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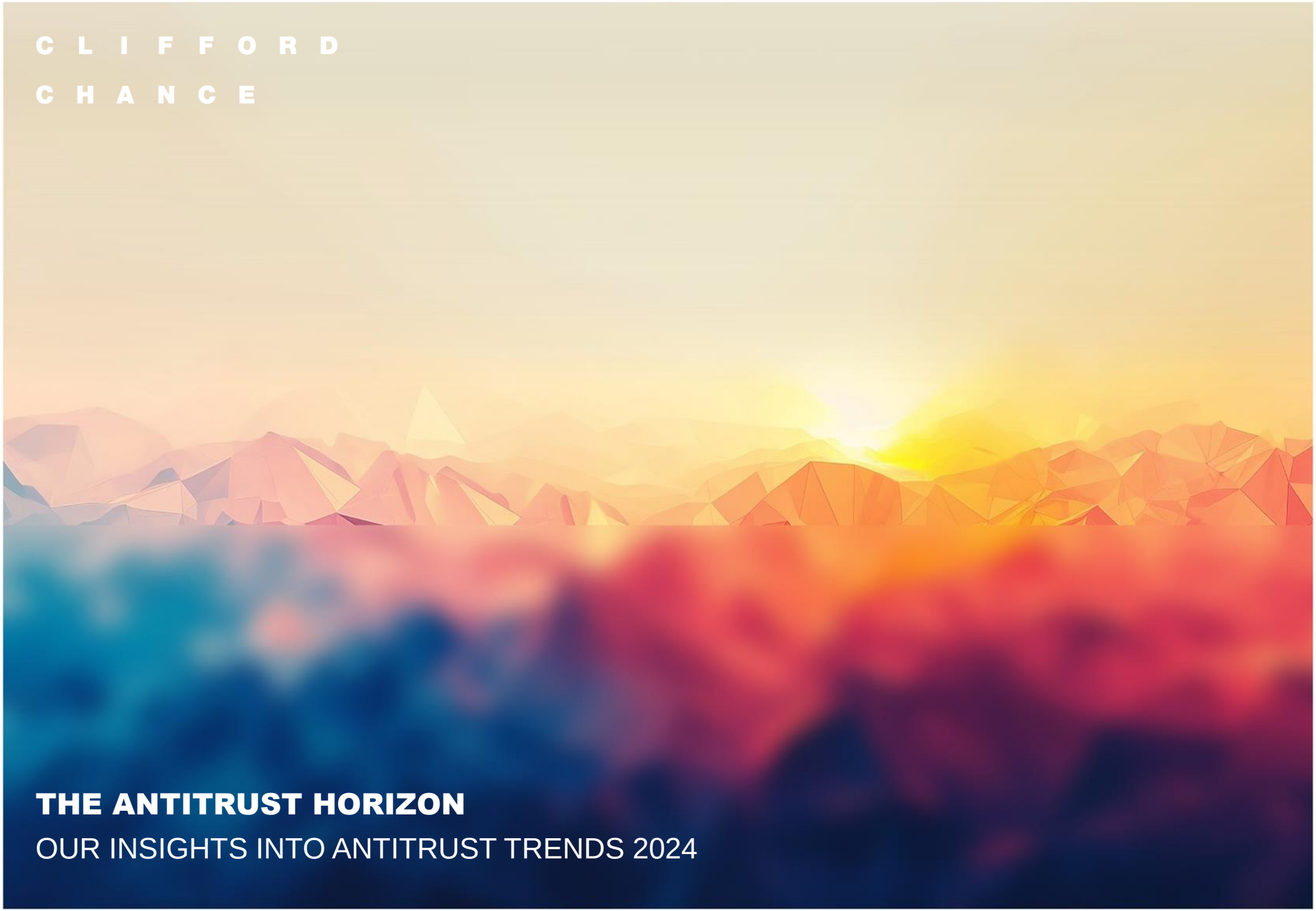

THE ANTITRUST HORIZON

OUR INSIGHTS INTO ANTITRUST TRENDS 2024

THERE ARE IMPORTANT CHANGES ON THE ANTITRUST HORIZON IN 2024

"While **levels** of enforcement are unusually muted in some areas – with record low cartel fines in the US and EU in 2023, and one of the lowest rates of intervention in mergers by the European Commission – the overall **scope** of conduct that is caught by antitrust laws and regulations is increasing sharply, in two ways.

