

10 key themes

Global antitrust in 2023

Welcome to our annual review of 10 of the most important trends in the world of antitrust for 2023

The perfect storm created by the ongoing recovery from the global pandemic, the war in Ukraine and the ensuing energy and cost of living crises casts a long shadow on the global economic outlook for 2023. Macroeconomic headwinds bring uncertainty for those having to navigate the road ahead but also opportunities as governments seek to promote and encourage innovation and investment and to tackle broader policy goals such as Net Zero.

This confluence of events poses new challenges to the international rules-based order. And antitrust rules are no exception. Add to this the ongoing challenges posed by the green transition and digital transformation, and 2023 is set to be a testing year for global regulatory enforcement and risk as policymakers and legislators jostle to address and curb the effects of these contemporary crises.



In today's climate of geopolitical and economic turmoil, and with the continued strengthening of regulatory enforcement globally, antitrust, foreign investment and broader regulatory awareness and strategies have never been more important to our clients. Our antitrust group is second to none when it comes to advising on new legal and policy developments in this complex and evolving environment. I hope you find their thoughts on what to expect in the year ahead helpful.

Georgia Dawson
The Senior Partner

The changing face of antitrust

2023 will see a swath of major antitrust reforms across many key jurisdictions, ranging from new legislation aimed at better-equipping agencies to carry out their enforcement agendas to additional powers and responsibilities in new regulatory spheres. The possibility of increased governmental intervention in markets, as agency heads and influential politicians seek to shake up the antitrust playbook, means greater confrontation with the new normal.

Digital regulation or revolution?

The evolution, or perhaps revolution, of antitrust in the digital space, where prescriptive regulation is replacing traditional economic assessment, will continue. 2023 will witness the first significant test of the EU's new Digital Markets Act and the potential introduction of similar legislation in the United States and other parts of the world. This new approach to digital regulation is likely to be seen elsewhere globally, with unprecedented implications for businesses operating in the digital arena.

Antitrust concerns from all angles

2022 saw the introduction of new rules and guidance in relation to vertical agreements, modernized to take into account the proliferation of e-commerce. The seeds were also sown, however, for the revival of older legislation to tackle concerns in the distribution context. Horizontal collaboration will similarly not escape regulatory scrutiny, with a spotlight on key areas of cooperation, such as life sciences and continued discussions around sustainability and environmental objectives, including in relation to industries in transition.

Shifts in the focus of merger control

The evolution of merger control is set to continue, with growing skepticism from antitrust enforcers toward M&A and sustained criticism of their perceived underenforcement. The traditional focus of antitrust analysis on the welfare of consumers continues to be challenged as calls are made for wider political and societal considerations to be taken into account in merger assessments. Even acquirers with a traditionally low merger control risk, such as financial sponsors, now find themselves under greater scrutiny. Understanding and anticipating the impact of this shift in focus on deal execution and the extent of cooperation and collaboration among agencies presents both opportunities and risks for businesses and will be critical to success, particularly in cross-border deals.

Supporting the green transition

With the war in Ukraine and global inflation bringing energy policy into sharp focus, climate change and the transition to Net Zero remains a top priority for governments, policymakers and businesses. Antitrust laws play a vital role in supporting decarbonization efforts, as more industries seek to collaborate on sustainability and R&D and state aid rules adapt to promote investment in clean energy and climate-resilient infrastructure. However, political drivers and a lack of consensus internationally make this a challenging area for businesses as authorities continue to balance these goals with their antitrust and consumer enforcement mandates.

Deglobalization trends

Businesses must be mindful of the implications of new rules entering into force in 2023; for example, relating to subsidy control and the impact that such strategic

autonomy and sovereignty may bring. Against the backdrop of an economic downturn and protectionist political agendas, the lack of convergence among local rules on foreign investment increases the probability of divergent outcomes.



We are fortunate to represent clients across multiple sectors before many of the world's most important antitrust enforcers, regulators and courts, which enables us to be at the cutting edge of the latest substantive and procedural developments globally – whether that's in the context of M&A, investigations or litigation. This puts us in the pole position to advise clients on global regulatory strategies. We look forward to continuing to help our clients successfully navigate these challenges in a changing world.

Rafique Bachour

Global Managing Partner and Antitrust Partner

A new age for investigations

Antitrust agencies will be keen to ensure that economic disruption does not provide cover for anticompetitive activities – the uptick in the number of dawn raids and investigations in 2022 is therefore likely to continue in 2023, particularly as authorities flex the enhanced powers afforded to them by new legislation. Antitrust compliance – and the implications of a lack thereof – should, therefore, remain high on the agenda for the year ahead.

Mass claims and antitrust litigation

New methods and novel bases of claims in the antitrust litigation space, including important developments in mass claims, will continue to feature highly as a risk area for businesses in the coming year, especially those operating globally. This sphere will remain very active throughout 2023, reinforcing the need for regular assessment of antitrust risk exposure.

Global antitrust in 2023 explores all these themes, and we will continue to track developments throughout the year in our series of topical podcasts, publications and blog posts. 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 within our [antitrust, competition and trade team](#).

On behalf of everyone at Freshfields, we wish you a happy and healthy 2023.



Thomas Janssens

Global Head,
Antitrust, Competition
and Trade Group

With thanks to Karen Slaney for her contribution.

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01.

The changing face of antitrust



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IN BRIEF

Antitrust enforcement is in a period of flux as it grapples with a mounting political perception that it is not doing enough to address some of the world's more pressing problems. Major reforms and shifts in enforcement priorities are taking place in response, and antitrust authorities are increasingly emboldened to pursue cases that they might not have undertaken a few years ago. The results of these changes in 2023 will be yet more unpredictability in merger review and new types of conduct being captured by antitrust enforcement rules. Companies will have to be nimble in responding to these changes.



...the antitrust community confronts an inflection point. People who had never before heard of the antitrust laws are realizing the costs of underenforcement.

Jonathan Kanter

Assistant Attorney General,
US Department of Justice – September 2022

Merger control is becoming more aggressive and less predictable

There is broad consensus amongst antitrust authorities that now is the time to strengthen aspects of their merger control regimes and ensure that existing regulatory tools are being utilized to their fullest extent. Their prevailing belief is that carrying out M&A activity should be more challenging than it has been in the past and, accordingly, that deals should be easier to review, investigations more comprehensive and standards of review even stricter (particularly with respect to the assessment of remedies) ([see Theme 2](#)).



We live in unpredictable times and merging parties can no longer assume convergence between competition authorities reviewing the same deal. The US antitrust agencies, the European Commission and the UK Competition and Markets Authority will continue to assert themselves in global cases involving parallel review – and that presents both opportunities but also some risks for companies surveying the M&A landscape.

Thomas McGrath
Antitrust Partner, London

The perceived need to strengthen enforcement in the digital space will make this a particular area of focus in 2023. However, those same reforming impulses will spill over into other industries as well. Despite these challenges, transactions of all sizes and across all industries remain deliverable with the right planning and execution, albeit companies may need to be prepared in some deals to offer creative remedies to address concerns raised by antitrust authorities or to litigate to defend the transaction.

Introduction of new tools – and regimes – to deal with problematic corporate conduct

In addition to stronger enforcement in the M&A space, antitrust authorities around the world are in the process of obtaining and utilizing new or enhanced investigative tools (or regimes) to deal with problematic aspects of corporate conduct and in strengthening the penalties for noncompliance. 2023 will see many of these tools/regimes come into force, with profound implications for businesses – particularly in the digital space.

Along with the European Commission's (EC) determination to reinvigorate traditional cartel enforcement, completely new enforcement tools are coming into play, including the Foreign Subsidies Regulation ([see Theme 10](#)), which can be also used to deal with the impact of non-EU subsidies on business strategy and conduct.

Then there is the Digital Markets Act (DMA), which entered into force in November 2022. Companies falling within the “gatekeeper” designation have until July 2023 to notify the EC and commence DMA compliance. This may lead to parallel enforcement action, with the conduct of the big digital players subject to action under both the DMA and antitrust law. Similar developments can be seen at the national level, with new Austrian and German digital market powers already in use and the creation of the UK's Digital Markets Unit (DMU), which is to be given power to impose bespoke conduct requirements on digital firms with “strategic market status.”



...it was Heraclitus who said, ‘the only constant in life is change’...We have completed or are about to complete major reviews of all our rules. And these reviews are resulting in important changes.

Margrethe Vestager
Executive Vice President, European Commission
– March 2022

Sea change in the United States

In the United States, the changes are arguably even more profound. The Biden administration has

signaled a desire to move beyond the traditional notion of a consumer welfare standard (which focuses intervention on the basis of harms to consumers) and toward a more expansive view of competitive harm to combat a perceived failure of merger enforcement over the past decades. Federal Trade Commission (FTC) Chair Lina M. Khan stated that merger control is one immediate area of enforcement that can become stricter because it is the “first-line defense” and more cost effective than antitrust enforcement.

The US Department of Justice (DOJ) Antitrust Division plans to increase scrutiny over private equity deals ([see Theme 4](#)) and US agencies have also started challenging mergers based on perceived harm to workers, including reducing employment options for existing employees or jobseekers. Businesses now face close reviews of non-solicits, no-hire provisions and non-competes, the latter being the subject of an FTC proposed rulemaking announced on January 5, 2023, that if implemented, would institute a near total ban on such clauses, with a limited exception for certain non-competes executed in M&A transactions.

While the US enforcers are increasingly skeptical of consolidation and believe the public should not bear the risk of harm where the competitive effects of a deal may be ambiguous, the cases litigated by the DOJ and FTC in the past year have brought mixed results.

While aggressive agency enforcement is bound to continue in 2023, the courts currently look likely to impose limits on the agencies’ new approach.

US enforcers intend to police conduct just as aggressively as deals. The most striking evidence of this is the FTC’s November 2022 Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act. This potentially

threatens enforcement against a range of conduct that would not previously have been considered to raise antitrust risk but now may be attacked under the rules prohibiting “unfair methods of competition.”



The recent FTC policy statement on ‘unfair methods of competition’ introduces an expansive new interpretation of the law, which on its face could apply to a broad range of behaviors, including conduct previously viewed as lawful. It remains to be seen whether the courts will support the FTC’s attempt to breathe new life into antitrust law.

Jan Rybnicek

Antitrust Partner, Washington, D.C.

Increased jurisdictional uncertainty – and a new mandatory regime – in Europe

In Europe, new laws aimed at strengthening merger control enforcement are being adopted and authorities are seeking to expand their jurisdiction to have greater flexibility to review potentially problematic transactions. At the forefront of these developments are the EC through the referral mechanism provided by Article 22 of the EU Merger Regulation (EUMR) and the UK’s Competition and Markets Authority (CMA) through its application of the share of supply test and “rebalancing” of merger control ([see Theme 2](#)).

In addition, the EU’s new Foreign Subsidies Regulation will add a layer of review to deals where companies involved have received subsidies granted by non-EU countries. Notification obligations will arise from September 2023 ([see Theme 10](#)).

Also in 2023, EC Executive Vice-President Margrethe Vestager will continue the thorough review of almost all aspects of the competition rules, including EC Regulation 1/2003, which covers the implementation of the rules on competition, and also new guidance on market definition.



Reflecting a global trend in this direction, the Italian competition authority has recently acquired the power to call in transactions (post-closing) that do not trigger the jurisdictional thresholds. The expectation is that the authority will carefully select the cases where such power will be used, but it increases the uncertainty for the parties and requires careful planning to frontload potential issues.

Ermelinda Spinelli

Antitrust Partner, Milan/Rome

The UK government is poised to introduce extensive reforms to the competition and consumer law regimes in 2023, committing to a “more active pro-competition strategy” to strengthen competition in UK markets. New rules aimed at more effective market inquiries, as well as stronger and faster enforcement against illegal anticompetitive conduct, will see more streamlined market investigations and the ability to impose fixed penalties for failure to comply with investigative measures, including failing to comply with an information request, as well as for noncompliance with orders imposed or undertakings and commitments accepted by the CMA.

