Antitrust Partner,
> Washington, DC

The recent meeting of the competition authorities of the G7, together with the EC and invitees from Australia, India, South Africa and South Korea, only emphasized that "joint action across international jurisdictions is needed" and that a global coordinated response "provides valuable insights into common concerns and approaches and serves as a starting point for developing a consensus view." And in the UK, for example, the CMA, communications regulator (Ofcom) and data privacy regulator (ICO) have come together to form the Digital Regulation Cooperation Forum to ensure greater cross-disciplinary cooperation on matters concerning online regulation.

While common themes are emerging, so is the potential for conflict. In Europe, despite Executive Vice-President Vestager having confirmed that ongoing antitrust investigations will continue, the practical impact of the DMA on these investigations – particularly given the overlap in the types of conduct that are reportedly being investigated – is uncertain. In particular, the impact on companies' rights of defense and appeal and on incentives for companies to invest in innovation and development of new products and services remains to be seen.

While in many Asian jurisdictions the power to challenge large platforms remains in the hands of antitrust authorities, Japan has chosen a unique approach in that the new Transparency Act and the "Monitoring System" of large platforms is under the jurisdiction of the Ministry of Economy, Trade and Industry (METI). This creates a situation in which the METI could effectively function as the industry regulator, akin to a financial or energy authority. Although the METI is saying that very serious infringements will still be challenged by the JFTC, the demarcation between the two bodies is increasingly unclear.

> **"While many competition authorities are carefully assessing the evolving landscape and seeking to coordinate their efforts with other regulators, others are striking out on their own and introducing divergent or novel regimes, often designed to pre-emptively address what are regarded as local issues. This can result in unpredictable outcomes. It is no longer sufficient for firms to limit their legal strategy and deal preparation to the traditional major authorities. In-house and external teams must work seamlessly to be able to quickly spot, and react to, unexpected local actions by certain national regulators."**
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> 
> **Kaori Yamada**
> Antitrust Partner,
> Tokyo

Looking ahead in 2022:

The wide variety of proposed reforms to existing competition law regimes, alongside proposals to introduce new regulation, means that business will want to focus on at least the following in 2022.

- **Globally converging and conflicting regulatory agendas –** as multiple agencies (within the same jurisdiction and across jurisdictions) continue to try to make an impact on behavioral conduct in this space. Equally relevant will be the expansion of, and growing interplay between, applicable antitrust, data privacy and consumer protection regimes across the globe. In the absence of any settled approach, companies will be challenged to keep themselves abreast of multiple moving parts, to understand their impact on ensuring compliance for current and future products and services, and on the potential for divergent outcomes.

> **"A key challenge for businesses is staying on top of all of the existing regimes and the proposals for further changes and new regulation. This is made more complex by the varying stages of evolution and differing approaches to reform across jurisdictions in the EU, the UK, Japan and the US. The expectation (or indeed hope) is that 2022 will start to provide further clarity on what the proposals and new regimes may mean from a practical perspective."**
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> **Ermelinda Spinelli**
> Antitrust Counsel,
> Milan/Rome

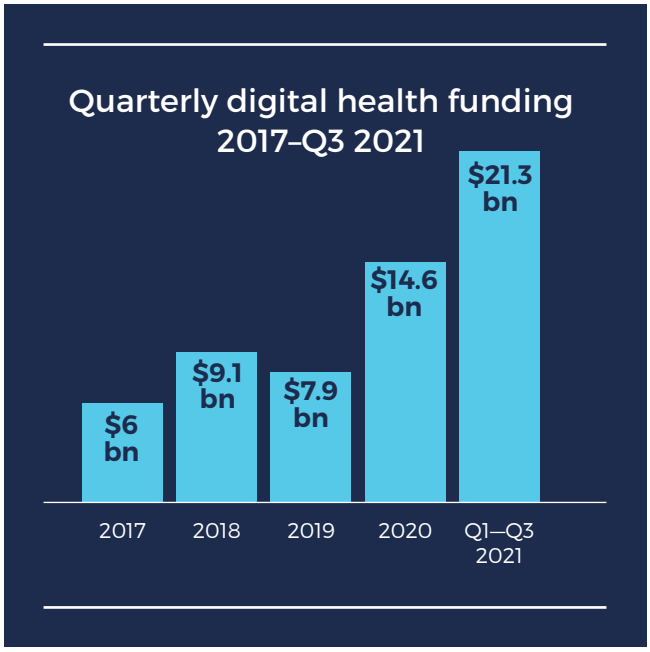
- **A worldwide desire to expand merger control –** whether via proposals: to lower (and in some cases, to reverse) the burden of proof on antitrust authorities; to lower the applicable jurisdictional thresholds; and, in some cases, to introduce a separate merger control regime/notification obligation on certain digital platform businesses.
- **Adopting a joined-up compliance and engagement strategy –** not only will cross-disciplinary and cross-jurisdictional collaboration be key to navigating the rapidly evolving legal and regulatory landscape, it will also be important to all aspects of companies' communications, compliance and engagement strategies. As the spotlight on digital and innovation-heavy businesses continues to intensify, companies will also need to focus on ensuring a joined-up approach among broader policy and communications teams.

With thanks to Ahmad Al Dajani, Alessandra Galea and Daniel Wylde for their contributions to this theme.

05. Antitrust in innovative sectors – new opportunities and risks for businesses in the regulatory spotlight

Innovation-driven industries, such as the life sciences, digital and tech sectors, have been high on antitrust authorities' enforcement agendas for a number of years. In Europe, the intervention rate (i.e., clearance subject to remedies or prohibition) in the life sciences sector in the last five years has been 28 percent – four times the intervention rate across all industries. President Biden's Executive Order on Promoting Competition in the American Economy signaled a focus on antitrust enforcement in the healthcare and tech sectors. This trend of intense scrutiny on innovative industries shows no sign of abating in 2022.

At the same time, funding in these innovation-driven segments, such as digital health, continues its upwards trajectory. The degree of antitrust scrutiny means that companies and investors active in these segments should plan for longer and more complex regulatory processes with less predictable outcomes and should conduct targeted due diligence of existing commercial practices as a routine part of investment decisions.



Be prepared for more complex transaction reviews

> **"The European Commission and UK CMA have been intensifying scrutiny of sectors where innovation plays a key role. With the agencies pushing both jurisdictional and substantive boundaries, dealmakers need to come armed with a compelling pro-customer deal rationale and evidence that stands up to a range of possible counterfactuals."**

Simon Priddis
Antitrust Partner,
London

Intervention by at least the US, EU and UK antitrust authorities in deals in innovation-driven sectors is increasingly unpredictable. The authorities are actively engaging with each other – not just in respect of individual cases, but on broader policy development (for example, through the recently announced Multilateral Pharmaceutical Merger Task Force, initiated by the US FTC and including the Canadian Competition Bureau, the EC, the CMA, the US DOJ and the Offices of State Attorneys General, a working group aimed at updating the enforcement agencies' approach to analyzing the effects of pharmaceutical mergers). Companies must be ready to engage on complex theories of harm as agencies push the established bounds of substantive and jurisdictional assessments (see theme 2):

- Loss of innovation competition has become a mainstream theory of harm. In the US, the Biden Administration has signaled that it is likely to increase its scrutiny of the effects of a merger on innovation – looking not just at direct overlaps, but also at broader innovation competition concerns that do not relate to specific pipeline products. While it remains to be seen whether this will result in different outcomes for individual cases in the US, companies can expect more

thorough investigations into innovation strategy, pipeline and investment, resulting in longer and more complex merger reviews. EU and UK antitrust authorities also continue to scrutinize whether transactions may lead to a reduction in innovation across an entire market or field of innovation (including in areas where the parties may not yet be active).