First, important pieces of legislation are imposing various new obligations on businesses, such as the EU's Foreign Subsidy Regulation, new and expanding foreign investment screening regimes and new *ex ante* regulation of digital service providers in various jurisdictions.

Second, competition authorities and courts are applying the existing antitrust rulebook more expansively to adapt to changing markets and political pressures, with new theories of harm to prohibit mergers and anti-competitive conduct, and broader investigative powers.

Businesses are also facing greater **adverse consequences** of compliance failures, driven by a global rise in private litigation, in particular antitrust class actions. However, we are also seeing new options for **compliance** being created, particularly in respect of conduct with sustainability objectives.

Our report this year also includes spotlights on antitrust regulation of three sectors that are key to the global economy in the coming year: **digital services**, **energy**, and **healthcare and life sciences**."

MARC BESEN
PARTNER, CHAIR,
GLOBAL ANTITRUST GROUP

"**Our antitrust team at Clifford Chance has the knowledge and expertise to help your business navigate these new complexities.**"

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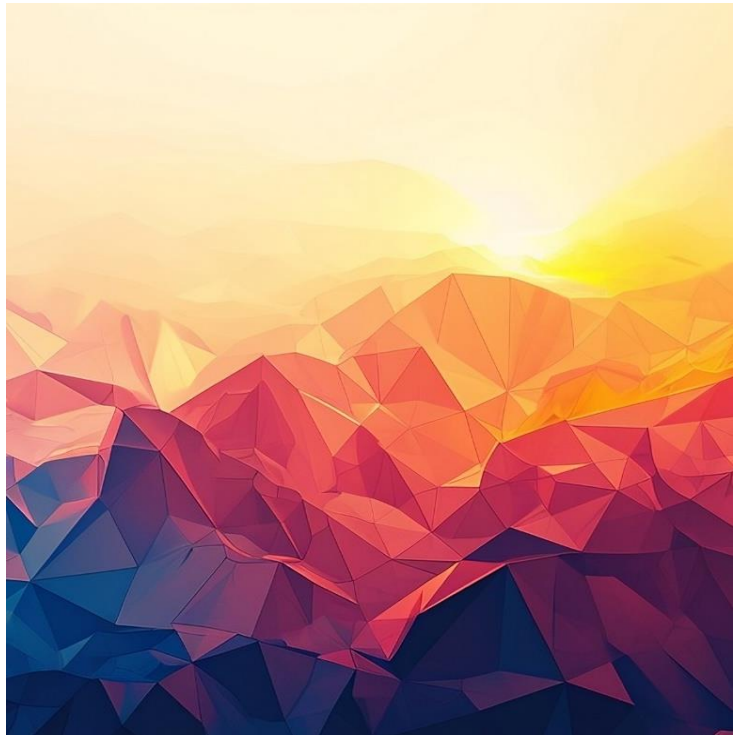


SECTION

GLOBAL ANTITRUST ENFORCEMENT TRENDS

In the face of declining numbers of cartel cases, antitrust authorities are broadening enforcement into new and atypical types of infringements

Enforcement is diversifying

- There has been a decline in enforcement by major agencies against traditional price fixing cartels, driven partly by fewer immunity applications. There were record lows for cartel enforcement in 2023 in the EU (lowest cartel fines from the European Commission (EC) in 20 years) and the US (a mere $2 million in criminal cartel penalties).
- Agencies are responding by ramping up international detection and enforcement activities. The US Department of Justice (DOJ) has an extra $100 million in its 2024 budget for this purpose. The EC has been opening more "own initiative" investigations and has reported a recent rise in immunity applications.
- We are seeing agencies diversify their enforcement into:
  - atypical cartels, such as collusion to delay quality or sustainability upgrades, buyer cartels and agreements restricting hiring or the salaries of employees;
  - distribution agreements, in particular resale price maintenance and restrictions of parallel trade;
  - new abuses of dominance, including disparagement of a rival's pharmaceutical product (see the healthcare section of this report), self-preferential use of customer or advertising data and anti-competitive M&A (see the merger control section of this report); and
  - in the US, the prohibitions on interlocking directorates.
- Abuse of dominance scope-creep is set to continue in 2024. The EC is expected to publish new guidance that sets out a wider range of circumstances in which dominant companies may be punished for conduct that harms only less efficient rivals. And in 2022 the DOJ declared its intention to prosecute some monopolisation violations as crimes, reviving a practice not used in almost 45 years. However, the two cases brought so far have unusual fact patterns – being more akin to cartel conduct – which limit their broader applicability.