A mix of reforms in the Asia-Pacific region

Many antitrust authorities in the Asia-Pacific region (APAC) are also seeing their enforcement powers broadened. The recent reset of the Chinese antitrust regime introduced, among other things, higher fines for noncompliance with the law, personal liability and a punitive “superfine” for the most serious violations. The new law empowers the State Administration for Market Regulation (SAMR) to provide “safe harbors” for certain vertical agreements, introduces a prohibition of “hub and spoke” conspiracies, and dedicates particular attention to the role of data in the digital sector and the risks of abuse via the use of data, algorithms, technology and platform rules. It also introduced a “stop the clock” mechanism and codified SAMR’s power to “call in” transactions that do not meet the notification thresholds, increasing the potential for unpredictable review timetables. SAMR also introduced a pilot program allowing some transactions to be reviewed by designated local authorities, adding a further layer of unpredictability in 2023 and beyond.

The Australian government has long been concerned that average and maximum penalties in Australia were substantially below those in comparable jurisdictions and risked being seen by some large companies as an “acceptable cost of doing business.” New laws came into effect in November 2022, increasing the maximum penalties a court can order by five times the previous limits. The new federal government is also expected to consider the Australian Competition and Consumer Commission’s (ACCC) 2021 proposals to replace its voluntary merger control regime with a mandatory and suspensory regime as well as a “call in” power for acquisitions that fall below the thresholds but give rise to potential antitrust issues.



In China, antitrust remains a key enforcement tool for the government, and the recent reforms give more teeth to the Chinese competition authority to enforce the law. Elsewhere in APAC, enforcement is also set to increase, as mature regimes (such as Australia, Korea, Japan, Singapore and Taiwan) expand their powers and shift enforcement priorities while emerging regimes (such as Hong Kong, Malaysia, Philippines and Vietnam) step up enforcement activity. A regional mindset and nimble teams will allow companies to adapt to and navigate the evolving enforcement landscape.

Ninette Dodoo

Antitrust Partner, Beijing

Meanwhile, in Japan, the Japanese Fair Trade Commission (JFTC) is facing the dilemma of how far it can push the boundary of the existing antitrust law regime and rely on “voluntary” processes (e.g., to review digital mergers that do not trip the filing thresholds) while avoiding judicial review. In contrast to its formal cartel investigations, the JFTC has recently implemented a “softer” approach to abuse of dominance investigations where it does not initiate formal investigations but instead solicits voluntary information requests and on-site inspections to collect information. As the JFTC does not disclose much detail on these informal investigations, it is difficult for other market players to interpret the takeaways and manage expectations (both on procedure and substance). These investigations are expected to result in voluntary commitments by the investigated companies, which so far have been mainly big technology companies.

Looking ahead in 2023

- **Plan ahead in order to be able to execute complex cross-border M&A in an integrated way.** Increasing unpredictability presents opportunities for well-organized merging parties; the same is also true for interested third parties looking to disrupt a transaction.
- **Follow closely how new legislation and policy changes may affect your business** and how they are implemented in practice, as they may create opportunities for well-prepared companies.
- **Several consultations on new legislation and guidance that may affect your business will open or continue in 2023.** Make sure you have your say on aspects that concern you.

With thanks to Joanna Goyder, Jan Jeram, Kailun Ji, Kara King and Natalie Pettinger Kearney for their contributions to this theme.

02.

Is merger control fit for purpose – evolution or revolution?



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IN BRIEF

Driven by concerns of underenforcement, antitrust authorities and governments globally are reassessing their merger control regimes. More or less evolutionary – or revolutionary – depending on the jurisdiction concerned, these changes generally represent a tightening of rules or thresholds or the adoption of more interventionist approaches to applying the rules, increasing the importance of early antitrust assessment and the development of an aligned, global merger control strategy.

Heightened global scrutiny, with divergence at the margins

Authorities are engaging with each other more than ever before against a backdrop of more stringent merger control enforcement in the leading jurisdictions. Despite some differences in approach, recent examples demonstrate heightened scrutiny and a greater willingness to challenge transactions. In this environment, a global merger control strategy that accounts for jurisdiction-specific considerations is crucial.

- **United States:** Under the current administration, the DOJ and FTC have signaled a skepticism of remedy packages that, in prior administrations, would have been deemed sufficient, with a preference for suing to block transactions they consider problematic. Merging parties have prevailed in defending against recent suits to block vertical transactions (e.g., the FTC's suit to block *Illumina/Grail* and the DOJ's challenge to *UnitedHealth Group/Change Healthcare*) and suits based on novel theories of harm (e.g., the DOJ's challenge to *Booz Allen/EverWatch*), underscoring the importance of preserving the ability to litigate in your deal documents.



In the current enforcement environment, preserving the ability to litigate – including building in sufficient timing in merger agreements – can be critical.

Mary Lehner

Antitrust Partner, Washington, D.C.

- **EU:** The EC has secured a number of important wins in EU courts. In *Illumina/Grail*, the General Court upheld the EC’s new policy to accept merger referral requests under Article 22 of the EUMR even from member states where the transaction does not meet national merger control thresholds. The judgments in *Tata Steel/Thyssenkrupp* and *Wieland/Aurubis* confirmed the EC’s wide margin of discretion in the assessment of substantive concerns and proposed remedies. In *Towercast*, the Advocate General’s opinion embraces the view that Article 102 of the Treaty on the Functioning of the European Union enables competition authorities to review and prohibit mergers involving dominant companies – outside the scope of the normal merger control rules. Encouraged by these developments, EC officials are envisaging a “creative and rigorous” approach to the review of mergers, in particular in the digital and life sciences sectors.
- **UK:** The prohibition by the CMA of the *Cargotec/Konecranes* transaction demonstrates that authorities can take divergent views on remedies packages. Here, the CMA refused to accept the same remedies package the EC had separately approved, notwithstanding that the significant majority of the merging parties’ activities took place outside the

UK. The CMA assesses remedies with greater skepticism than do many other agencies and is increasingly reluctant to accept risk in remedies assessments – whether it be composition risk of the divestment package or acquirer risk (for example, demonstrating a strong preference for industry buyers over financial investors and requiring upfront buyers).

- **China:** Against the background of geopolitical tension, in sectors considered sensitive or strategic to the Chinese economy and technology autonomy/self-sufficiency, SAMR will pay close attention to supply chain stability. SAMR remains skeptical of vertical and conglomerate mergers, and this can result in behavioral remedies being required for clearance (e.g., *II-VI/Coherent*). Most recently, the *DuPont/Rogers* transaction was abandoned due to a failure to receive clearance in China before the long stop date. Conversely, if SAMR is convinced that the transaction will not impact the Chinese market, it is also comfortable giving its consent instead of waiting for other jurisdictions (which tended to be the approach in the past).



Merging parties need to factor in sufficient time and prepare for bespoke strategy, including the advocacy and remedies in jurisdictions such as China. A global strategy should be informed by detailed jurisdiction-specific strategies, particularly in those jurisdictions where timing implications can be significant.

Hazel Yin

Antitrust Partner, RuiMin Law Firm, China*

*RuiMin is an independent PRC law firm that is part of our global StrongerTogether Network

Fear of missing out: more measures to capture ‘killer acquisitions’

Authorities in recent years have been concerned with so-called killer acquisitions – acquisitions of nascent targets that do not trigger existing thresholds – especially in the life sciences and technology sectors. In 2022, the EU General Court in its *Illumina/Grail* decision approved the EC’s approach to applying Article 22 of the EUMR, which allows an EU member state to refer any transaction to the EC for review.



There are indications that a series of court wins in 2022 have emboldened the EC in its enforcement policy. Going forward, we expect the EC to be more open to pursue untested theories of harm, making it more difficult to predict outcomes in particular in cases involving dynamic competition and service ecosystems.

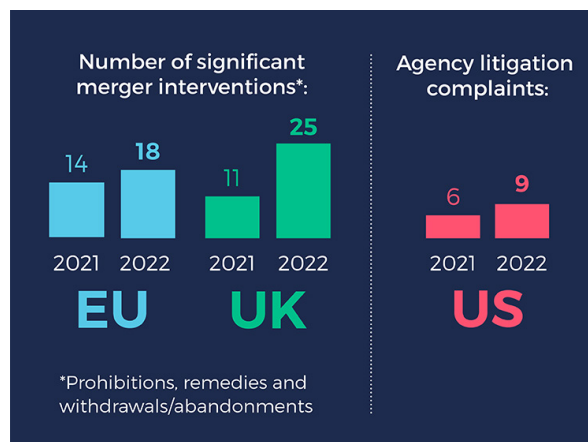
Sascha Schubert

Antitrust Partner, Brussels

US authorities continue to scrutinize acquisitions of nascent competitors. DOJ Assistant Attorney General Jonathan Kanter notes that “if we allow dominant firms to buy up or block these nascent competitors before they get to scale, we will lose out twice. First by losing potential innovations, and second by losing [a] potential source of new competition.” FTC Chair Lina M. Khan echoes this sentiment, emphasizing the importance for antitrust enforcers to remain “alert to instances in which emerging competitors are acquired before they can fully emerge to be a threat.” Both the DOJ and FTC remain focused on investigating and challenging acquisitions of emerging competitors.

China has codified in its amended Anti-Monopoly Law (AML) SAMR’s power to capture killer acquisitions on its own initiative, and new filing thresholds are proposed for transactions involving so-called mega corporates. Under the proposal, a filing would be triggered where (i) at least one party has turnover in China greater than RMB100b (approx. US\$14b, €13.5b, £12b); (ii) the target has a market capitalization or valuation greater than RMB800m (approx. US\$115m, €109m, £94m); and (iii) the target generated more than one third of its global turnover in China in the preceding financial year.

In the UK, as part of reforms to “rebalance” the merger control system expected to be legislated in 2023, there are plans to introduce a new test that would give the CMA jurisdiction where at least one of the merging businesses has (i) an existing share of supply of goods or services of 33 percent in the UK or a substantial part of the UK; and (ii) UK turnover of £350m. This new jurisdictional test would, therefore, capture transactions where there is no overlap with the target’s activities and in practice will amount to mandatory merger control for many well-established businesses, given the CMA’s expansive approach to its “share of supply” test.



Reforms implemented or in the pipeline

- **United States:** Potential reforms are under consideration before Congress, but even absent congressional action, the US agencies have implemented changes to enforcement policy that heighten scrutiny of potential transactions. Both the DOJ and FTC are skeptical of behavioral remedies and require structural fixes. More broadly, DOJ Assistant Attorney General Kanter has stated a preference for litigation over imperfect settlements, and the DOJ has been reluctant to agree to *any* remedies. In addition, the DOJ and FTC have jointly launched a process to review and revise the Merger Guidelines that the agencies follow, with an aim to “modernize” antitrust enforcement, including in relation to novel theories of antitrust harm (e.g., labor market and innovation issues).



It is imperative to consider whether the efforts covenant in the merger agreement accounts for remedies that go beyond simple divestitures or hold separate arrangements. Likewise, where deals are taking over one year to close due to antitrust review, sellers and target companies must also think carefully about the interim operating provisions they agree upon, and for transactions with debt financing, ensure that debt commitments do not expire before antitrust concerns can be resolved.

Paul Humphreys

Global Transactions Partner, New York

expected to be published in Q3 2023 and will reflect the EC’s views on defining multi-sided markets and markets with zero-price services. The DMA will impact the M&A risk assessment for gatekeeper platforms; effectively, all their acquisitions will become reportable and public, raising the chances of a referral to the EC under Article 22 of the EUMR. Although the EC has been looking for ways to capture below-threshold acquisitions in the digital sector, it has resisted proposals to introduce new merger review thresholds based on market shares or transaction value that some EU member states have adopted.