> **"In merger investigations, competition regulators are looking further back into the innovation pipeline, focusing not just on late-stage products that are close to market, but also at early-stage projects and overall R&D strategies. This can dramatically increase the scope of an investigation and the time needed to eliminate competition concerns, leading to longer review timelines, more expense and more uncertainty for businesses."**
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> 
> **Jenn Mellott**
> Antitrust Partner,
> Brussels and Washington, DC

- Antitrust authorities are increasingly focused on vertical and conglomerate aspects of mergers, looking for in particular the potential for reduction in competition through reduced post-merger access to key upstream inputs, such as active pharmaceutical ingredients, data inputs, IP and interoperability. In recent cases, the EC has raised concerns around how reduced access to inputs could create a downstream loss of innovation and product development. These theories of harm are particularly relevant in life sciences and tech sectors where companies often aim to be ubiquitous partners for all types of clients (e.g., pharma companies, biotechs, start-ups, research institutes and academia). As a result, there tends to be a high degree of cross-supply in these sectors and merging parties can often be both a key supplier and a downstream competitor.
- Nascent and dynamic competition is a particular focus for the UK CMA, with recent cases highlighting the authority's desire to consider competitive effects beyond current competitive conditions. The CMA's new merger assessment guidelines give it a high level of flexibility and discretion regarding the assessment of likely and possible entrants and the overall direction of future competition and innovation. This leads to less predictable outcomes for companies, especially as the CMA has already shown that it will chart its own course in pursuing these concerns. Likewise, it is telling that the EC has chosen a high-profile and US-centric life sciences deal (*Illumina/Grail*) as the test case for its revamped approach to the use of Article 22 EUMR, asserting jurisdiction following referral of a transaction that would not otherwise have been notifiable at either Member State or EU level (see theme 2).
- Mixing of merger review and other policy objectives particularly impacts life sciences and tech deals (including concerns around national security, technological leadership, critical supply chains and data privacy/security) (see theme 3), and we have seen more of this during the pandemic. Politicians and regulators continue to tread the fine line between promoting innovation and choice, and not dampening investment and growth in strategically important industries.

Companies need to be prepared to present robust evidence in response to these complex concerns, including on a multitude of possible (hypothetical) markets. The current landscape presents opportunities for those who are able to substantiate a compelling, pro-customer and pro-innovation deal rationale. More than ever, companies in innovative industries need a truly global and well-planned approach to their regulatory clearance strategy, even for prima facie national or regional deals.

> **"With agencies in the US, the UK and Europe increasingly coordinating on investigations, tech and life sciences companies need to develop and execute strategies for engaging consistently with regulators around the world. The need for a joined-up defense is greater now than ever before, especially for mergers receiving close scrutiny in multiple jurisdictions."**
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> 
> **Andrew Ewalt**
> Antitrust Partner,
> Washington, DC

Investment, licensing and collaboration – plan for success

The investment focus on innovation-intensive industries is understandably driving a wide variety of deal structures that can be used to pursue joint research and innovation objectives, including data and/or asset pooling, or partnering with early-stage start-ups.

If the parties are, or could become, actual or potential competitors during a collaborative venture, they will need

to consider appropriate safeguards, including around information exchange and possible "spillover" risks between the collaboration project and their own businesses. This may also impact the ease with which option rights can be exercised in the future, which in turn needs to be reflected in appropriate risk allocation mechanisms and exit options. For example, option deals may, depending on their structuring, not be notifiable at the time of signing, but could become notifiable once the rights are exercised (and could face in-depth reviews depending on how the parties' own pipelines evolved in the period between signing and notification). There is also the risk that agreed option rights cannot be exercised by the expected buyer because another deal concluded in the meantime creates a product or innovation overlap which makes it difficult to exercise the underlying option. We are seeing ongoing litigation around these issues in the US.

In addition, licensing, collaboration and option agreements may impact medium-term M&A strategy. Antitrust authorities analyze minority stakes and other investments as if they are part of the overall portfolio of the merging parties. This means that without holistic planning relatively small collaborations or option deals could complicate or delay future acquisitions.

> **"Life sciences and tech companies need to be prepared for more complex and lengthy antitrust reviews. This needs to be reflected in appropriate closing periods and risk allocation mechanisms. Careful deal structuring will be key to maximizing commercial objectives, especially in innovation-driven industries where clients have to plan for a range of possible outcomes and exit strategies."**
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> 
> **Adam Golden**
> Global Transactions Partner,
> New York

Continued investigation of commercial practices

Outside of merger control, life sciences and tech companies can expect continued close scrutiny of business practices that sit at the intersection of competition, consumer, data privacy and IP/patent laws, as well as other political sensitivities (such as the protection of national health services). For example:

- Significant unexplained price increases continue to attract regulatory scrutiny, with further excessive pricing fines being imposed on pharma companies in the EU and UK. The US agencies continue to investigate a string of generic drug price-fixing allegations, which may have resulted in inflated prices for federal health care programs and end customers. These cases highlight that the protection of national health care programs is high on the enforcement agenda on both sides of the Atlantic.
- Non-pricing behaviors, such as misuse of patent processes and the instigation of marketing campaigns that seek to unlawfully restrict the use of competing products, are also in the spotlight. Potentially narrow market definitions in connection with innovative products, especially in pharma, can result in abuse of dominance findings in connection with pricing and non-pricing behaviors.
- Territorial restrictions aimed at preventing parallel trade remain an enforcement priority in the EU. The position on EU/UK trade restrictions is both uncertain and complex following Brexit.
- Consumer rights investigations, including the UK CMA's consumer investigation into PCR testing, and the US government's investigations and actions against various "big tech" players are ongoing. We are increasingly seeing consumer class action suits in both jurisdictions following regulatory infringement decisions.

These investigations can result not only in substantial fines, but also, in some cases, in individual sanctions, such as director disqualifications in the UK.