Labour markets

- Promoting competition in the labour markets continues as a focus for enforcers. While a top priority in the US for the Biden administration, the US DOJ has lost a number of recent criminal prosecutions before juries relating to agreements between employers not to hire each other's employees ("no poach" arrangements) or to fix their wages. It fared better in others, however, having reached a plea agreement with a healthcare staffing company accused of colluding to suppress school nurses' wages.
- Cases are increasing in Europe and Asia too, with no poach infringement decisions in China (hog breeders) and France (metal recyclers) and wage-fixing violations in Poland (speedway riders) in 2023, as well as numerous ongoing investigations by the EC and national authorities in the UK, Portugal, Belgium and France.

Algorithmic pricing

- US agencies are focused on the potential for algorithmic pricing to lead to price fixing, having withdrawn long-established safety zones that competitors had previously used to share pricing and salary information.
- Ongoing cases include the intervention by the DOJ to back litigation against RealPage, which allegedly co-ordinated higher prices among lessors of accommodation by collecting their competitively sensitive information and feeding it into an algorithm, and recommending prices based on the output. The DOJ has also alleged that Agri Stats, a data company in the meat processing industry, operated an information-sharing scheme that allowed competitors to exchange vast quantities of competitively important data.
- In contrast, the Tokyo High Court recently rejected claims that Tabelog (operator of Japan's largest review and reservation platform) had manipulated its platform algorithm to incentivise restaurants to pay for higher rankings. The High Court found the updates to the algorithm were rational given Tabelog's objective to ensure consumers' trust of its evaluation system.

"Businesses need to ensure they understand wage economics in their industry and make sure their decision-making on hiring, salaries and non-competes is independent and compliant with the antitrust laws."

SUE HINCHLIFFE
PARTNER, LONDON

"The DOJ is actively seeking-out violations of the Clayton Act prohibition on interlocking directors in competing companies, which can lead to forfeiture of investors' board rights."

BRIAN CONCKLIN
PARTNER, WASHINGTON D.C.

GLOBAL ANTITRUST ENFORCEMENT TRENDS
(CONTINUED)

Antitrust authorities are expanding their enforcement toolkits with increased international cooperation, new powers to investigate and remedy concerns and more use of informal guidance

International co-ordination in dawn raids

- After a hiatus of several years, co-ordinated dawn raids are back. In 2023, authorities of the EU, UK, Turkey and Switzerland have, in various combinations, worked together on three dawn raids. Two of these took place in consultation with US agencies, and the EC and US authorities have announced "intensified cooperation" in cartel investigations.

Investigative powers are adapting and are likely to expand

- Authorities are adapting their investigations to changing habits: the rise in home working has triggered an increase in dawn raids of employees' homes; and increased use of encrypted messaging apps has led to businesses in Poland and the Netherlands being fined when their employees deleted chats after the start of a dawn raid, or warned others that a dawn raid was happening. Authorities' access to employees' personal messages is becoming increasingly sensitive and contentious.
- With increasing use of cloud storage, we expect authorities will soon update or clarify their powers to access off-site servers and to carry out “remote” dawn raids without visiting business premises. The EC is likely to lead the way on this in its upcoming revision of the procedural legislation that governs its antitrust investigations.