- **Germany:** New reforms are expected in 2023 that will substantially lower notification thresholds for transactions in specified markets (in sectors where the German Federal Cartel Office (FCO) has previously conducted a sector inquiry).



Given the way the CMA has pushed application of the 25 percent ‘share of supply’ test in recent years, the proposal to raise the turnover threshold is not likely to exclude much industrial consolidation from the possibility of review, unless the parties fall within the new proposed £10m safe harbor. Businesses should continue to prepare for an interventionist CMA, which will cooperate with other authorities in its information gathering while remaining free to diverge on its assessment of transactions and remedies as they affect the UK.

Alex Potter

Antitrust Partner, London

- **EU:** The EC continues to adapt its competition law enforcement for the increasing digitalization of the economy. An updated Market Definition Notice is

- **UK:** The reforms expected to be legislated this year will likely include measures to allow more targeted use of CMA resources; for example, raising the

turnover threshold to remain in line with inflation (from £70m to £100m UK turnover) and introducing a small merger safe harbor where each party's UK turnover is less than £10m.

- **China:** The new AML entered into force on August 1, 2022. It introduced: (i) a “stop the clock” mechanism, which is welcomed, as it removes the need for a “pull and refile,” but its broader impact on timelines is still unclear; (ii) new classification systems for mergers by “categories and levels” that have resulted in the introduction of more streamlined merger review processes (e.g., delegation to local authorities for certain cases) and specific filing thresholds (such as the proposed mega corporate thresholds mentioned above); (iii) priority sectors for merger review, mandating stronger scrutiny of deals relating to people's livelihood (e.g., within industries such as finance, media, technology, health care, etc.); and (iv) much harsher penalties for failing to notify a reportable merger.
- **Australia:** In 2022, the new ACCC chair noted that the absence of a mandatory merger notification requirement meant that the ACCC is often approached comparatively late and warned businesses that they would be taking a risk by failing to prioritize Australia in their merger filing exercises. The Assistant Minister for Competition, Charities and Treasury recently indicated that he is open to considering reform of Australia's merger laws, which would replace Australia's voluntary merger control regime with a mandatory and suspensory regime, introduce a “call in” power for acquisitions that fall below the thresholds and/or change the test for establishing a substantial lessening of competition.

Looking ahead in 2023

- **There is a need for greater coordination globally on all aspects of merger control**, including substantive assessment and remedies planning, and how this will play out in each jurisdiction:
 - to ensure transaction documents allow sufficient time for merger review processes and account for jurisdiction-specific risk, including the possibility of needing to go to court to overcome resistance from the agencies;
 - where strategically appropriate, to engage early with authorities to use parties' resources more efficiently; and
 - to consider the cross-jurisdictional sufficiency of any proposed remedy package to minimize incremental demands.
- **Use procedural approaches in different jurisdictions to align on timing where possible or to take advantage of fast-track options**, which can limit burden on the parties and save time and resources.
- **Factor in foreign investment and national security regimes**, which are now the norm in most major jurisdictions, from the early stages and prepare for how these will interact with merger control processes.

With thanks to Konstantin Bondarenko, Laura Onken and Theo Souris for their contributions to this theme.

03.

Foreign direct investment – record year for prohibitions and new developments



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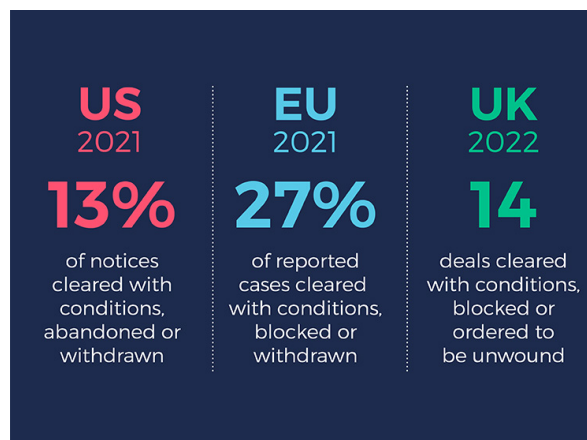
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IN BRIEF

2022 saw seismic shifts in geopolitics spurred by the war in Ukraine and frictions between some of the world's largest economies, resulting in many countries adopting more protective, if not protectionist, policies. These trends have impacted the regulation of foreign investment where we have seen a record number of deals prohibited or subjected to onerous conditions and a proliferation of new regulations and policy changes across the globe that dealmakers need to navigate. More sectors than ever are being subjected to intense scrutiny on national security grounds, including computing hardware, robotics, artificial intelligence, advanced materials and data infrastructure.

Unprecedented number of deals prohibited or unwound on national security grounds

Heightened tensions between the leading Western economies and Russia and China, together with growing concerns about technology transfer and supply chain security, saw intense political focus and media coverage on foreign investment policy and acquisitions in 2022. An unprecedented number of transactions were prohibited, abandoned or unwound due to national security or foreign investment concerns, a trend that we expect to continue in 2023.



In the United States, a better resourced Committee on Foreign Investment in the United States (CFIUS) has stepped up its efforts to identify, call in and in some cases force the divestment of completed investments that pose national security risks. The latest published statistics indicate that CFIUS reached out to parties to 135 transactions in 2021, requesting filings for eight of those transactions. CFIUS reportedly required divestment in several instances in the past year, mostly involving investors with Chinese and Russian ties. Portending even more aggressive enforcement of CFIUS mandatory filing requirements and mitigation agreements, CFIUS issued Enforcement and Penalty Guidelines for the first time in October 2022. While China and Russia are likely to remain the principal focus of these efforts, investors from other countries in sensitive businesses have received inquiries from CFIUS and are likely to also continue to experience an overall increased level of scrutiny.



While a meaningful proportion of the mitigations imposed by the UK government under the National Security and Investment Act in its first year have involved acquirers with links to China, a number of other transactions with no China links have also been ‘called in’ for an in-depth review and/or cleared only subject to remedies. Given such interventions can add months to deal timetables and ultimately impact future governance, it is critical that a fulsome national security assessment is conducted pre-signing, regardless of investor nationality.

Michele Davis

Antitrust Partner, London

On the other side of the Atlantic, within the first year of the UK’s National Security & Investment Act (NS&I) regime coming into full force, the UK government has already prohibited three transactions and issued an order to unwind two more, all of which involved Chinese- or Russian-backed acquirers of intellectual property rights over, or ownership of, advanced technologies or communications networks. A significant proportion of Final Order cases, i.e., cases where the UK government has imposed remedies, have also involved targets developing advanced or sensitive technologies as well as those owning and operating critical national infrastructure assets (notably in the energy sector).

Other European regulators have also taken a tough stance on Chinese investment in sensitive sectors such as technology, health care and critical infrastructure. For example, the German government cited protection of technological and economic sovereignty as the basis for prohibiting acquisitions of three semiconductor and wafer manufacturers in 2022, and partially prohibited Chinese shipmaker Cosco’s acquisition of a minority stake in the Port of Hamburg on the grounds of “*threat to public order and security*” (a controversial decision that has sparked significant debate both within and outside Germany).



Against the backdrop of the ever-increasing scrutiny of foreign investment by national governments, undertaking an upfront and rigorous FDI feasibility assessment is becoming critical in almost all deals.

Alastair Mordaunt

Antitrust Partner, London/Hong Kong

New CFIUS Executive Order – a greater transparency of national security risk factors

On September 15, 2022, President Biden signed an executive order (EO) directing CFIUS to consider certain national security risk factors when analyzing transactions, providing greater public transparency and more definitive direction to CFIUS agencies.

The EO confirms that ensuring supply chain security and technological competitiveness are important considerations in CFIUS' national security review, especially as it relates to the technologies of the future (advanced computing, biotechnology and clean energy technologies, among others), regardless of their current known or intended military applications. Parties should be aware that even investors from friendly countries may be closely scrutinized on these grounds. Cybersecurity and access to sensitive data also remain key factors that CFIUS takes into account in its national security review. The cybersecurity posture of both the investor and the target may be relevant to CFIUS' assessment of the effect of the transaction on cybersecurity and the protection of sensitive data.

The EO repeatedly emphasizes with respect to each of the foregoing factors that CFIUS may consider third-party risk, meaning indirect risks from countries of concern like China. Even where the transaction has no direct nexus to such country, CFIUS may view the investor's own investment, R&D or manufacturing relationships in such country, or dependence on revenue from such country, as risk factors.

While the EO more reflects current trends than establishes a new direction for CFIUS, it is still notable as confirmation that an increasingly broader range of US targets and foreign investors will face CFIUS scrutiny and because it may have the effect of lowering the threshold for CFIUS action whenever these factors are present. As CFIUS continues its push to engage with other countries on foreign direct

investment (FDI) screening, it is also possible that many of these themes will be adopted by FDI authorities in other jurisdictions as well.



The web of national security-based regulations is expanding in scope and complexity by the day. These regulations are likely to impact company growth and acquisition strategies, financing sources, stability of supply chains, and exit plans, among other fundamental commercial considerations. The boardroom and C-suite of any company with global operations, global supply chains or global ownership structures should invest the time to understand and plan against this complex regulatory and geopolitical environment.

Aimen Mir

CFIUS Partner, Washington, D.C.

Outbound investment controls – a new layer of foreign investment regulation?

While the focus in recent years has been on regulating inbound investments, discussions around the introduction of outbound investment screening (OIS) in the United States and EU have gained momentum. OIS is intended to close the circle of government investment control: in addition to inbound screening, OIS seeks to control strategic investments abroad in countries such as China and Russia and is one additional piece of the current US/China strategy in tense geopolitical times. Some lawmakers are focused on OIS as a means of addressing the risk that strategic and financial investors may aid in the development in China or Russia of technologies that are sensitive and that the government is seeking to protect through inbound investment and export controls.

Other lawmakers also see OIS as a means of addressing offshoring of critical capabilities to China and the resulting increased reliance on China.

Some limited outbound investment restrictions related to semiconductor technology have already been enacted as part of the US Creating Helpful Incentives to Produce Semiconductors Act of 2022. There are active discussions in Congress to establish a much broader form of OIS, but no legislation has received sufficient support. In the absence of legislation, the Biden administration is considering whether to create some form of OIS via EO. However, it has not yet settled on whether it will seek to establish a mechanism just to collect information or instead establish an actual screening mechanism.

The EC has also announced that it will review its control mechanisms for outbound investments. This response is likely triggered by the need for coordination between the United States and Europe on OIS to make this an efficient tool in the Western Hemisphere. However, so far, it remains to be seen whether and how the EU wants to address OIS from a European perspective or whether this will be addressed at the member state level. Several EU member states are already in discussions with the US government and assessing the implementation of OIS regulations.



Most clients have already become accustomed to FDI filing requirements. Now, governments are thinking about the introduction of outbound investment controls. Once implemented, they would add yet another layer of regulatory uncertainty for cross-border M&A transactions.

Frank Röhling
Antitrust Partner, Berlin

Looking ahead in 2023

- **Transactions in a wider range of sectors will be scrutinized.** While deals in the defense and military industries and those involving critical infrastructure will still continue to attract scrutiny, we can expect foreign investment regulation to bite on deals in a wider range of sectors, especially those involving advanced or emerging technologies such as computing, advanced materials and health care, and critical infrastructure.
- **Regulation of outbound investments may be on the horizon.** With OIS firmly on the policy agenda in the United States and the EU, if legislated, dealmakers will need to navigate an additional layer of regulation and pay particularly close attention where capital or sensitive technology and know-how are flowing into countries that may pose strategic or national security risks.
- **Proactive management of regulatory risk remains key to deal certainty.** Dealmakers need effective diligence on commercial ties, in particular to China and Russia, to identify areas of potential concern early and develop an effective regulatory engagement and communications strategy that bridges commercial rationales with national and economic security goals.