> **"Agencies in the US, UK and EU have doubled down on enforcement action in innovative industries – especially life sciences and tech. The agencies in the US, UK and EU are looking not only at M&A deals, but also pricing, anticompetitive agreements and other commercial practices."**
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> 
> **Alan Ryan**
> Antitrust Partner,
> Silicon Valley

Looking ahead in 2022:

- **Be ready to engage on complex theories of harm.** Companies should be able to present compelling evidence for their deal on a number of different hypothetical market scenarios. If data and/or innovation-driven concerns are likely to arise, parties should think proactively about global remedy packages. Vertical and conglomerate concerns may require creative structural or behavioral solutions.
- **Assess the risk of a transaction being reviewed even if thresholds are not met.** As mentioned in theme 2, businesses need to look beyond revenue-based thresholds in order to assess the risk of investigation by the EC pursuant to an Article 22 referral or by the CMA under its share of supply threshold even for transactions that are not reportable. This is particularly relevant for deals in innovation-driven sectors.
- **Anticipate future regulatory requirements when designing alternative deal structures,** such as option deals, licensing and collaboration agreements. Companies and investors should analyze at the outset whether meaningful overlaps or other competition concerns are likely to arise in the future if the project succeeds. Build in appropriate contractual mechanisms to address these points upfront.
- **View regulatory risk and compliance holistically.** Companies in innovative industries need to take particular care to ensure that business models and commercial strategies are compatible with competition, consumer, data privacy and IP/patent laws. Have a pro-consumer, pro-innovation and pro-transparency narrative that is well-understood across the business.

With thanks to Marta Janek and Jenny Leahy for their contributions to this theme.

06. Antitrust in transforming industries – new issues on the horizon

The only constant

Technology conversion, energy transition, consumer protection and data privacy, shifting customer expectations and disruptive new entrants are driving businesses across a range of industries to venture beyond core competencies and expand into new spaces.

- Products are increasingly "smart," connected to other devices through the Internet of Things and supported by services as add-ons, often in the cloud.
- Cars are becoming automated, connected and electric.
- Banks are becoming ever more digital and finding new ways to leverage their data.
- Energy companies are expanding into renewables while diversifying across the energy value chain.
- AI and big data are set to revolutionize R&D in the pharma and life sciences industries.

> **"By combining (bio-)physical and ESG elements into the digital and tech transition, the Fourth Industrial Revolution is creating new product and process upside and avenues for industrials while at the same time causing first-mover challenges and exposure."**
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>
> **Deborah Janssens**
> Global Transactions Partner and Co-Head of Industrials, Brussels

As transforming businesses reinvent themselves – whether organically, by collaborating or via M&A – they face new and often complex antitrust risks that must be managed across their business and investment strategies. Against this backdrop, the need for change also brings opportunity, and businesses that understand and can navigate both the antitrust and regulatory landscapes stand to benefit.

Collaborations, not cartels

Cooperation between market actors, whether on a bilateral basis or across an industry, is often crucial to unlock the innovation and investment necessary to achieve a step change in sustainability goals. However, cooperation can be a loaded concept in antitrust: alongside the familiar concerns about price-fixing (including to account for additional costs for new technologies) or information sharing, competition authorities are expressing other concerns about collaboration arrangements:

- Can they result in reduced competition in innovation, including the potential knock-on effect of softening competition in adjacent products or services?
- When is it appropriate for collaborators to impose exclusivity or other restrictions to recoup investment and prevent free riding?
- If collaborators pool data, have they set up appropriate safeguards? Are those in the pool inappropriately cutting off access to those outside?

> **"In Europe, we're seeing a broad range of novel collaborations – from hydrogen purchasing for the chemical production process to charging stations for electric vehicles – to meet tech conversion and energy transition goals. Governments and the European Commission often recognize that these collaborations are necessary but nonetheless prescribe a narrow path for compliance."**
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> **Katrin Gaßner**
> Antitrust Partner, Düsseldorf

In this fast-moving environment, it is essential that commercial strategy and compliance take account of the sometimes-ambiguous line between justifiable cooperation and anticompetitive conduct. There is a way through – and governments are increasingly acknowledging that such collaborations are often beneficial and even necessary to achieve broader policy objectives – but businesses will have to understand the direction of travel for antitrust authorities across the globe in order to position their practices on the right side of the divide.

"Although traditionally US antitrust authorities have focused their intervention efforts on horizontal combinations, in the first year of the Biden Administration we've seen more scrutiny of vertical competition issues. Collaborations and mergers with market players at different points in the value chain are now more likely than ever to draw regulatory attention."

Mary Lehner
Antitrust Partner,
Washington, DC

Financing the transition to Net Zero

Businesses need unprecedented levels of investment – both public and private – to fund the green transition and promote innovation. The good news is that the opportunity is there: the long-term and investment-heavy nature of these initiatives has already led many governments to provide direct subsidies and loans – such as the EU's Recovery and Resilience Facility – as well as to establish frameworks to enable private investment; and antitrust authorities are considering how their regimes can further facilitate this approach (see theme 8). The flipside is that the precise scope of these new regulations and guidelines remains often unsettled, creating uncertainty for businesses and investors.

The EC has recently adopted a revised Communication on State aid to promote the execution of important projects of common European interest (the IPCEI Communication), setting out criteria that the EC will use to assess the compatibility of public financing of certain projects with State aid rules. It places particular emphasis on the need for projects to contribute to existing EU objectives, including the pursuit of sustainable growth, addressing societal challenges and increasing competitiveness. In this context, it also provides for State aid for upscaling of pilot facilities or first-in-kind facilities – so-called first industrial deployment – to promote innovation and transformation of industry. To date, the EC has authorized very few such projects, leaving industrials to navigate largely uncharted territory. In addition, the EU's "Fit for 55" package prioritizes decarbonization of key sectors, such as energy, steel and transportation. Investors and businesses will have to find ways to use public funds to support their own transformation strategies without market distortion.

The provision of government funding and State aid to less environmentally friendly industries and businesses may also be scrutinized more closely or made subject to sustainability commitments going forward. This may create obstacles for companies that need to maintain traditional activities which conflict with the global sustainability agenda in the short term, in order to finance the green transition in the longer term.

Firms navigating collaborative private sector-led sustainability initiatives must be attentive as well: joining rivals to pool funds and collaborate on targets, standardization, know-how and carbon pricing may prompt regulatory concerns regarding collaboration unless structured carefully.

"EU frameworks, such as the Guidelines on State aid for climate, environmental protection and energy (CEEAG) and the Guidelines on State aid to promote risk finance investments, can facilitate the investment opportunities necessary to help certain sectors as they transition, but businesses must be mindful of the limits that antitrust and State aid laws may still place on their conduct."

Tone Oeyen
Antitrust Partner,
Brussels

Combine with care

Acquiring new capabilities through consolidation carries its own uncertainty as well. In the past, such deals – often bolt-on acquisitions of less mature targets in new product or service areas – would typically not attract regulatory scrutiny. But key antitrust authorities are now taking a more expansive view both of their jurisdiction to review these deals and of the issues that could arise – especially in deals where innovation is critical (see theme 2). In particular, the role of data as a competitive factor is becoming an increasingly salient consideration (see theme 4), and authorities are correspondingly becoming more sophisticated in their assessments.

National security and foreign investment regimes are also expanding to cover 21st century concerns (see theme 3). Gone are the days when intervention risk was limited to deals involving the defense sector: investments in transforming industries, such as energy, banking and manufacturing, can all raise questions in relation to critical infrastructure, security of supply, technological competitiveness, industrial policy and counterintelligence. Financial services providers, in particular, must be

prepared for scrutiny of transactions that would result in a foreign investor having access to sensitive data. And the expanding concept of critical infrastructure can catch industrials – whether because physical infrastructure in traditionally uncontroversial sectors has become a greater focus for foreign investment regulation or because industrials are expanding into typically sensitive areas where access to infrastructure is a security issue. All of this has been further compounded by the global supply chain crisis.