Market investigation regimes on the rise in Europe

- Market investigation regimes allow competition authorities to impose wide-ranging remedies – such as divestments or price caps – to address features of markets that they consider to be adversely affecting competition. Market players can be forced to make costly changes to their business models, following a long, rigorous investigation, despite having committed no breach of antitrust laws.
- Until recently, only a handful of countries had such regimes (the UK, Greece, Iceland, Israel, South Africa and Mexico). However, Germany introduced its regime in November 2023, and is now pressing for the EC to be given similar powers. The Czech Republic has also introduced legislation for a market investigation regime and the Dutch authority has voiced interest in one.

Agencies are making greater use of informal guidance

- Increased use of informal guidance started as a response to the need for urgent competitor cooperation during the pandemic. However, it has continued post-pandemic, on topics such as fair-trade purchasing (UK), pricing of combination therapies (UK), joint gas purchasing (EU), CO_2 storage (the Netherlands) and gas price caps (Australia). This creates new opportunities for businesses to obtain legal comfort for beneficial competitor collaborations where the law is unclear.

“Cross-border investigations give rise to complex issues in relation to leniency strategies, data protection and legal privilege. Businesses should ensure that their dawn raid and internal investigation policies for all international offices are up to date and co-ordinated.”

MATTHEW SCULLY
PARTNER, LONDON

“Market investigation regimes are often unpopular with businesses, as no amount of compliance effort can shield you from the risk of intrusive remedies. Businesses should be alert to proposals for these regimes and make their voices heard.”

CHANDRALEKHA GHOSH
COUNSEL, LONDON

SECTION

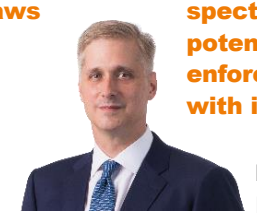
A CONTINUING EXPANSION IN ANTITRUST CLASS ACTIONS GLOBALLY

We expect the significant growth in antitrust class actions around the globe to continue in 2024

- In **the UK** there are now over 35 separate collective actions before the Competition Appeal Tribunal (CAT). Most have been brought on an opt-out basis (*i.e.*, class members do not have to opt in) and framed on behalf of wide-ranging consumer classes (often seeking multiple billions in compensation on behalf of millions of consumers). The increasing trend is for these claims to be brought on a stand-alone basis (*i.e.*, where there has been no finding by a competition authority) and for abuses of a dominant position, with claimants increasingly supplanting the role of UK competition enforcers in alleging wrongdoing against companies.
- The threshold for these actions to be authorised by the courts remains low. Even where the CAT raises serious questions about a claim, claimants' representatives are typically given more time to refine their case. Defendants cannot settle these cases quickly, as court approval is required. The first-ever liability trial (in the *Le Patourel* case) began in January 2024, despite the regime being in place since 2015. Whether that claim is successful and, if so, the amount of damages awarded, may have significant implications for future claims, the approach to settlement, and the appetite of funders to support them. In another case (*Merricks),* the representatives suffered a significant setback in February 2024, when the CAT ruled that there was no causal link between EEA multilateral interchange fees and UK interchange fees, implying that any quantum award may be substantially lower than the ca. £10 billion claimed.
- Class actions have been available in **Australia** since 1992. Antitrust class actions have been rare in the past in the jurisdiction, but recent trends suggest that this may be changing. The Federal Court of Australia has six active antitrust class actions and 37 active consumer law actions at present.
- All of these are stand-alone claims which do not rely on previous regulatory enforcement, complementing the trend seen in other jurisdictions. A number of the recent antitrust actions (*e.g.*, those against Apple, Google and Sony) are parallel proceedings which seek to replicate class actions taking place in other jurisdictions, notably in the digital platform sector. There is also an action against a number of international banks with respect to alleged FX currency manipulation which replicates private damages litigation in the UK and the US.
- In **Spain**, the transposition into Spanish law of the 2020 EU Directive on representative actions for the protection of the collective interests of consumers is still pending. Once the transposition is complete, it is expected that class actions will become a trend in antitrust disputes.
- The **US** continues to represent the most mature and developed market for antitrust class actions. In 2024, the spotlight on antitrust class actions is expected to continue, particularly focusing on Big Tech. Landmark US Department of Justice (DOJ) and Federal Trade Commission (FTC) actions against companies like Amazon and Google, along with a potentially imminent DOJ case against Apple, are set to test the limits of antitrust laws in the digital realm. This continued aggressive government enforcement may also spur an increase in private class actions addressing similar issues. These cases, along with others involving alleged information-sharing schemes and the role of technology in facilitating these practices – especially in certain housing and accommodation rental markets – highlight a critical examination of traditional antitrust theories. Moreover, as generative artificial intelligence (AI) advances and increasingly intersects with antitrust, consumer protection, and data privacy laws we anticipate a rise in antitrust class actions in this rapidly evolving domain.