With thanks to Justin Chen, Sarah Jensen, Ilka Oberländer, Uwe Salaschek, and Tuna Tanik for their contributions to this theme.

04.

Financial investors – in the regulatory spotlight



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IN BRIEF

Led by the United States, antitrust authorities around the world are increasingly focused on financial investors, one facet in the global trend toward increased antitrust scrutiny. This has several implications for dealmaking by private equity (PE) and other financial investors, including longer review periods and in-depth questioning from authorities on potential overlaps and vertical links, noncontrolling minority stakes, and cross-directorships across the investment portfolio, even in deals that appear to raise minimal antitrust concerns.

Regulatory filings are no longer just a procedural hurdle

While most transactions involving financial investors do not raise antitrust issues and will continue to be cleared following brief reviews under simplified processes, financial investors should no longer assume that merger clearance will be just a procedural hurdle. Investors should anticipate and prepare for more questions both from sellers and agencies, particularly in those deals that feature horizontal overlaps and vertical links, even if market shares are limited. In such cases, the risk of longer review periods needs to be factored in.



Buyout groups are “an extremely important part of our enforcement programme” and fuller assessment of their deals is “top of mind for me, and... for the team.

Jonathan Kanter

Assistant Attorney General,
US Department of Justice – November 2022

A deep and current understanding of portfolios – including noncontrolling minority stakes and interlocking directorships – is key to gauging merger control risk. Well-prepared financial investors will be

at a competitive advantage if potential competition concerns are identified early and any vendor concerns are alleviated. They will be better placed to execute on a successful regulatory strategy and to negotiate appropriate terms and conditions in deal documents.

Financial investors should also continue to heed increasingly unpredictable FDI reviews (see Theme 3) and, for transactions involving European targets, familiarize themselves with the requirements of the upcoming EU Foreign Subsidies Regulation (see Theme 10), which will give them an edge in regulatory risk assessments in the future.

US agencies lead the charge on a more aggressive stance toward financial investors

Antitrust enforcers at the DOJ and FTC increasingly are criticizing financial investors, and PE firms in particular, with the head of the DOJ's Antitrust Division seeing a business model “*designed to hollow out or roll up an industry and essentially cash out*” as “*very much at odds with the law and very much at odds with the competition we're trying to protect.*” Both the FTC Chair and the head of the DOJ's Antitrust Division have criticized PE firms for using such transactions involving the combination of smaller players in the same industry to “accrue market power” without the antitrust authorities noticing.

In 2022, the FTC brought an enforcement action against one PE firm requiring divestitures of certain health care clinics that the firm sought to acquire in its most recent series of rollup transactions. The FTC has required this PE firm to divest similar assets in recent years, and the consent agreement requires that the firm both notify and seek prior approval from the FTC for future related transactions, even if those are nonreportable under the Hart-Scott-Rodino Act (HSR Act). This action signals the agencies' likely approach to comparable deals in the future; there, the FTC alleged the PE firm was “*gobbling up competitors in regional markets that are already concentrated.*”



We expect PE firms to remain in the crosshairs of US antitrust enforcers going forward. In transactions that raise material horizontal or vertical issues, transaction agreements should include timelines that allow for litigation regardless of whether firms ultimately elect to litigate. US agencies will face judicial review when bringing more novel claims against PE firms, but they will have greater discretion in pursuing nontraditional claims in consent decrees.

Jenn Mellott

Antitrust Partner, Washington, D.C.

Interlocking directorships will remain on authorities' radar in 2023

Antitrust authorities around the globe are carefully scrutinizing interlocking directorships on a stand-alone basis and in the context of merger reviews. Investors should be mindful of the risk that an authority might perceive interlocking directorships as facilitating unlawful information exchange, coordination or an unfair method of competition.

The most recent sign of enforcers' focus on PE came with the DOJ making good on its promise to “reinvigorate” rules against interlocking directorates. In mid-2022, the DOJ announced that as a result of identified violations of Section 8 of the Clayton Act, which governs interlocking directorates, seven directors had resigned from the boards of five companies, including several directors affiliated with PE firms. The FTC similarly reaffirmed that it will use its authority under Section 5 of the FTC Act to pursue enforcement actions against interlocking directors and officers of competing firms that are not covered by the literal language of the Clayton Act.

Although most other jurisdictions do not impose a specific prohibition, antitrust laws in the EU, the UK and other jurisdictions are wide enough to address

anticompetitive effects arising from interlocking directorates, and authorities have considered this in their reviews, including when it comes to the design of remedies. Even where an interlocking directorate is not technically prohibited, it may still be prudent for investors to proactively manage regulatory risk in this area by implementing firewalls and information-sharing guardrails.

Regulators in the EU, the UK and APAC also share skepticism about broad portfolios with overlapping investments and cross-directorships

The call for more aggressive enforcement against investors by US agencies has been picked up by regulators in other jurisdictions, especially in the EU and the UK. This will make it even more important for financial investors to think about ways to anticipate and mitigate global antitrust risk.

In 2020, the EC initiated a study on the effects of common shareholdings by institutional investors and asset managers on European markets. While no major enforcement action has been taken since the report, the EC continues to monitor overlaps created by minority shareholdings. Indeed, the proposed new EU merger notification form would mandate disclosure of all material (including noncontrolling) shareholdings and directorships in competing companies or companies active in vertically related markets for each notifiable transaction. In addition, it is increasingly common in merger control proceedings to receive questions on influence rights and information flows across the purchaser's groupwide investment portfolio. Finally, the revised referral policy under Article 22 of the EUMR allows the EC to potentially intervene in rollup acquisitions that may previously have escaped scrutiny at the member state level because of low target revenue.

A draft law is being discussed in Germany that would grant the German FCO broad powers to address perceived “disruptions” of competition. Those powers are likely to include oversight of cross-ownerships and

interlocking directorates. Similarly, in the UK, while the CMA has recognized that highly leveraged PE acquisitions are unlikely in themselves to impact competition, it has also demonstrated a willingness to follow the EC in pursuing financial sponsors for potential antitrust violations by their portfolio companies, as demonstrated most recently by its case against two PE firms which previously owned a business engaged in excessive pricing for thyroid drugs.



While it is the US agencies that have been producing the recent headlines when it comes to antitrust and financial investors, many of the issues raised had already been on the radar, and we regularly see questions from authorities on potential effects of minority or noncontrolling shareholdings. Investors should expect this to intensify over the coming years, wherever the center of gravity of the deal.

Paul van den Berg

Antitrust Partner, Amsterdam/Brussels

In APAC, the ACCC has been on record stating that “*common fund management and ownership that allow a degree of control or influence by minority interests have the potential to detrimentally effect competition.*” This position led to an investment in a regional cargo port being abandoned – the investment would have resulted in common ownership interests across competing port infrastructure. The ACCC's statement is a warning for investors in critical infrastructure and may spur other agencies in Asia to closely scrutinize such (minority) investments for potential anticompetitive effects.

Mandated divestitures can still be an opportunity for well-prepared financial investors

Antitrust officials are increasingly skeptical of PE firms as potential buyers of divestiture assets to remedy transactions that otherwise raise antitrust concerns.

The head of the DOJ's Antitrust Division has argued that PE firms “*are incapable [of] or uninterested in using [divested assets] to their full potential*” and therefore are not able to restore and preserve competition that may be lost as a result of a transaction. However, earlier this year, a district court denied the DOJ's attempt to block UnitedHealth Group's \$7.8b acquisition of Change Healthcare, finding that the proposed divestiture to a PE buyer would resolve any competitive concerns. The DOJ is appealing this decision.

Equally, both the EC and the UK's CMA have expressed skepticism at financial investors being suitable divestment remedy purchasers and are raising more questions during merger reviews as to whether a financial investor would have the incentive and industry know-how to vigorously compete through ownership of the remedy business.

In this context, financial investors need to think carefully about how they present their acquisition case, and ideally would do so through portfolio companies that can demonstrate sector knowledge and expertise – as well as evincing an intention to invest in the competitiveness of the divestment business for the future. A bid supported by an ambitious and credible procompetitive narrative will therefore be at an advantage.

Anticipating regulatory scrutiny up front

In an era of more aggressive, less predictable merger enforcement (see [Theme 2](#)), financial investors remain a highly attractive proposition for sellers looking to maximize deal certainty when compared with strategic buyers. However, even for financial investors, the world is more complex than it used to be. Identifying likely risk areas early when considering transactions will allow investors to reassure sellers about their ability to manage potential regulatory intervention. For this, knowledge of one's own portfolio (across funds if applicable) is paramount, as is the choice of coinvestors. Opportunities resulting from antitrust divestiture processes will still be possible, though they will require a robust engagement plan with agencies. Overall, it

will be even more important to seek antitrust advice early in the process and provide for the necessary contractual protection to develop an effective regulatory strategy, involving sellers and target management as required. The regulatory obstacles will by no means be insurmountable, but financial investors should be prepared for additional scrutiny of a greater portion of their deals going forward.



There will still be plenty of cases where financial investors will be able to confidently present an offer as certain from a regulatory perspective. But the desire to present a certain bid will need to be risk assessed more than ever in the context of the increased scrutiny of and more aggressive enforcement against transactions involving financial investors. More emphasis on conducting upfront analyses of the merger control risks, to ensure a clear picture, will enable financial investors to remain confident as to the extent of certainty that can be offered or the degree of tailoring and contractual protections that may be required, especially in the face of pressure to accept any form of hell-or-high-water obligation. Where relevant, the potential for extended review periods will need to be factored early on into the ask with respect to debt financing commitment periods.

Rebecca Ward

Global Transactions Partner, London

Looking ahead in 2023

- **The political stance of the US antitrust agencies is unlikely to change in 2023, and recent election results may even embolden them.** Investors should expect more test cases and challenges, increased scrutiny of PE divestiture buyers in consent decrees, and longer merger review timelines, which allow for potential litigation if the risk profile of a transaction is higher.
- **In the EU, the revised notification form will require increased disclosure and more scrutiny of minority shareholdings and cross-directorates in horizontally or vertically related markets.** This further increases the need for portfolio management and knowledge, even across different fund structures. Multiple investments in a single sector even from funds under common management but different ownership will inevitably lead to protracted reviews, even if no competition issues are ultimately identified.
- **Merger control is but one piece of the regulatory puzzle.** Coordination of review timelines will gain in importance as the geopolitical climate forces a further proliferation of national security and FDI screenings, and the EU's novel Foreign Subsidy Regulation will add another layer of scrutiny on state-owned or -linked investors. Transaction documents should leave sufficient leeway to address regulators' questions and potential concerns, and regulatory risk allocation clauses should anticipate novel theories of harm.
- **Expect regulatory risk to feature more as a parameter in auction dynamics.** Anticipating difficulties of competing bidders or consortia across merger control, foreign investment and subsidies will be a clear advantage. At the same time, avoiding own goals through anticompetitive or suspect narratives in internal documents remains essential, as agencies can be expected to demand disclosure, including of information memoranda and other deal documents.

With thanks to Laurent Bougard, Kara Reid and Vanessa van Weelden for their contributions to this theme.

05.

Collaboration and licensing – new risks and opportunities



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IN BRIEF

In 2023, licensing and collaboration deal structures will continue to present significant opportunities for companies, particularly in the life sciences, digital and technology sectors, provided the possible regulatory pitfalls are successfully navigated. Collaborations should be carefully structured and assessed against any broader strategy (including future pipeline efforts or M&A activity) and throughout the lifetime of the collaboration to account for any changes to regulatory risk profiles.