In the last 3 years approximately

12%

of phase 1 remedies and phase 2 reviews by the UK CMA and

6%

of phase 1 remedies and phase 2 reviews by the EC involved fintech transactions

"In the UK, the CMA has a laser focus on M&A deals and non-merger collaborations among potential as well as existing competitors. Industries undergoing digital or environmental transformation do not get a free pass: in order to satisfy the CMA, deals and collaborations in these sectors need to have a clear pro-consumer rationale, such as bringing to market new and/or more sustainable products and services, and not unduly limit market-wide competition on innovation, price or other factors."

Rod Carlton
Antitrust Partner,
Brussels and London

Looking ahead in 2022:

- **Collaborations with competitors** to meet sustainability and innovation objectives must be set up and managed appropriately at all times. Make sure that sufficient safeguards are in place to prevent information exchanges from straying into anticompetitive territory.
- Consider whether your business may be eligible for **government financing** and, if so, what conditions are likely to be attached to the grant of aid. For companies active in less environmentally friendly industries yet seeking aid, consider whether it is possible to offer commitments linked to sustainability.
- If mergers or collaborations involve new **ownership of data**, give careful consideration to how such data is maintained and accessed to ensure compliance with competition laws.
- Think about how these themes of transformation – whether driven by sustainability, technology and/or innovation – inform **M&A activity** and ensure that the transaction rationale is appropriately framed and documented.

With thanks to Josh Chamberlain, Aaron Green and Tom McGrath for their contributions to this theme.

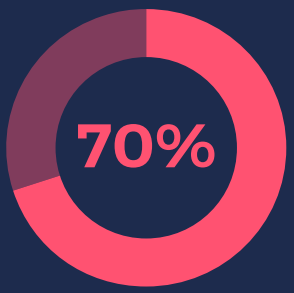
07. Supply chain resilience – where new trade and subsidy rules will help or hinder

The optimization of supply chains and ensuring their resilience will be near the top of the agenda for any business. Competition, subsidy control and trade law developments will make that more important than ever in 2022.

New trade and subsidy rules, as well as changing antitrust and foreign subsidy and investment rules, mean that new challenges and opportunities are emerging for supply chains – regardless of where a business is located.

In addition, growing stakeholder scrutiny of the environmental and social impact of supply chains has to be a key driver of strategy.

It is estimated that



of international trade today involves global value chains, as services, raw materials, parts and components cross borders – often numerous times

New free trade agreements – and beyond

Around the world, states are making free trade agreements (FTAs) that open up new trading opportunities. The UK and Australia have recently concluded an agreement, and both the UK and EU are hoping to conclude agreements with New Zealand in the near future; both the UK and China have applied to join the mega-regional Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); and last year saw the conclusion of the broad Regional Comprehensive Economic Partnership (RCEP), which brings together the ASEAN countries and China, Japan, South Korea, Australia and New Zealand. These reduce customs duties on trade between parties, making the sourcing of products from FTA party countries cheaper than from non-parties. But they are not without challenges. For example, demonstrating that the product being sourced "originates" in an FTA party country can be tricky and often requires expert input.

"FTAs form an indispensable part of the regulatory framework that business operates under and are key to any business's organization of its supply chains."

Lorand Bartels
Trade Counsel,
Brussels and London

Sophisticated supply chains are about more than trade in inputs, and modern FTAs now go further than simply reducing trade barriers. They guarantee capital movements and the ability to supply services and protect investments and intellectual property. Increasingly, these agreements also contain provisions guaranteeing free flows of data, limiting data localization, and encouraging the development of common digital standards and other confidence-building measures. We expect that efforts to tackle barriers to the flow of data will become a much bigger issue in 2022 and beyond.

Trade and other supply chain challenges

While FTAs free up trade, trade restrictions of various sorts will nevertheless continue to hamper it, sometimes dramatically. The COVID-19 pandemic has shown how trade restrictions can interrupt traditional supply chains, with many countries adopting export restrictions to

keep hold of the products produced in their territories, exacerbating existing product shortages. The EU is now considering ways to keep supply chains open in such situations. Political events can also lead to countries imposing trade restrictions on sovereignty or national security grounds, even beyond what is provided for in foreign investment regimes.

> **"Supply chains can be significantly disrupted by national protectionist measures, whether via legal regimes, such as those providing for measures based on national security or other grounds, or outside these."**
>
> 
> **François Gordon**
> Antitrust Counsel,
> Paris

Another emerging risk area is subsidy control. Where supply chains involve companies receiving EU Member State support, they have always been subject to EU State aid rules. Now the risk of coming up against this sort of issue is about to increase, with the EU planning to introduce new rules on subsidies coming from foreign governments, and the UK introducing its own (currently somewhat skeletal) regime following Brexit. A supply chain that includes companies that have received state support could be vulnerable to actions to recoup that assistance.

> **"The EU's proposed regime to control foreign subsidies benefiting those doing business in the EU will introduce new hoops to jump through for companies looking to boost their supply chains by joining forces with companies that receive state support from outside the EU."**
>
> 
> **Martin McElwee**
> Antitrust Partner,
> Brussels and London

ESG supply chain due diligence

Yet further conditions are imposed on trade, either by governments or by private actors such as retailers, to ensure that businesses and their suppliers comply with prevailing ESG norms. Investors are also increasingly focused on a company's ESG profile. For example, the EU has just announced a mandatory due diligence proposal for businesses importing agricultural products to ensure that they are not associated with deforestation. This comes on top of new rules adopted in Germany and the EU in relation to forced labor and other human rights violations, with climate change and other sustainability concerns likely to follow.

Antitrust issues in the supply chain

> **"The UK Subsidy Control Bill will take the place of the EU State aid rules that applied before Brexit. It provides for judicial review by the Competition Appeal Tribunal of subsidies from UK public authorities and the possibility of ordering recovery of illegal subsidies."**
>
> 
> **Ricky Versteeg**
> Antitrust and Dispute Resolution Counsel,
> London

Joint arrangements with competitors continue to need care, as do arrangements involving joint purchasing, access to IP and know-how, and data collection and exchange.

In 2022, arrangements between companies at different levels of a market will need particular attention. New EU distribution rules are close to being finalized and will enter into force in 2022. While the general approach remains consistent in most areas, some notable changes are currently proposed:

- the removal of the benefit of the block exemption "safe harbor" from online cross-platform retail price parity (or most favored nation (MFN)) clauses;
- removal of the exemption for information exchange aspects of dual distribution (when a manufacturer competes with its retailers) above a 10 percent combined retail market share; and
- for online intermediation services, removal of the benefit of:
  - the rules that take agency arrangements outside the scope of antitrust prohibitions; and
  - the block exemption of dual distribution arrangements.

While targeted in scope, these are big changes for companies caught by the new rules.

The UK verticals regime is also under review and while the CMA recognizes the advantages of ongoing consistency with the EU rules, it has stated that any advantages of convergence should not outweigh the need to protect UK consumers and the UK economy. This has already led

to a number of areas of divergence between the proposed revised EU Vertical Block Exemption Regulation and the new Vertical Agreements Block Exemption Order in the UK, so that in certain areas the UK proposals are either less permissive (as in the case of parity clauses) or more permissive (as in the case of dual distribution). Such divergence will require careful consideration by companies whose supply chains involve both the EU and UK.