"UK opt-out competition claims against large consumer businesses are increasing, with many breaches of environmental, data privacy or consumer protection laws being dressed up as competition law claims to take advantage of this favourable litigation route."

SAMANTHA WARD
PARTNER, LONDON



"The intricate dance between digital innovation and the legal boundaries of the antitrust laws may redefine the spectrum of cases we typically see, potentially spurring increased private enforcement in non-traditional areas with innovative theories."

ROBERT HOUCK
PARTNER, NEW YORK

THE GROWTH OF STAND-ALONE ACTIONS

Stand-alone antitrust claims, where there has been no prior infringement finding of a public enforcer, are increasingly common, both for class actions and actions by individual claimants

- In **Australia** all of the recent antitrust class actions have been brought on a stand-alone basis and in **the UK** these are also increasingly common. However, this trend is not just limited to class actions but to damages actions brought by companies seeking compensation from breaches of antitrust law.
- The courts in **Germany** are faced with increasing numbers of stand-alone competition law cases, some of which are stretching the boundaries of competition law. There has been a particular focus on market dominance cases, featuring for instance a dispute between a German telecom company and Meta regarding the remuneration of IP transit services. There have also been platform access disputes (*e.g.*, a German startup Bliq against established ride-hailing providers Uber and Bolt). This trend is expected to continue in 2024, when designated gatekeepers are required to comply with the DMA from March 2024 bringing about a new framework for dominant online platforms and setting standards for access to and the conduct of online platforms.
- This is a challenge for both antitrust enforcers and defendants. For decades, enforcers in many jurisdictions (particularly within the EU) had the luxury of taking decisions first with claims for compensation being brought subsequently. That allowed enforcers to take the lead on the development of the law in this area, with claims for damages principally focusing on questions of causation and quantum. It also meant that weaker complaints with a tenuous basis in antitrust law rarely resulted in a finding. With the growing popularity of stand-alone claims, it may be that private litigation plays an increasingly important role in shaping developments in antitrust law. It may also require enforcers to consider the speed with which they seek to investigate and resolve cases. Complainants may well consider that they are better off pursuing action in the courts, rather than waiting for an authority to complete its investigation.
- However, private stand-alone actions are not without risk to claimants, particularly if they fail to establish liability at trial. In **the UK,** the High Court in late 2023 rejected a high-profile claim brought on behalf of the administrators of Phones4U (a mobile phone retailer) against major mobile operators EE (represented by Clifford Chance), Vodafone, O2, Telefonica, Orange and Deutsche Telekom. The case was the largest of its kind to reach trial in the UK and alleged that the mobile operators had colluded in their decisions to stop selling through Phones4U. The claimants now face a hefty costs bill for tens of millions of pounds, having failed ultimately to prove those allegations at trial.
- In **Spain**, follow-on actions are more frequent than stand-alone actions, particularly in connection with the EU truck cartel and the Spanish car cartel. Notably, there is a pattern where, in instances where a stand-alone action is initiated relying on a non-final decision from the Spanish competition authority, Spanish commercial courts tend to defer the decision on the stand-alone action until the resolution of the appeal against the competition decision.

"Private claimants are increasingly taking on the mantle traditionally held by the UK competition authority in accusing companies of misconduct and pursuing such claims in the courts."

LUKE TOLAINI
PARTNER, LONDON

"In Australia claimants are initiating antitrust class actions independently of any prior decision of the court concerning the conduct the subject of the claim. All of the current antitrust class action cases in the courts today have been brought as stand-alone claims."