Licensing and collaboration agreements remain popular for structuring R&D and innovation investment

Authorities continue to closely scrutinize M&A in innovation-driven industries, and companies should expect deals in these sectors to remain subject to potentially lengthy and unpredictable reviews ([see Theme 2](#)). However, authorities have traditionally been, and are expected to remain, more open to recognizing the long-term benefits of genuinely procompetitive and pro-customer licensing and collaboration agreements, especially for the purpose of bringing together complementary skills and resources.

Macroeconomic headwinds, geopolitical fragmentation, increased R&D costs and greater regulatory complexity present challenges as well as opportunities for industries where continued investment in innovation remains fundamental to success. Licensing and collaboration agreements, early-stage investment and option deals can provide ideal solutions to these challenges and are predicted to remain popular deal structures in 2023.



The commercial terms and structure of a collaboration and licensing deal are limited only by the creativity of the parties – especially as companies evolve toward the development of platform technologies and research teams find increasingly complex ways to combine and layer these platforms and the underlying IP. A clear understanding of the strategic rationale of any collaboration or licensing deal, and of the worldwide regulatory frameworks impacting these deals – not only at the time of signing, but over the lifetime of the agreement – is crucial for both parties as they think about the progression and commercialization of these technologies.

Kristen Riemenschneider

Life Sciences Partner, Washington, D.C.

Broad and flexible jurisdictional thresholds mean that quasi-M&A structures can still trigger filings

Certain joint ventures, strategic alliances, collaboration agreements and even pure IP licensing deals may trigger notifications under antitrust and/or foreign investment regimes globally.

Parties to strategic licensing, collaboration and option agreements should therefore carry out a full filing assessment early, bearing in mind that actions and events beyond the initial agreement also could be notifiable. For example, the exercise of an option may trigger filings and, increasingly, high milestone payments may reach HSR Act thresholds or newer deal value thresholds in European jurisdictions. In the

United States, the application of HSR Act rules can be complex and the commercial terms of an agreement can impact the need for a notification (e.g., co-exclusive licenses may be exempt, whereas exclusive patent licenses can be reportable). In the UK and certain EU member states, lower control thresholds can capture minority-stake investments, especially when combined with special rights and/or board representation. Notably, the jurisdictional assessment in the context of licensing and collaboration arrangements often raises questions and can be more complex than traditional M&A.

In addition, foreign investment regimes increasingly cast a wide net, catching a broad range of transactions, including pure licensing deals. For example, this year saw the first prohibition under the UK's new NS&I regime of a pure licensing deal involving an IP license with respect to certain dual-use technology developed by the University of Manchester to a China-based partner ([see Theme 3](#)). The exchange of information that is considered critical from an FDI perspective can also require government consent – even at the deal negotiation stage.



Licensing and collaboration agreements can be an effective way for companies to leverage complementary skill sets, pool resources and share the risk of innovation and R&D. However, close compliance monitoring at key cooperation milestones is crucial to navigate antitrust risk globally and optimize exit strategies.

Meghan Rissmiller

Antitrust Partner, Washington, D.C.

Information exchange remains a hot topic

Where collaboration partners are actual or potential competitors, any sharing of competitively sensitive information could breach competition rules. Companies should therefore consider at the outset, and at any key transition points in the collaboration, the need to implement safeguards. These need to include systems and controls around information exchange to mitigate against possible spillover risk between the collaboration project and their own business (noting that innovation pipelines – and therefore sensitivity levels – often evolve during the term of an agreement). The same holds true for financial investors with competing businesses in their investment portfolios. The DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors specifically note that appropriate safeguards governing information sharing make it less likely that collaboration will raise antitrust concerns.



The revision of the Horizontal Block Exemption Regulations and Guidelines is an important policy project as it clarifies for businesses when they can cooperate with rivals. Horizontal cooperation may lead to substantial economic and sustainability benefits, including support for the digital and green transition.

Margrethe Vestager
Executive Vice President,
European Commission

The EU's revised block exemption regulations on R&D cooperation and specialization agreements, as well as the updated guidance for horizontal cooperation, are expected to come into force in summer 2023. On the one hand, the revisions helpfully recognize a broader range of collaboration structures, particularly in the context of R&D. However, the current drafts also appear to lower the bar for potential unlawful information exchanges “by object” – even in the context of overall procompetitive collaborations.



Changes to the EU Horizontal Block Exemption Regulation and Guidelines and the new R&D block exemption expected to come into force in summer 2023 will likely require a careful reassessment of existing collaboration agreements to ensure continued compliance with EU competition rules. The European Commission has made it very clear that innovation-based theories of harm are front of mind for them and that they are willing to impose hefty fines where they find companies to be on the wrong side of the line.

Uta Itzen
Antitrust Partner, Düsseldorf

In line with vigorous scrutiny by major authorities of interlocking directorships, shared ownerships and other links between competitors ([see Theme 4](#)), dealmakers must also think carefully in the context

of licensing and collaboration agreements about the individuals appointed to boards or collaboration committees in light of other roles held by those individuals (including considering information exchange in relation to proprietary products and commercial strategy).

No blanket permission for ESG-driven collaborations

For companies considering collaboration to maximize the scale and effectiveness of their environmental and sustainability efforts, authorities across the United States, APAC and Europe have been clear that – while generally supporting necessary collaboration for environmental, social and corporate governance (ESG) policy priorities – this does not provide an exemption to the application of antitrust laws. Though some European and Asian legislators have been more open to providing guidance on how to engage in genuine ESG collaborations without violating antitrust laws, there remains divergence in Europe at the national level. While in some jurisdictions policies or even existing antitrust laws have been adapted to grant companies more leeway to enter into meaningful initiatives in light of wider societal benefits, other authorities have been more reluctant to depart from the established but relatively narrow principle of consumer welfare toward wider societal benefits. Meanwhile in the United States, Republican legislators have publicly stated their intent to demand antitrust investigations of collaboration agreements focused on ESG, and several Republican state attorneys general have publicly initiated antitrust investigations into certain ESG initiatives.



While ESG objectives are high on the political agenda on both sides of the Atlantic, antitrust regulators have made clear that ESG-driven collaborations will continue to be closely scrutinized in order to avoid ‘greenwashing’ or other collusive conduct. It therefore remains key to conduct a careful antitrust risk assessment of collaborations aimed at implementing ESG objectives, which may include quantification of expected sustainability benefits.

Maria Dreher-Lorjé

Antitrust Partner, Vienna/Brussels

Living agreements should be set up to cope with evolving regulatory risk

The lifetime of a collaboration agreement can be long (10 or 20 years) and the parameters are continuously changing. The M&A activity of one party, combined with evolving innovation pipelines, means that regulatory risk profiles change over time. Parties should implement and regularly revise the necessary safeguards, such as firewalls between potentially competing programs. This involves an assessment beyond mere horizontal product and pipeline overlaps as well as a look at broader innovation and key data sets. These changes can also impact exit strategy. Although parties cannot account for all eventualities at the outset, they may want to build in contractual flexibility in the event of protracted regulatory reviews or other antitrust challenges.

Dealmakers will want to keep their eye on the extent to which the collaboration could have an impact on

overall M&A strategy (e.g., leading to completion risk/delay in other deals), as antitrust authorities are increasingly analyzing collaborations and minority investments as part of the competitive capabilities of merging parties. The FTC’s expanded interpretation of “unfair methods of competition” under its November 2022 Enforcement Statement includes the potential to challenge a series of acquisitions, investments or collaborations as incipient threats to competition.



Holistic planning is needed to ensure that even small collaborations or equity stakes do not end up complicating a company’s future unrelated M&A goals. This is even more important considering the increasing skepticism of antitrust authorities toward behavioral remedies.

Alvaro Iza

Antitrust Partner, Madrid

Looking ahead in 2023

- **Procompetitive and pro-innovation objectives do not lower the bar for scrutiny and compliance.** Parties collaborating or innovating for the greater good, e.g., to bring novel or new technologies and products to market or to meet sustainability objectives, must still ensure that contractual arrangements are robust in terms of antitrust compliance and managed appropriately.
- **Anticipate future regulatory requirements when designing licensing and collaboration deal structures.** Partners and investors should analyze at the outset whether meaningful overlaps, including companies’ pipeline efforts, or other competition concerns are likely to arise in the future if the project succeeds. Build in appropriate contractual mechanisms to address these points up front and be prepared to conduct regular compliance audits of antitrust obligations and risk to ensure the necessary safeguards are in place.
- **Be mindful of who sits on collaboration committees or boards,** especially across multiple arrangements with different third parties and/or across different portfolio investments, as information exchange and broader concerns around reduced incentives to compete remain enforcement priorities.

With thanks to Jenny Leahy, Tom Morgan, Enrica Schaefer and Megan Yeates for their contributions to this theme.

06.

Vertical revival – expanding the enforcement toolkit



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IN BRIEF

In 2022, supply and distribution agreements (vertical agreements) were at the top of the agenda for a number of antitrust authorities, with important legal reforms in the EU, the UK and China, as well as new or revived regulatory scrutiny in Hong Kong and the United States. We can expect vertical restraints to remain an enforcement priority in 2023.

Vertical restraints in Europe

In 2022, both the EU and the UK introduced updated rules and guidelines for vertical agreements. These rules apply across sectors and will have implications beyond Europe – with companies often using the EU framework as their global compliance template and regulators equally looking to it for inspiration.

The changes were largely evolutionary, updating the rules to address technology platforms and e-commerce. Suppliers generally gained flexibility, with some exceptions such as online platform providers that will face more scrutiny under the new rules.



The revised EU rules have introduced welcome clarifications and flexibility on important topics like exclusive distribution, selective distribution and some online sales restrictions.

Bertrand Guerin

Antitrust Counsel, Berlin/Silicon Valley

Rules for the age of e-commerce

The new legal frameworks appear to have been, on balance, relatively well received, and they go a long way toward clarifying how the EU and UK rules should apply in an e-commerce setting. However, suppliers of online intermediation services are subject to stringent new rules, particularly in the EU.

Indeed, large e-commerce players, particularly those on which a marketplace service is also embedded, are in for a complex ride. Not only will they have to consider their operating model under the prism of those new vertical rules (if they apply to them, which will not always be the case), but some of them will also need to factor in the existing abuse of dominance rules as well as the implications of the DMA ([see Theme 7](#)).

An early test case for regulatory divergence post-Brexit

The 2010 EU rules were brought into UK domestic law as “retained EU law” post-Brexit. The expiry of the 2010 rules on May 31, 2022 therefore necessitated new UK-specific rules on vertical agreements and represented an early test of whether the UK – no longer bound by EU-specific considerations such as the single market imperative – would diverge from the EU in its approach to restrictive agreements.

The benefits of continued regulatory alignment ultimately won the day. While there are some important points of divergence between the new EU and UK rules and their accompanying guidelines, for the most part, the two regimes remain closely aligned. Further, a review of the few substantive points on which the two sets of rules do differ does not reveal any recurring grounds for divergence.



The continued close alignment of the EU and UK rules relating to vertical arrangements will be welcome to suppliers and distributors with a pan-European presence. How permanent this alignment will be remains to be seen: the UK rules expire in 2028, six years prior to the expiry of the EU rules, leaving the UK with an interesting thought leadership opportunity – ‘stick or twist’.

Deirdre Trapp

Antitrust Partner, London

Increased focus on vertical restraints in Asia

Vertical restraints have also been an area of increased focus in both China and Hong Kong.

China’s new AML, which entered into force on August 1, 2022, empowers SAMR to establish safe harbors for vertical agreements. This will create a presumption of legality for certain types of vertical agreements where the parties’ market share(s) are below thresholds to be set by SAMR (currently expected to be 15 percent and provided that the relevant practice does not result in anticompetitive effects). It is worth noting that the AML does not explicitly exclude hardcore restrictions (such as resale price maintenance (RPM)) from benefiting from the safe harbor. However, it is likely that such restrictions will not be covered by the safe harbor in practice given that the AML presumes RPM is unlawful.