> **"If the EU goes ahead with the removal of the block exemption for many dual distribution arrangements, this will have a huge impact on both online and traditional businesses that rely on hybrid or omnichannel distribution models."**

Maren Tamke
Antitrust Counsel,
Berlin

Looking ahead in 2022:

- Check whether new or pipeline FTAs or other trade agreements may provide opportunities for cheaper or more efficient sourcing.
- Be aware of current and potential future government and purchaser ESG requirements and their implications for management of your supply chains.
- Review your European distribution policies in the light of the likely new EU rules and keep an eye on them as they are finalized in time for their entry into force on June 1, 2022.
- Keep under review any UK-related distribution arrangements, giving particular attention to restrictions on parallel trade between the UK and the EU.

With thanks to Joanna Goyder for her contribution to this theme.

08. Antitrust and Net Zero – how will the rules shift to support transition?

It has never been clearer that there needs to be a rapid acceleration in the fight against climate change to prevent global temperatures from rising by more than 1.5 degrees Celsius. Businesses will play a critical role in driving action to achieve global Net Zero and, as part of their efforts, they need to be alive to the antitrust risks that may be involved.

COP26 and competition policy

COP26 affirmed the goals set out by the Paris Agreement and measured global progress toward Net Zero by 2050. It set out many interim actions required by governments, policymakers and businesses to keep this target within reach. Key outcomes of COP26 included:

- a call to action for developed countries and financial institutions to accelerate the alignment of their financing activities with the goals of the Paris Agreement;
- steps encouraging the creation, expansion and strengthening of carbon offset markets;
- commitments by world leaders to work together and accelerate action by 2030; and
- agreements on ending deforestation and cutting methane emissions.

> **"Our clients will play an important role in translating many of these commitments into action. We are advising businesses across all sectors to help them deliver on Net Zero sustainability goals."**
>
> 
>
> **Timothy Wilkins**
> Global Partner for Client Sustainability, New York

Throughout 2021, we saw continued policy debate and focus from global regulators on antitrust and Net Zero. Antitrust authorities in the EU, the UK and Singapore have invited views on how competition policy can support Net Zero objectives. Authorities in Greece and the Netherlands published a joint report on how broader social benefits of sustainability initiatives can be quantified in competition assessments. Others, including authorities in Australia and Japan, have signaled their focus on sustainability. In the US, antitrust and Net Zero has received increased attention from business and policymakers but remains comparatively nascent.

Regulators remain very keen to receive examples from businesses of areas where antitrust may be holding back bolder Net Zero sustainability initiatives so that these can be factored into ongoing policy development. For example, the EC has communicated that it "stands ready" to respond to companies' requests for guidance to provide legal certainty for collaborations with sustainability objectives as part of its ongoing review of its Horizontal Block Exemption Regulations and Guidelines.

Approximately
$50 trillion
of investment is required by
2050
to transition the global economy to
Net Zero
emissions

Transformation through consolidation

One way businesses will invest in Net Zero transition is through acquiring "green" businesses and technologies. We expect that such transactions will grow in terms of volume and value in the coming years. With this, a larger number of "green" transactions will be subject to review by antitrust authorities around the world.

When assessing transactions with an espoused Net Zero or sustainability rationale, antitrust authorities may be faced with weighing up the benefits of sustainability-related efficiencies of the transaction. For example, the UK CMA has recognized that reduced carbon emissions can be considered as a relevant customer benefit in merger assessments. However, antitrust authorities have traditionally set a high evidentiary bar for this type of analysis, and targeted guidance from agencies on substantiating sustainability efficiencies is needed to assist companies in evidencing possible "sustainability defenses."

This is one key area where we expect international divergence, particularly in relation to the impact of environmental sustainability agreements or mergers on consumer welfare as some antitrust authorities are likely to go further than others in the weight they place on the longer-term and out-of-market environmental effects of the joint initiative or merger. As risk assessments for global initiatives are typically based on the most stringent rules internationally, international convergence is crucial to driving real change.

We are also seeing an increase in merger cases that involve a theory of harm based on alleged harm to sustainability. One area that antitrust authorities are now on the lookout for is so-called "green killer acquisitions," i.e., those that may result in smaller companies relevant for green innovation exiting the market (see themes 2, 4 and 6). This was a key issue raised by Executive Vice-President Vestager in a recent speech: the EC has "already had to step in several times, to protect innovative efforts to find less toxic pesticides, or to develop more energy-efficient turbines."

> **"For businesses considering 'green' transactions that carry traditional merger control risks, building up evidence of sustainability-related efficiencies, including how these will be passed on to consumers, should form part of early transaction planning."**
>
> 
>
> **Mary Wilks**
> Antitrust Counsel,
> London

Net Zero funding high on government agendas

The EC will provide up to €672.5bn under its Recovery and Resilience Facility, targeted at enabling EU economies' green transition and available at Member State level. The EU's Green Deal has triggered the revision of various EU State aid instruments (e.g., Guidelines on State aid for climate, environmental protection and energy and the Communication on Important Projects of Common European Interest). The EU is also providing support for decarbonization (see theme 6).

In the UK, funding allocated to promote environmental protection has typically made up around 44 percent of the government's total subsidy spend. The new UK subsidy control regime (expected to be passed into law in 2022) will continue this trend to help deliver on the UK government's 2050 Net Zero goal. We expect that, in addition to the EU and UK, all major governments will use public funds to attract inbound investment in sustainable production and technology to safeguard jobs and growth.

> **"There has never been more funding available from the public sector to support the Net Zero transition. Businesses should carefully consider how to structure and implement their individual funding strategy in sync with industrial reality to obtain the maximum outcome."**
>
> 
>
> **Andreas von Bonin**
> Antitrust Partner,
> Brussels

Rise in private sector collaboration initiatives and litigation risk

Encouraging governments and the private sector to work together was a key goal of COP26, and indeed no country, company or individual can drive change alone. A key challenge for businesses is the potential competition law risks raised by collective decision-making to pursue sustainable investment strategies. Businesses jointly developing best practices for sustainable investments should be aware that implementing sustainable investment strategies – and decisions to cease investing in specific sectors – raises the potential for collective boycott concerns.

"Higher pressure on businesses to collaborate to pursue sustainability goals comes with greater risks of infringing competition law. Businesses will need to be alive to policy developments, new guidance and international differences in competition rules when carrying out risk assessments."

Paul van den Berg
Antitrust Partner,
Amsterdam and Brussels

We expect antitrust authorities to take an increasingly tough stance on anticompetitive agreements that are disguised as environmental sustainability collaborations or any illicit agreements that have a negative impact on the environment.

Increased industry collaboration also raises the risk of more litigation and class actions, especially where collaborations could be interpreted as alleged anticompetitive agreements. This is particularly the case for sustainability initiatives that result in small price increases or a reduction in choice for customers (at least in the short run).