ELIZABETH RICHMOND
PARTNER, SYDNEY

THE EMERGING POWER OF ANTITRUST IN CHALLENGING SPORTS REGULATORS

Recent high-profile and successful challenges against major football regulators demonstrate that antitrust compliance failures can leave sports organisations' rules in tatters, their credibility undermined, and exposed to the risk of private damages claims

The Superleague case

- In 2021, the European Superleague Company (ESLC) and A22 Sports Management (A22), represented by Clifford Chance, filed a claim against UEFA and FIFA in the Commercial Court of Madrid. ESLC and A22 requested the Court to declare that UEFA and FIFA had abused their monopoly position regarding the organisation of international football tournaments within Europe. ESLC also requested interim measures, which were granted within one working day after the petition was processed and confirmed by the Court of Appeal of Madrid. ESLC and A22 also requested a preliminary ruling of the Court of Justice of the European Union (CJEU).
- In December 2023, the CJEU delivered its judgment, ruling that the sport sector enjoys no special exemption from EU competition law and free movement rules. The Court also found that the associations responsible for football at global and European levels, FIFA and UEFA, abused their dominant position by implementing rules that required their prior approval for the setting up of any new interclub football competition in the EU by a third party, and by controlling the participation of professional football clubs and players in such a competition.
- Following the CJEU's judgment, the trial before the Commercial Court of Madrid will be held in March 2024.

Challenges to FIFA rules

- In 2023, proceedings were also brought throughout the EU and the UK challenging proposed rules by FIFA which sought to cap the fees paid to football agents.
- In Germany, the court in Dortmund suspended the implementation of the fee cap (although this is on appeal) and the court in Mainz has submitted a request for a preliminary ruling to the CJEU. In Spain, the Commercial Court of Madrid provisionally suspended the implementation of the fee cap until further notice.
- These rules have also been challenged in arbitration proceedings. While FIFA was successful before the Court of Arbitration for Sport (CAS) in Switzerland, it lost proceedings brought by agents in England against FIFA and the English Football Association. In the English case, in which Clifford Chance represented the agents, the Award found that the fee cap was a decision to fix purchase prices and constituted an abuse of a dominant position in breach of UK antitrust law. As a result, these rules cannot be implemented in England, one of the most significant markets for football in the world. In late 2023/early 2024, FIFA announced that it was suspending the implementation of the regulations globally, pending the CJEU's determination.

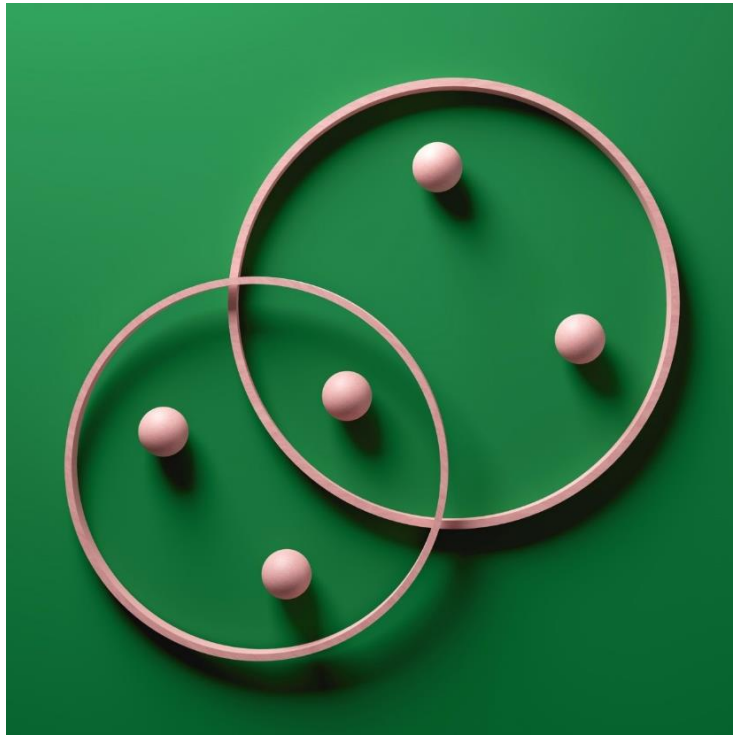
"The ECJ's *Superleague* case demonstrates that the right to free competition is an essential pillar of the EU, which must be respected by all sectors, without exception."