In 2022

15 vertical infringements
within the **EU** and **UK**
resulting in approx.

▼
€15m
in fines

2022 also saw the Hong Kong Competition Commission (HKCC) bring its first RPM action before the Competition Tribunal (CT). The action alleges that the respondent, one of the largest manufacturers and suppliers of monosodium glutamate (MSG) powder in Hong Kong, has been imposing minimum resale prices for its MSG powder on its two main local distributors and using disincentives and threats of penalties to ensure compliance with the minimum pricing. This is the first vertical case to be prosecuted by the HKCC before the CT. The HKCC is contending that the arrangement constitutes serious anticompetitive conduct, which designation stops the respondent from being able to remedy its conduct and avoid court proceedings. The case is still pending before the CT.

A revival of vertical enforcement in the United States



The US agencies' enforcement actions and policy initiatives relating to vertical arrangements have in some ways made what was old new again. Companies should review distribution arrangements like loyalty programs and exclusivity agreements to determine whether they might become subject to scrutiny under the revitalized analytical standards.

Bruce McCulloch,

Antitrust Partner, Washington, D.C.

In the United States, vertical arrangements have become subject to heightened regulatory scrutiny as part of the antitrust agencies' ongoing commitment under the Biden administration to ramp up antitrust enforcement. Enforcement efforts include reinvigorating analytical standards and reliance on laws that in recent decades have come to be viewed as too difficult to administer and insufficient to achieve the policy goals of the antitrust laws. For example, the FTC challenged a loyalty rebate program it labeled a pay-to-block scheme under a law it has not sought to enforce in decades. The agency also issued a policy statement broadening its interpretation of its authorizing statute to prohibit a wide range of business practices, including some that heretofore have been treated as lawful, e.g., exclusivity agreements where the contracting parties do not have market power.

With this plethora of new rules globally, now is the time to conduct a “legal audit” of material contracts in light of the new provisions.

Looking ahead in 2023

- **With new rules now settled in the EU and UK, we can expect enforcement of anticompetitive vertical restraints to be high on European competition authorities' agendas.** Both the EU and UK rules build in a one-year grace period for entities to bring any existing vertical agreements in line with the new rules. Following this, we expect both the EC (and national competition authorities in Europe) and the UK's CMA to ramp up enforcement of the new rules.
- **New safe harbors for vertical agreements giving rise to anticompetitive effects in China will – as has been the case in Europe – greatly simplify the task of assessing whether such agreements comply with the AML.** Businesses and advisors will need to wait for implementing rules to specify the safe harbor thresholds before the anticipated simplification. The MSG powder case in Hong Kong will be one to watch. A victory for the HKCC could spur it to launch enforcement proceedings as it looks to deter suppliers from engaging in RPM strategies.
- **The US antitrust agencies have made clear that they intend to target business practices that they have not focused on previously.** Businesses are well advised to consider whether vertical arrangements that historically have been viewed as ordinary course might now be deemed unfair and subject to regulatory scrutiny.

With thanks to Rory Jones, Angela Landry, Tracey Lu, Charles Tay and Lucas Vanassche for their contributions to this theme.

07.

A new age for investigations – prepare for agencies to come knocking



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IN BRIEF

Physical dawn raids are back. Virtual dawn raids via extensive RFIs are becoming more commonplace. And antitrust authorities, especially in the United States, are pushing for increased cartel enforcement by scrutinizing (through broader powers and greater coordination with other agencies) what they regard as an increased potential for collusion – where legitimate cooperation among competitors is more frequently pursued to address economic and social crises. Are you ready if an authority comes knocking?

Authorities in Europe are on the hunt again (and with more teeth)

After a decline in dawn raids during the global pandemic, at least 15 different European antitrust authorities conducted more than 40 raids in the first nine months of 2022. High-ranking officials of various authorities, including the EC, the German FCO and the UK's CMA, have clearly articulated that the days of refraining from dawn raids due to the pandemic are over – they are back, and they are just getting started.

Key trends we are seeing when steering clients through this latest wave of dawn raids include:

- authorities increasingly carrying out “copy and dash”-style raids, showing less interest in going through physical materials and instead focusing more on seizing significant amounts of electronic data – no matter the format (chat protocols, Sharepoint data, etc.) or where it is physically or virtually stored (on private phones used for business purposes, on cloud servers outside their jurisdiction, etc.);
- regular home working bringing challenges to companies when being raided, e.g., due to an increased risk that their trained on-site staff might simply be outnumbered by officials (especially at the outset); and



In-house counsel and external dawn raid advisors need to know the rights of the company and individuals, be aware of the precise data collection powers of each authority and know what the limits are, particularly when it comes to accessing personal data.

Deba Das

Antitrust and Dispute Resolution
Partner, London

- working from home also is increasing the risk that authorities raid not only company premises but also private homes – a trend companies and their executives have rightly become increasingly worried about; the head of the EC's Cartel Unit has specifically said that such domestic raids are a response to the shift to home or hybrid working.



Domestic raids are particularly challenging, especially in jurisdictions like Germany or the UK where authorities can and do impose sanctions against individuals so that the latter might start cooperating in a way from which the company cannot benefit.

Tobias Klose

Antitrust Partner, Düsseldorf

Now is the time for companies to ensure that their dawn raid trainings and guidelines are fit for purpose with a view to these new developments and that they have experienced dawn raid counsel by their side if an authority strikes in the post-pandemic world – be it at the company's premises or at the general counsel's or CEO's private home.



And the authorities are thirsty for even more powers

Changes in approach and regime reform globally are leading to clear expansion and increased application of enforcement powers, particularly in the United States. The DOJ has keenly focused on increasing criminal enforcement of no-poach and wage-fixing issues, already pursuing five criminal actions and bringing two to trial. These cases illustrate the potential for a wage-fixing or no-poach agreement to be a per se criminal violation. Even more recently, the United States has seen a revival of criminal enforcement of monopolization or attempted monopolization under Section 2 of the Sherman Act, with the DOJ securing a guilty plea in its first Section 2 criminal case in more than four decades.

While the DOJ's criminal enforcement is heating up, its leniency program is losing steam (as is the case across many jurisdictions globally). The costs and uncertainty with seeking leniency – including the prospect of follow-on private litigation and exposure to liability in other jurisdictions – has greatly reduced its leniency pipeline. As a result, the DOJ is turning to other creative methods of detecting cartel activity,

including through merger investigations, private litigation and initiatives like its Procurement Collusion Strike Force (PCSF).



Rather than reducing burdens of its leniency program to increase applicants, the DOJ has doubled down on showing its intent to aggressively utilize all the antitrust laws in its toolkit. The DOJ's coordinated efforts with an increasing number of government agencies to detect and prosecute antitrust crimes across a range of industries is one of those tools.

Jamillia Ferris

Antitrust Partner, Washington, D.C.

In addition to increased enforcement activity, antitrust authorities are also increasing interagency coordination domestically and interjurisdictional cooperation abroad. The UK, in particular, is now looking to sign further cooperation agreements with authorities in the United States, Australia, New Zealand and, potentially, Japan and South Korea. In the United States, coordination among federal agencies continues to increase, including with the DOJ's recent announcement of additional enforcement partners in its PCSF.

Invasive requests for information – caution the ‘fishing expedition’

Authority requests for information across Europe, the United States and APAC are getting broader and expectations for compliance more forensic. A key element of this in Europe is the authorities' use of generic search terms to extract documents relating to specific custodians over significant time periods. With typically limited opportunity for negotiation on the scope of the request, and with significant fines for

noncompliance, companies can find themselves in an impossible position, being required to hand over significant amounts of data and many documents with no relevance to the matter at hand and, in some cases, no privacy-related filter. Some agencies have gone even further, sending sweeping RFIs to a whole industry asking whether the addressees had any exchange with competitors.

Such requests can feasibly be regarded as a kind of “virtual dawn raid.” Unlike a dawn raid with core protections based in case law, however, the scope for irrelevant but still sensitive business documents to end up in the authority's case file is much greater. Antitrust authorities appear to be seeking *carte blanche* to conduct a “fishing expedition” – being able to pick up on other potential lines of inquiry outside the scope of their original investigation – and are testing the boundaries of their powers in this regard. We are already acting on cases before the EU General Court on these issues.



Where authorities are requesting the production of documents hitting on broad search terms, seeking a compromise position, for example by offering access through the use of a virtual data room, can help mitigate the risk of large swaths of irrelevant but sensitive documents ultimately ending up on the authority's case file.

Alicia Van Cauwelaert

Antitrust Counsel, Brussels

It is worth noting that companies are not eligible for any leniency discount as a result of providing responsive information or documents that have been asked for pursuant to a request for information. Companies therefore need to consider whether to get

out ahead of the authority and assess their risk in relation to closely linked business lines to that of the business directly impacted by the investigation or to audit their wider business, to be able to self-report potentially broader infringements and/or additional breaches in order to secure more lenient treatment (so-called leniency plus).

Companies need to consider how best to handle these large document requests from authorities, including the risk that such broad requests may inevitably produce documents that also contain private information about employees or other individuals, thereby adding another layer of complexity in terms of data privacy considerations. Moreover, companies should keep in mind the risk of US litigants seeking automatic discovery of documents submitted to antitrust authorities in the UK and the EU. Preventing this type of discovery in the United States can be difficult for some types of documents, and the DOJ may also subpoena US plaintiffs to obtain any documents they receive. Having joined-up transatlantic counsel is therefore key.

Looking ahead in 2023

- **Be match-ready when the authority strikes.**

- Make sure to equal authorities' dawn raid teams even in times of hybrid working by having a basic "first responder" checklist that works for a broad range of potentially available employees.
- Have dedicated dawn raid trainings for IT specialists (including outsourced functions) who need to be available to answer any technical questions officials may have.
- Update your dawn raid guidelines and trainings in light of the new challenges resulting from copy-and-dash-style raids and raids of private premises.

- **Assess risks across all business areas.**

- While an authority may be probing one issue, broad powers for requesting information can inadvertently bring into scope other business areas. Being on top of potential issues across the entire business is key to assessing risk on an ongoing basis.
- Be open and creative in ways of responding to authority requests with a view to finding a compromise that may better protect both the company and individuals' privacy rights.

- **Keep in mind authorities' push for increased cartel enforcement.**

- Remain vigilant to the potential for collusion, particularly in the current environment where legitimate cooperation among competitors may be more frequently pursued to address economic and social crises.

With thanks to Chinwe Chukwuogo, Dominic Divivier and Dan Wylde for their contributions to this theme.

08.

Digital regulation – contagion of new rules



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IN BRIEF

Antitrust regulators are set to become the next “digital disruptors” as the much-debated EU DMA enters into force. What were once considered “novel” antitrust theories of harm have now been codified into law, shifting companies’ focus toward compliance preparation and the role of the DMA as a blueprint for global lawmakers seeking to update their own statute books.

A new regulated industry

Enforcement by antitrust authorities in the digital sector has focused in recent years on substantiating “novel” theories of harm within the boundaries of the antitrust legal framework, requiring agencies to assess and prove dominance and anticompetitive effects – and to engage with companies’ efficiency arguments and remedy solutions. Such analysis has been – and continues to be – the key battleground between companies and antitrust authorities, including before the EU courts.

The DMA (along with other new regulations such as the parallel Digital Services Act) entering into force in the EU, and being replicated in other regions across the world, aims to reset the existing system of checks and balances by codifying these novel concepts into mandatory prescriptions for application to a wide variety of digital platforms – both now and in the future – and across fundamentally different business models. The result is a complex set of uncertain antitrust and regulatory rules that businesses will need to navigate quickly to ensure their (and others’) compliance.