"The number and variety of climate change cases have grown significantly in recent years. While defendants have typically been governments, claims are increasingly directed at corporates. When considering sustainability collaborations, businesses must consider the risks of customer and/or competitor complaints."

Bea Tormey
Antitrust and Dispute Resolution Partner,
London

Rise in consumer law enforcement

We expect to see a continued trend in consumer law enforcement on misleading sustainability claims. Businesses need to be alive to the risks of making misleading statements in relation to the sustainability credentials of products and services.

In Europe, the Netherlands Authority for Consumers and Markets (ACM) has been particularly active in seeking to regulate sustainability claims under consumer law. The ACM published Guidelines on Sustainability Claims in early 2021 and has since been actively monitoring the market for potentially misleading environmental sustainability claims. It has sent letters to 170 companies across various sectors calling on them to check the accuracy of their claims and reminding them of their consumer law obligations. In addition, the ACM announced investigations into six companies in the clothing sector following initial findings of misleading sustainability claims.

Similarly, in the UK, the CMA published the "Green Claims Code" in September 2021. The CMA plans to conduct a detailed review of misleading environmental and sustainability claims and will prioritize enforcement action in sectors such as textiles and fashion, travel and transport, food and beverages, and beauty and cleaning products. We can expect active enforcement from the CMA in this area in 2022. The UK government is also consulting on strengthening the CMA's consumer law enforcement powers, proposing fines of up to 10 percent of global turnover envisaged for breaches of consumer protection law.

We expect all European consumer protection agencies to collaborate closely on these issues. In connection with its own investigation, the Dutch ACM has announced it is working with other regulators to act against companies based outside the Netherlands.

In the US, consumer protection-related litigation is as busy as it has ever been with actions being brought by both regulators and private plaintiffs. We expect this to continue into 2022.

Regulators have increasingly brought actions against companies for making misrepresentative claims about environmental credentials. For example, both the Massachusetts Attorney General and City of New York have brought claims against oil and gas companies for violating respective consumer protection laws by allegedly issuing advertisements containing misleading environmental claims.

Looking ahead in 2022:

- **Businesses need to prepare for an influx of new guidance from regulators –** the EC will provide guidance on sustainability cooperation as part of its update to the Horizontal Block Exemption Regulations and Guidelines, as well as guidelines on the new derogation from antitrust rules for agricultural sustainability agreements between producers and/or other actors in the food value chain. The EC is also planning a series of further guidelines in relation to State aid for projects supporting the Net Zero transition during 2022. The CMA will advise the UK government in early 2022 on how competition law and consumer law can better support the UK's transition to an environmentally sustainable and Net Zero economy. In Singapore, the Competition and Consumer Commission has invited researchers to submit proposals on the topic of sustainability and competition law.
- **Build a helpful evidence bank –** businesses considering "green" acquisitions and industry collaborations need to be clear about the indispensability of the project to help meet Net Zero goals. Evidencing environmental sustainability benefits and building a pro-consumer narrative are key for project planning.
- **Continue to shape the debate –** we expect other antitrust authorities to follow Europe's and Singapore's lead to seek industry input to shape policy changes and guidance documents. In the US, businesses have an important role to play in helping influence the direction of travel on antitrust and Net Zero to ensure that their needs and concerns are considered by antitrust agencies.

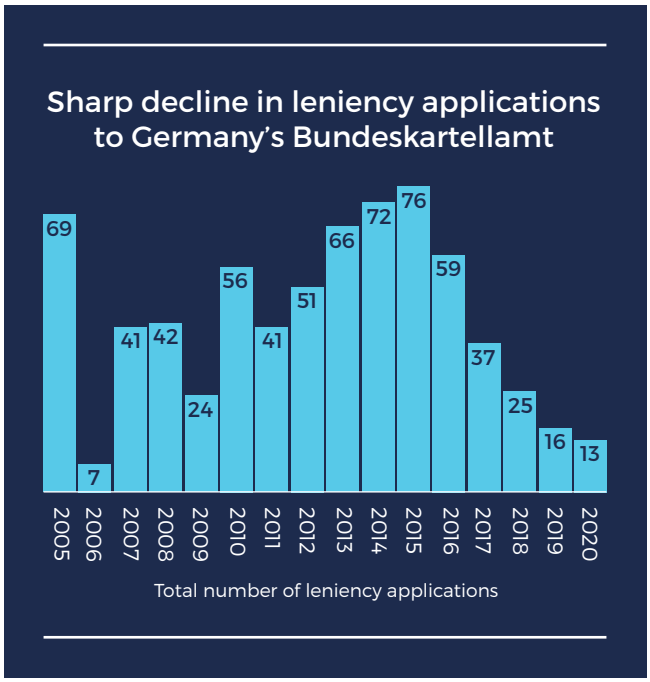
With thanks to Kirsty Brown for her contribution to this theme.

09. Detecting cartels and compensating consumers – flexing the rules to reinvigorate enforcement

The starting gun is raised. Are you ready?

> **"Various antitrust authorities have announced that it is 'hunting season' for cartel enforcement again. And they seem to go for more 'digital' or 'remote' dawn raids that create new challenges for searched companies."**

Maria Dreher
Antitrust Partner,
Brussels and Vienna



The start of the 21st century saw corporate leniency programs across the globe successfully incentivizing cartel participants to self-report and cooperate with regulators to build cases against their co-conspirators. But recently, the leniency pipeline has dried up, and the number of cartel investigations pursued by regulators has fallen. For instance, the total number of criminal cases filed with the US DOJ has dropped by more than 50 percent in the last five years compared with the previous five, from an average of approximately 55 criminal cases per year to approximately 23 per year.

At a time when both sanctions and private civil claims by injured consumers have increased globally, both in number and in damages claimed, legislators and antitrust authorities are looking for ways to renew companies' incentives to take advantage of leniency programs and blow the whistle on their competitors. One incentive being considered is immunity from civil damages claims in addition to immunity from administrative fines. Should these ideas come to fruition, the stakes for companies deciding whether to self-report would be raised even higher.

Authorities are thinking about flexing the leniency rules. But have they correctly diagnosed the issue?

A common view is that the increased costs associated with submitting a leniency application – exposure to follow-on damages, the complexity of navigating the leniency programs of multiple jurisdictions for cross-border cartel conduct, and stricter standards for successfully obtaining and retaining leniency – are the primary driver behind companies' increased reluctance to blow the whistle. Antitrust authorities have responded by considering ways to make self-reporting more attractive.

The EC, the Bundeskartellamt and the UK government are all considering granting immunity from civil damages claims to the first-in applicant. Such a change would be controversial and may have unanticipated consequences. For example, because investigated parties other than the first whistleblower would bear increased follow-on damages exposure (by having to foot the bill for sales of the immune party), they would have less incentive to cooperate with the investigating authority. That would exacerbate a key problem authorities face: securing corroborating evidence.

Hong Kong has already implemented civil damages immunity for companies and is waiting to see the results. The US recently renewed its Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), which reduces but does not eliminate successful leniency applicants' exposure to civil damages. However, many practitioners believe that ACPERA's vague cooperation requirements will continue to limit its effectiveness.

Other measures to reinvigorate leniency, used particularly by the US DOJ, include agencies' increased willingness to use deferred prosecution agreements (DPAs) to resolve criminal antitrust violations short of a criminal conviction, even for companies that missed being the first-in applicant. At the European level, we have seen a certain willingness to reward companies' cooperation outside the leniency framework.

But would these measures return leniency to its earlier heights? We do not think so. Our sense is that global efforts to detect, destabilize and prosecute cartels have been successful. Companies are more aware of what constitutes classic unlawful cartel activity and have consequently undertaken immense compliance efforts. These endeavors, increased fines for cartel activity and the ever-present risk of civil damages exposure have helped to make "traditional" infringements less prevalent.

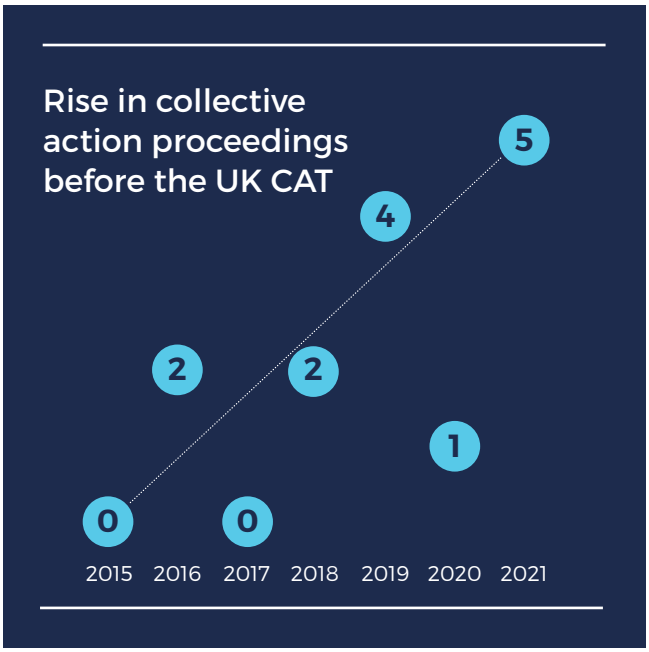
We are also seeing more nuanced information-exchange conduct without classic "hardcore elements" such as price-fixing or market allocation. This conduct is harder to assess and runs the risk of violating the law but is ineligible for leniency. Vertical conduct typically suffers similarly – it is scrutinized by the EC while even for a first-in applicant only a limited fines reduction may be available on a case-by-case basis. And authorities are increasingly focusing their resources on pursuing new theories of harm they would not have previously entertained, such as horizontal cooperation agreements in the ESG field. How should such novel and nuanced theories be dealt with? Authorities could offer up-front confidential guidance or informal advice mechanisms that de-risk the making of a leniency application in a borderline case or be open to accepting commitments instead of fines.

Mass claims risk continues

Granting immunity from civil damages claims to the first-in applicant could still result in litigation for the co-conspirators. While follow-on mass claims by private litigants have been the norm in North American jurisdictions for decades, other jurisdictions are catching up, making it even costlier for multinational companies to defend themselves. Claimants are using various mechanisms, including claims vehicles and collective action procedures (in particular, the UK's CAT appears to be adopting a more claimant-friendly approach to certification than the US or Canada). And third-party funders and claimant law firms are significantly investing in this area and engaging even more frequently and effectively in close cooperation across borders, also with consumer organizations.

"Rapidly expanding mass claim and class action risks, combined with claimant-friendly approaches to class certification in some jurisdictions, are increasing the civil damages risks from anticompetitive conduct."

Mark Sansom
Antitrust and Dispute Resolution Partner, London



Looking ahead in 2022:

- **Closely monitor authorities' activities.** Authorities publicize their fine-tuning of leniency regimes or introduction of new enforcement efforts or theories of harm. Then they look for cases to show they are serious about their new approach. The recently formed US Procurement Collusion Strike Force – geared to increase detection of collusion in government procurement – had more than 25 investigations ongoing in October 2021, several international in scope. And the EC has been conducting more dawn raids in pursuit of reinvigorating its investigation pipeline. So be vigilant.
- **Is your compliance department fit for purpose?** Compliance remains high on the agenda, especially with increased remote working. Have your policies been updated for new technology like ephemeral messaging or remote working arrangements? Regulators have indicated that a company's corporate compliance program is an increasingly important factor in its resolution of antitrust cases.

> **"A robust compliance program should address the antitrust risk posed by changes in the way employees communicate, including the use of ephemeral messaging apps."**
>
> 
>
> **Julie Elmer**
> Antitrust Partner,
> Washington, DC

- **Be prepared for (remote) dawn raids**. The EC, the Bundeskartellamt and the US DOJ, among others, will not accept COVID-19 as an excuse for illicit behavior. And dawn raids are changing. Have you recently reviewed your dawn raid guidelines and training, including covering private homes? Can your IT department deal with expansive document requests for multiple custodians? Do you have policies for use of and data retention from apps or other informal business communication tools, such as chats?
- **Prepare for follow-on claims**. Be proactive in risk evaluation and management, coordinate business activities across the globe, and deploy strategies to deter claimants or dispose of cases early, where appropriate. Cross-border coordination is vital to ensure that litigious decisions are not taken in one jurisdiction that adversely impact others.

With thanks to Dominic Divivier, Ashmita Garrett, Tyler Garrett and Angela Landry for their contributions to this theme.

10. Antitrust in labor markets – key compliance issues for employers, employees and the self-employed

An emerging area of antitrust enforcement

The focus of antitrust enforcement has traditionally been on price-fixing and other anticompetitive conduct in sales markets, with labor markets relatively untouched by antitrust enforcers globally. However, growing recognition that antitrust has a role to play in labor markets has led antitrust authorities around the world to enhance their scrutiny of labor markets.

Individual accountability, particularly in the post-pandemic world of hybrid working, continues to be relied upon as an important instrument in the authorities' enforcement toolbox. Respectively, reliance on individual compliance and self-reporting of potentially anticompetitive conduct remains crucial for businesses. This expansion of antitrust into previously "overlooked" areas brings with it increased antitrust exposure for companies, highlighting the need for new and specialized compliance measures.

> **"When competition is lacking in labor markets, employer market power robs workers of the benefits of their time and energy. That's what makes promoting competition here so fundamental."**
>
> **Jonathan Kanter**
> Assistant Attorney General, US Department of Justice Antitrust Division, December 6, 2021

The US DOJ has expressed its commitment to enforcing antitrust laws against employers engaging in anticompetitive conduct in US labor markets, culminating most recently in a series of *criminal* wage-fixing and no-poach cases. Labor markets are a clear focus of the current administration: President Biden recently tweeted, "... companies should have to compete for workers just like they compete for customers. We should get rid of non-compete clauses and no-poaching agreements that do nothing but suppress wages," a theme reflected in the Executive Order on Promoting Competition in the American Economy of July 2021. Accordingly, both the US DOJ and FTC have made labor-related issues a priority: "Put simply, employees, like consumers, are entitled to the benefits of competition that the Sherman Act affords and protects" (Jonathan Kanter, Assistant Attorney General, US DOJ Antitrust Division, combined DOJ and FTC workshop on promoting competition in labor markets).