Although the debate about their divergence and convergence has been ongoing for some time, the introduction of the DMA – and other proposed new regulations in the EU, the UK, the United States and Asia – makes it a priority for companies to think holistically about their competition, privacy and regulatory obligations. Thinking only about antitrust is no longer viable; it is essential that companies are adopting a joined-up strategy across disciplines and geographies.

Sharon Malhi

Antitrust Partner, London

Europe at the epicenter

The EU continues to be the trailblazer when it comes to digital regulation. The final text of the DMA entered into force in November and companies that meet the criteria for gatekeeper designation have until July 2023 to notify the EC and begin the path to DMA compliance, required by March 2024. The coming year will be formative for the DMA as the EC increasingly defines what that “compliance” will need to look like, with a hope for greater guidance in the form of consultative workshops/discussions and guidance papers.

At the member state level, antitrust authorities are tooling up to support the EC. The Dutch, French and German competition authorities have already tabled legislation that will allow them to take up their role in investigating possible noncompliance with the DMA, addressing what is perceived to be a resource gap at the EC level. The German FCO – having already designated a number of digital platforms as having “paramount significance across markets” under updated legislation that came into force prior to the DMA being enacted – can also be expected to increase

its enforcement agenda against large technology firms. The interplay between the DMA and national regimes seeking to tackle similar types of conduct is also expected to unfold over the coming months.

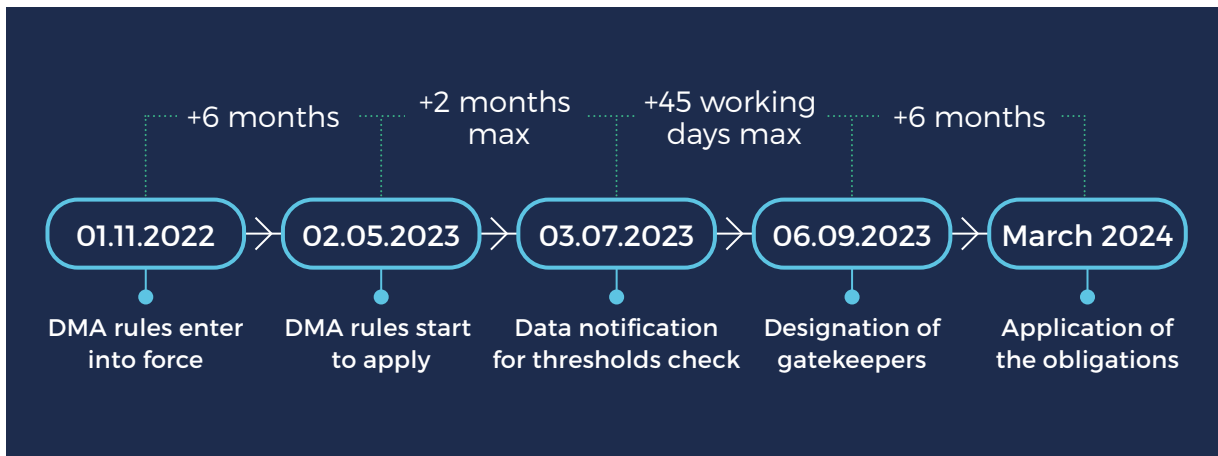


The Digital Markets Act presents a jigsaw of regulatory interpretation in which companies need to consider carefully how their interpretation of compliance in one area may cause potential problems in another. This is exacerbated when you factor in the patchwork of regulatory regimes at the national level, including beyond Europe. Businesses need to take a holistic view of their new regulatory world in order to ensure changes made to business models can withstand regulatory divergence in other jurisdictions.

Tone Oeyen

Antitrust Partner, Brussels

In the UK, it is anticipated that the DMU, which sits within the CMA, will be empowered by legislation to enforce a new regulatory regime by October 2023. While the regime overseen by the DMU can be expected to take some inspiration from early learnings of the DMA, it will differ in material respects. In particular, the DMU is likely to take a more qualitative approach to designating companies as having “strategic market significance” (SMS) and will likely seek to impose a tailored code of conduct for each SMS-designated company. Pending its new DMU powers, the CMA has been actively progressing a number of antitrust enforcement investigations, market studies and settlements in the technology space, while also calling for broader antitrust and merger control reforms.



Other countries joining the fray

While Europe has so far gone the furthest, a number of other countries are set to introduce their own new digital regulation regimes.

In the United States, the American Innovation and Choice Online Act (AICOA) has received narrow bipartisan support in the House of Representatives and now awaits consideration by the Senate. The AICOA would impose obligations similar to those of the DMA on large online platforms. The Senate is also considering the Open App Markets Act (OAMA), which would outlaw app marketplaces from self-preferencing their own products and services. While the two acts are stuck in legislative deadlock, US authorities are attempting to utilize existing powers to increase enforcement in the digital sector. In November 2022, the FTC updated its policy on enforcement of Section 5 of the FTC Act – which prohibits “unfair methods of competition” – to include several wide-ranging definitions of harm that will cover unilateral conduct by digital platforms.



In the United States, much attention has been given to the AICOA, which could have sweeping ramifications for tech players if enacted. However, notwithstanding this pending legislation, both US agencies responsible for antitrust enforcement have made it clear that they will be aggressively using existing tools to tackle a wide range of unilateral conduct in the digital sector.

Justin Stewart-Teitelbaum

Antitrust Partner, Washington, D.C.

Across Asia, there continues to be some focus on standards of transparency and fairness between platforms and their users, with new legislation incoming in Korea and Thailand similar to legislation already introduced in Japan. Both Australia and India appear to be taking more direct inspiration from the DMU and DMA, with the ACCC considering mandatory codes of conduct for certain platforms to protect and promote competition and the Indian

competition authority pursuing ex ante regulation, which will see certain platforms designated as gatekeepers and subject to additional obligations.



Authorities in Asia should not be overlooked, as they could draw much stricter lines than we would see in the United States or Europe, often addressing what they consider to be national issues. For example, Japan was one of the first countries globally to introduce legislation directly targeting large digital platforms and is considering emboldening its legislative arsenal with further ex ante rules governing digital ecosystems. Unlike in many other countries, these are managed by the Ministry of Economy, Trade and Industry, outside the competition law regime, more as ‘industry regulations’ similar to those for energy, telecom and financial services.

Kaori Yamada

Antitrust Partner, Tokyo

The world wide web of regulation

The recent avalanche of digital regulation across the globe draws heavily from existing legal frameworks, particularly competition, privacy and consumer protection laws. The DMA contains obligations relating to the use of personal data that relate to the EU’s General Data Protection Regulation rules, while the UK government’s proposed powers for the DMU include a focus on delivering enhanced consumer choice and transparency.

The net result is an increasingly complex web of regulations that companies acting in the digital world will need to navigate. Doing so requires a broad and detailed understanding of the technical applications

and policy objectives behind the full range of applicable regulation. Along with contending with an array of (often overlapping) regulators, companies will need to factor in the increasingly large appetite for the enforcement of digital regulation by private litigants.



Although wide ranging, the Digital Markets Act is just the first of many disruptors in the digital regulatory landscape. Both the Digital Services Act and the Data Act will have ramifications for the content on digital platforms and the data that must be made available to users and competitors. In-house legal functions across competition, consumer protection and privacy will need to work more closely together to ensure compliance across all regimes and to identify the ‘right’ answer.

Christoph Werkmeister

Dispute Resolution Partner, Düsseldorf

The scope for parallel investigations into similar conduct under different legal and regulatory regimes will lead to additional challenges for businesses. This also risks making the task of effective enforcement a more difficult one as regulators and courts strive for a consistent application of principles across different legislative measures and different territories while avoiding double jeopardy.

Looking ahead in 2023

- **Antitrust-only advice is no longer enough.**

In the digital sector, antitrust advice alone may lead to the wrong answer or an incomplete picture. Instead, companies will need to take a holistic approach to antitrust, privacy and regulation, with new regulation set to become the lowest common denominator.

- **An understanding of regulatory priorities is key.**

A close understanding of regulatory priorities and their continuing evolution will be key to navigating the complex web of new regulation and its interplay with existing laws – and this is only exacerbated by the many untested procedural and substantive questions that are likely to arise going forward.

- **Be vigilant of unexpected regimes.**

Companies will need to keep abreast of developments as the regulatory contagion spreads. Avoiding gatekeeper designation in one jurisdiction will not necessarily avoid it in another – and as enforcement priorities and legislative changes take place in the United States and APAC, companies will need to assess whether they could be brought into the spotlight.

With thanks to Martin Dickson, Elizabeth Giordano, Aaron Green and Rikki Haria for their contributions to this theme.

09.

Mass claims and antitrust litigation



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IN BRIEF

Mass claims remain at the forefront of risk issues for businesses, especially those operating across many jurisdictions. There is a general uptick in this type of litigation in the antitrust space, with many novel features, largely being fueled by the willingness of plaintiffs to initiate proceedings, stand-alone or otherwise, based on a wide array of alleged abusive practices (many of which push the boundaries of conventional competition law breaches).

Private proceedings based on novel conduct claims on the rise

As antitrust agencies globally continue to investigate a broader range of abusive conduct, particularly in the technology and life sciences spaces ([see Theme 2](#)), private antitrust enforcement based on novel theories of harm continues to increase.



It has never been more important to assess antitrust mass claims exposure on a global basis. The proliferation of US class actions together with the emergence of new fora in continental Europe and the continued evolution of the UK collective proceedings regime creates a complex web of risks and opportunities.

Ricky Versteeg

Antitrust and Dispute Resolution Partner, London

This is particularly evident in the United States, where we are seeing private plaintiffs asserting more claims based on single-firm conduct – and in particular monopolization claims against large technology companies. Many of these claims depend on novel theories targeting conduct that US courts have not previously considered unlawful (such as limiting interoperability and self-preferencing), seeking to achieve results through litigation that have (as of this writing) stalled in Congress. While private cases traditionally followed investigations led by the federal antitrust agencies, plaintiffs are increasingly bringing claims based on the investigations of foreign enforcers and state attorneys general as well as claims developed through their own efforts. The uptick in monopolization cases coincides with the DOJ prosecuting fewer large-scale cartels, leading to a decline in the overall number of private antitrust cases. Five years ago, private plaintiffs were filing more than 600 cases per year in the United States, but they brought just half as many cases in 2022.



With government agencies pressing technology companies to change how they operate going forward, private plaintiffs in the United States will not be far behind in trying to extract substantial amounts from the same companies based on past practices.

Andy Ewalt

Antitrust Partner, Washington, D.C.

Thriving mass claims environment in the UK and Europe

2022 has witnessed a surge of collective proceedings in the UK. Ten applications for collective proceedings were filed this year (with others threatened) across a wide

range of industries and subject matter, including cryptocurrency and environmental issues. A significant number of recent claims relate to an alleged abuse of a dominant position, and a majority have been brought on a stand-alone basis (where there is no underlying infringement decision by a competition authority).



Companies serving substantial numbers of customers face significant risk in the UK from opt-out competition class actions; in particular, claims involving novel alleged abuses of dominance based on general consumer protection, product liability or privacy breach grounds.

Mark Sansom

Antitrust and Dispute Resolution Partner, London

A common theme of cases in the UK is the use of competition collective actions to pursue fundamentally consumer protection complaints rather than conventional alleged competition law breaches. Claims include that:

- a social media platform abused a dominant position by requiring users to give access to their personal data to access the platform, without monetary return;
- a mobile phone handset maker failed to be transparent to its customers about an alleged battery life issue supposedly caused by an operating system update and that it failed proactively to offer a remediation service; and
- wastewater utilities abused their market position to the detriment of consumers by allegedly failing to comply with environmental legislation – the first “environmental” antitrust class action.