> **"Under pressure from both the Trump and Biden Administrations and Congress, the DOJ has actively been looking for these cases and is now bringing them. Companies are now facing more scrutiny than in the past."**
>
> 
> **Bruce McCulloch**
> Antitrust Partner, Washington, DC

Labor markets rising up the US antitrust agenda

- **Mid 2021** – Biden Executive Order
- **Jan 2021** – First DOJ criminal no-poach case
- **Dec 2020** – First DOJ criminal wage-fixing case
- **Pre 2020** – Civil labor-related cases
- **2016** – DOJ and FTC Antitrust Guidance for HR Professionals

While the EC has not yet pursued or prohibited wage-fixing or no-poach agreements as standalone violations of competition law, there are clear indications of its intention to do so: "... some buyer cartels do have a very direct effect on individuals, as well as on competition, when companies collude to fix the wages they pay; or when they use so-called 'no-poach agreements' as an indirect way to keep wages down, restricting talent from moving where it serves the economy best" (Executive Vice-President Margrethe Vestager, speaking at the Italian Antitrust Association Annual Conference).

National competition authorities have also shown a willingness to flex their enforcement muscle in this context. In her farewell speech, the President of the French Competition Authority, Isabelle de Silva, said that the French authority must continue to focus on competitive harm in labor markets. Independent antitrust proceedings have been initiated and fines imposed in respect of mutual no-poach agreements and wage-fixing arrangements in Lithuania, Hungary, Poland and Portugal. Similar initiatives have been adopted in Brazil, Mexico and Turkey.

"It is almost certain that antitrust authorities outside the United States will follow the DOJ's lead. Companies should be prepared for 'copycat enforcement' and follow-on litigation around the world."

Nicholas Frey
Antitrust and Dispute Resolution Partner, London

Antitrust and HR compliance

Businesses cannot afford to wait and see how this new wave of antitrust enforcement plays out; they should be proactively looking to audit their HR practices now. Significantly, in the labor context, "competitor" includes any business that competes to hire the same employees, irrespective of whether that business makes similar products or provides similar services. This contrasts with the competitive analysis in other antitrust contexts, which focuses on current, future or potential competition for goods sold and services offered. This differentiating feature on the "buy-side" of competition for employees presents risks to businesses *across* industries, all of whom compete for the same *type* of employees (e.g., engineers, accountants), even though the employers for whom they work may not outwardly appear to be competitors in the common use of the word. This is an important distinction for businesses.

"In the wake of this renewed interest in labor markets, companies should assess whether their HR practices are antitrust compliant to ensure they are not exposing themselves to possible claims. If potentially anticompetitive arrangements are identified, not only should they be terminated immediately, but companies must also consult with legal counsel quickly to consider whether they should seek leniency to avoid prosecution."

Tobias Klose
Antitrust Partner, Düsseldorf

Impact on labor markets as a new theory of harm?

Enforcers are increasingly aware of merger transactions leading to increased monopsony power (i.e., where a market has few buyers and many sellers), particularly in heavily concentrated labor markets, and we are starting to see labor market-related questions from regulators during their merger reviews. In the US, the FTC and DOJ are reviewing their merger guidelines as a result of President Biden's Executive Order, for example, noting that the update will provide "an opportunity to directly analyze mergers affecting critical areas of our modern economy, such as ... labor markets" (Lina Khan, Chair US FTC).

Updating antitrust law

In many antitrust systems, self-employed contractors are considered economic entities in and of themselves, meaning any form of collective bargaining by the self-employed (especially in relation to compensation arrangements) is considered to be a wage/price-fixing cartel and therefore illegal. This has led many, including antitrust enforcers, to conclude that antitrust law needs updating to take account of new and developing working practices. In September 2021, the Chair of the US FTC, Lina Khan, released a memo in which she urged Congress to consider passing legislation to protect gig workers who organize. The EU has already taken some measures toward the same end, culminating in the EC's platform workers protection package published in December 2021, which proposes a rebuttable presumption of employee status; a softer way of improving the rights of platform workers. As a framework directive proposal, it would be up to Member States to establish the presumption in accordance with their national legal and judicial systems. Companies engaging self-employed workers need to remain cognizant of these changing dynamics.

Continued emphasis on individual accountability and whistleblowing

The trend for individual accountability as a tool to support antitrust compliance remains. The UK government, for example, has proposed extending director liability through the imposition of civil penalties for the provision of false declarations.

Whistleblowing continues to be a cornerstone of antitrust compliance. In the US, the Criminal Antitrust Anti-Retaliation Act (CAARA) affords protection from retaliation for antitrust whistleblowers who report possible criminal violations. Employers should review those internal reporting mechanisms to ensure reports do not result in retaliatory measures that could trigger a CAARA complaint. The UK government is proposing to make improvements to the current legal framework and give greater certainty over the handling of a whistleblower's identity across the enforcement process in order to bolster use of this tool. This follows publication of whistleblowing guidance by the CMA in July 2021. More broadly, following implementation of the 2019 EU Whistleblower Protection Directive, which protects reporting persons who acquired information on breaches in a work-related context, EU employers will need to keep in mind the requirement for confidentiality and compulsory feedback to whistleblowers following a report.

New challenges in the hybrid workplace

The pandemic has had a revolutionary effect on working practices such that the hybrid workplace seems here to stay. Businesses need to remain alive to the increased risks posed by remote and hybrid working, including inadvertent disclosure of confidential and/or privileged information and careless document creation/retention, as well as the enhanced risk of anticompetitive conversations due to less formal "office supervision." Businesses should be revisiting their compliance policies and practices to determine whether they are actually fit for purpose in the longer term if hybrid working is here to stay.

Antitrust enforcers are also aware of the changes brought about by increased home working; the UK government has put forward proposals to extend the CMA's seize and sift power under warrant to *domestic* premises, presumably with a view to being able to retrieve evidence from the "home office."

"Most global employers have moved beyond the idea that remote or hybrid working is a temporary state. If the move to hybrid is permanent (or at least long term), it's important to step back and consider whether long-standing policies and procedures remain fit for purpose, whether training needs to be revisited, and whether the oversight arrangements that have operated successfully in an entirely office-based environment translate effectively to a hybrid model."

Holly Insley
People and Reward Partner,
London

Looking ahead in 2022:

- Companies need to be alert to the increased scrutiny of **compensation and hiring practices** and proactively prepare for further restrictions in light of the anticipated growth of antitrust enforcement in this area. HR professionals, particularly those responsible for recruitment, should be included in antitrust compliance programs, which themselves should address specific HR and hiring practices so that these individuals understand the limits for communicating with competitors.
- **Merging parties** can expect to see augmented consideration of the impact of horizontal mergers on labor markets and will need to be prepared to address any such perceived concerns in the same way as they do currently for traditional anticompetitive theories of harm.
- Businesses should continue to carry out risk assessments regularly to ensure they have proper and effective oversight over their employees as **hybrid and remote working** becomes more established. And they should also ensure that their whistleblowing and compliance procedures are sufficiently agile to adapt to regulatory and workplace evolutions to remain antitrust compliant.

With thanks to Meredith Mommers, Amy Rentell and Karen Slaney for their contributions to this theme.

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