While we are not yet seeing across all EU jurisdictions the sorts of expansionist abuse-based damages claims that are prevalent in the United States and emerging in the UK, there has, nevertheless, been a significant increase in the volume of competition damages claims across all member states. In the Netherlands, the number and size of competition law damages claims are set to grow even where there is limited connection to the Netherlands, though this has resulted in jurisdictional challenges. The Dutch class action rules now allow collective damages claims, and a class action for damages relating to competition infringements is likely soon to follow. In France, there has also been a recent increase in competition damages claims going to trial in the civil and administrative courts. The actions are stand-alone and follow-on with an increase in assignment-based mass claims and claims handled by a single law firm on behalf of many individuals. In Portugal, opt-out remedies are being pursued for alleged abuse of dominance by university professor Fabrizio Esposito (instead of the usual consumer associations), assisted by Portuguese, English and Spanish counsel acting on behalf of 6.5 million individuals.

In Spain, factors such as lower litigation costs, unlimited contingency fees, the direct involvement of consumer and sector associations, and claimant-friendly court decisions come into play. This has resulted in follow-on damages claims thriving, with courts awarding damages even in the absence of detailed quantifications.



Spain is now at the forefront of antitrust litigation in continental Europe, and this will only increase in the years to come given the current leading role of litigation funds.

Natalia Gómez

Dispute Resolution Partner, Madrid

This environment has led litigation funds, self-financing plaintiffs' law firms or combinations of the two to develop and implement a massive, but fragmented, litigation model. And first-instance judgments can be rendered in a few months. Further, courts are considering mechanisms to make procedural rules even easier. For example, there has been a recent referral from the Spanish Supreme Court to the European Court of Justice about serving claims on the Spanish subsidiary of a defendant, even if the defendant has not been served, to avoid claimants incurring translation costs.

In Germany, the Federal Court of Justice has recently taken a more liberal approach to the admissibility of assignment-based mass claims (although not in antitrust matters). The German legislator is also currently working on the introduction of yet another tool for collective redress implementing the European Directive on Representative Actions (for further information please request our [2023 Class and Collective Actions Guide](#)). As things stand, procedures will be available to both consumers and small businesses. It remains to be seen whether such potential claimants will make use of them in order to pursue cartel damages.



In 2023, many German cases will enter into the 'evidence phase.' How will the courts deal with quantum reports by econometric experts? This is unprecedented in Germany – especially in mass claims scenarios with numerous cases pending before different courts.

Roman A. Mallmann

Dispute Resolution Partner, Düsseldorf

Looking ahead in 2023

- **The focus on large technology companies will continue to intensify in the United States**

as federal and state competition authorities and private plaintiffs push antitrust law up to (and perhaps beyond) established boundaries to reach an increasingly wide array of practices. Accordingly, there will likely be no shortage of antitrust litigation, particularly in the technology sector, even if there remain fewer high-profile cartel prosecutions than there were five years ago.

- **In the UK, some cases will move toward consideration of the substantive merits of the claims.**

The courts will then need to consider whether (i) such claims involve an overreach of competition law; (ii) they would result in a divergence opening up between UK and EU law on abuse of dominance; and (iii) it is appropriate for antitrust to be used as a catch-all law of unfair competition or a general consumer protection panacea.

- **There will be no respite in Spain.**

Spain will remain a hot spot for private antitrust litigation. The claimant bar and litigation funders have certainly not run out of ideas for bringing these claims.

- **The German courts will have to handle quantum reports by court-appointed experts.**

Fierce opinion battles are to be expected here, including long expert hearings. It will be interesting to see how deeply courts will dive into the econometrics and how they will deal with remaining uncertainties, as this is largely unprecedented in Germany.

With thanks to Ashmita Garrett, Alex Holroyd, Kerstin Lampert, Franziska Leinemann, Jérôme Philippe, Eileen Ramos and Lauren Vaca for their contributions to this theme.

10.

Trade and subsidy control



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IN BRIEF

Governments are facing multiple challenges: In the long term, there is a need to decarbonize the economy, whereas in the shorter term, there are economic, food and energy crises resulting from the war in Ukraine and the ongoing impact of the global pandemic. Geopolitical frictions are also driving governments to build supply chain resilience relating to a wide range of sectors, from agricultural (food) and medical (vaccines) to technological (chips) and energy (diversification). While increased subsidization brings significant opportunities for businesses, it also increases the risk that subsidies seen to distort trade or competition will be challenged, including through new subsidy control mechanisms slated to come into effect in 2023 at the World Trade Organization (WTO) and at the bilateral and unilateral levels.

Increasing legal challenges to subsidization under existing law

The most frequent – and most advertised – subsidies of the 2020s to date are green subsidies, including favorable tariffs for green energy and subsidies for other green industries such as wind farms and solar panels, with the aim of facilitating a Net Zero ambition. In recent years, the EU and its member states have spent around €75bn in subsidies for renewable energy, primarily in the form of feed-in tariffs and feed-in premiums. This amount is, however, dwarfed by the US Inflation Reduction Act (IRA), due to come into force in 2024, which offers \$369bn in green subsidies, this time mainly in the form of tax credits. Fears of relocating production have led to calls for the EU to respond by increasing its own green subsidies.

There has so far been an unofficial understanding among governments that green subsidies should in principle be regarded as being compatible with good public policy goals and, as such, should not be challenged. However, there are limits. One is that the use of local content should not be a condition for receiving a subsidy. Such local content conditions are often seen as a means of attracting domestic political support for green subsidies, but they are highly distortive and prohibited under WTO law. In 2022, the EU complained successfully about local content requirements in the UK's Contracts for Difference

subsidy for low-carbon energy production, and the EU, Japan and Korea have publicly complained about local content conditions in the incoming IRA. Subsidies conditioned on increasing exports are similarly prohibited by WTO law and liable to challenge.

More sophisticated green subsidy schemes are also coming under scrutiny. Some governments have adopted emissions trading schemes that rely on cap-and-trade certificates. Over the past two years, the United States has made two determinations in unilateral anti-subsidy investigations that the granting of free certificates by both the EU and Korea amounted to a subsidy, leading it to impose countervailing duties on imports considered to have benefitted unfairly from such subsidies. A WTO challenge to these determinations cannot be ruled out.



Public funding is instrumental in green transition but the associated risks often go unnoticed. Governments increasingly act against subsidization schemes in other jurisdictions, undermining their benefits to businesses. Companies should carefully assess whether the subsidies they will obtain are prone to such challenges.

Lorand Bartels

Trade Counsel, London/Brussels

Companies should assess the risks associated with green subsidies before obtaining them, as they are increasingly being challenged in major jurisdictions.

New subsidy control mechanisms

2023 will witness two new subsidy regimes bringing more regulatory complexity.

- The EU is introducing new rules to tackle “foreign” subsidies granted by non-EU governments to businesses operating in the EU. The idea is to plug a gap in existing WTO and EU state aid rules, as WTO rules only cover subsidies to businesses within the jurisdiction of the granting body and EU state aid rules only govern subsidies granted by EU member states.
- The UK is introducing its own subsidy control regime following Brexit, which will be the main framework to help deliver on the UK government’s 2050 Net Zero goal. The new regime in the UK envisages establishing a relatively flexible framework when compared with the EU state aid regime, but at the same time it remains bound by the principles set out in the UK-EU Trade and Cooperation Agreement, which have been transposed into domestic law.

EU foreign subsidies regime

The regime will come into effect in mid-2023 and will have a considerable impact on mergers and acquisitions and public procurement procedures in the EU.

For targets established in the EU, it will create a third level of mandatory and suspensory M&A review alongside merger control and FDI reviews, at least for major acquisitions. The review will focus on whether any foreign subsidies distort the internal market by distorting either the competitive bidding process or competition in markets where the target operates. Subsidized buyers may be requested to repay the subsidy or offer other remedies to obtain EU clearance.

As regards the EU public procurement procedures, bidders will be required to inform the contracting authorities of the non-EU public funding they obtained – and the contracting authorities are required to transfer that information to the EC for review. The EC’s review is suspensory (exceptions apply) and might result in the prohibition of the award of the contract to subsidized bidders.

All businesses with any non-EU public funding across all sectors and jurisdictions (and regardless of nationality) will be affected by the regime. This regime will likely become a key feature of the M&A due diligence process, affecting data gathering for regulatory filing requirements, deal certainty and timetables.



The new measures [the Foreign Subsidies Regulation] will empower the EU to investigate and prevent the unfair practices supported by some non-EU countries. This will allow the EU to ensure fair competition and level playing field for all companies.

Jozef Síkela

Minister for Industry and Trade, Czech Republic

It is also worth noting one major uncertainty in the regime: the overlap between the new regime and the WTO rules on subsidies. A strict reading of the WTO rules would suggest that subsidies that are even remotely related to goods cannot be subject even to a notification under the new regime, which would significantly reduce its reach. However, this point is

unlikely to be settled before the regime enters into force; therefore, businesses should start to prepare now assuming that all subsidies will be covered by the notification obligations.



M&A activity in the EU will now be subject to mandatory and suspensory foreign subsidy reviews in addition to merger control and foreign investment reviews. Businesses should start to prepare now for the new regime to detect any deal risks and avoid delays in timetables.

Merit Olthoff

Antitrust Partner, Brussels

UK subsidy control regime

The new UK subsidy control regime will come into effect from January 4, 2023 and is intended to be more flexible than the EU state aid regime in order to unlock funding for key strategic areas of the UK economy. All private stakeholders benefiting from funding will be affected by the new regime, and contractual counterparties to public authorities are also likely to be affected.

Under the new regime, public authorities will need to self-assess compliance against a set of principles that are broadly similar to the policy goals of the EU state aid regime but much less detailed than the EU rules. The key difference is that public authorities are not required to first obtain approval from a regulatory body before granting the aid, which may add flexibility and speed, but at the cost of certainty.

That said, public authorities may, in certain cases, have the benefit of nonbinding advice from the newly created Subsidy Advice Unit, which sits within the CMA. In practice, the assessment against the subsidy control principles is expected to be less than straightforward given the lack of precedent and potentially subject to challenge on judicial review grounds. Such challenges are more likely to be with respect to subsidies with a greater impact on competition and investment in the UK and/or international trade. The risk of an adverse judicial review challenge will be disproportionately borne by the private stakeholder beneficiary, which could be subject to a recovery order if the subsidy award is successfully challenged.



The UK's new flexible subsidy control regime may create funding opportunities for businesses, but the flexibility has knock-on implications for legal certainty. Companies obtaining public funding will need to actively engage with granting authorities at an early stage of the design and assessment of any proposed measure to ensure compliance with the untested legal framework.

Martin McElwee

Antitrust Partner, London/Brussels

To minimize the risk and potential impact of a successful challenge, it would be essential for private stakeholder beneficiaries to (i) work closely with public authorities and conduct their own rigorous self-assessments; (ii) ensure that contractual

protections are in place to allocate risk, including taking the risk of challenge into consideration when setting the transaction timetable; and (iii) consider and develop worst-case-scenario defense strategies from the outset of the proposed arrangement.

Looking ahead in 2023

- **Assess the risks of a subsidy being challenged in the future.** As subsidization increases across the world, so does the risk of a subsidy being challenged – and granting authorities may not always be aware of such potential risks. Conduct a full risk assessment across jurisdictions before obtaining public funds that are material for your business.
- **Start the screening of affiliates and portfolio companies for any public funding now, in preparation of the EU's foreign subsidies regime.** Public funding is defined broadly in the regime and it will therefore be challenging to screen across the group to confirm notification obligations within a tight timeline.
- **Engage with your government in relation to subsidy design to reduce the risk of a future challenge,** especially in relation to subsidies of material importance to your business.

With thanks to Bola Ajayi and Aytaç Çelebi for their contributions to this theme.

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