MIGUEL ODRIOZOLA
PARTNER, MADRID

"While sports governing bodies have a margin of appreciation when regulating the conduct of the sport itself, that margin does not provide a blank cheque to regulate the activities of third-party commercial actors."

BEN JASPER
SENIOR ASSOCIATE, LONDON

SECTION



GLOBAL MERGER CONTROL TRENDS

More jurisdictional hurdles need to be cleared, with transaction parties facing expanded notification requirements and jurisdictional battles for below threshold deals

New and expanded pre-closing filing regimes

- **Australia**: Fuelled by a concern that certain acquisitions by rapidly expanding digital platforms are not adequately captured by current competition laws, the Australian Competition and Consumer Commission (ACCC) has proposed a mandatory suspensory merger control regime (see our briefing for more details). The mandatory notification would be supplemented by a "call-in" power for transactions below the threshold where there are competition concerns. This proposal is currently subject to a public consultation.
- **China**: In January 2024, China's State Council unveiled major amendments to the merger control notification thresholds of its Anti-Monopoly Law (AML), significantly increasing both the combined and individual turnover thresholds triggering a mandatory filing in China, in line with the long-standing plan of the State Administration for Market Regulation (SAMR) to focus on transactions that are more likely to have effects on the Chinese market.
- **Egypt**: Egypt's long-anticipated reform of its merger control regime to introduce a mandatory pre-closing notification requirement entered into force in December 2022 and is expected to be fully finalised in 2024 with the issuance of executive regulations on key details of the regime.
- **Luxembourg:** The only EU country without a merger control regime intends to introduce one in 2024.
- **Uganda**: New long-awaited merger control legislation has been adopted but thresholds and other significant practical details have not yet been provided.
- **United Arab Emirates**: A new competition law entered into force in December 2023 which will reduce the scope of filing exemptions for companies operating in certain sectors. New regulations (likely to be passed in the first half of 2024) are also expected to amend the filing thresholds, in particular by introducing turnover thresholds.

Increased risks for below threshold transactions

- In **the EU**, the EU General Court's judgment in *Illumina / Grail* confirmed the European Commission's (EC) jurisdiction to review deals that are referred upwards to it by national competition authorities, even if they do not meet the relevant thresholds to trigger an EC or EU member state filing, and even after they have closed.
- The Court of Justice of the EU held in *Towercast* that EU national competition authorities and courts can also use abuse of dominance rules to review such below threshold transactions (see our briefing for more on this). Again, this may happen post closing and gives third parties the ability to bring private actions.
- China and Italy have recently introduced powers to review below threshold mergers, and Denmark plans to do so. The Chinese SAMR conditionally approved a below threshold transaction for the first time in September 2023. Simcere Pharmaceutical's acquisition of Beijing Tobishi Pharmaceutical voluntarily submitted the transaction to SAMR soon after the introduction of SAMR's new powers (see our briefing for more details).

" It is becoming increasingly difficult for transaction parties to predict where – and on what basis – a global deal might be challenged."

BELEN IRISSARRY
COUNSEL, MADRID

" New possibilities for authorities and courts to review transactions that fall below mandatory filing thresholds, even after closing, create legal uncertainty and risk for transaction parties."

ALEKSANDER TOMBIŃSKI
COUNSEL, BRUSSELS

GLOBAL MERGER CONTROL TRENDS
(CONTINUED)

More expansive theories of harm in merger assessments are adding new challenges and uncertainty

New ecosystem theories of harm in the EU

- In September 2023, the EC prohibited Booking.com's proposed acquisition of eTraveli, arguing that the deal would have strengthened Booking's dominant online hotel booking platform through the addition of eTraveli's (non-competing) flight booking portal. The EC is reported to have taken the position that even a small increase in Booking's market share would have sufficed to entrench its dominant position.
- The case marks the first time the EC has used an ecosystem theory of harm to prohibit a combination of two companies active in complementary services. In doing so, the EC departed from its own guidance for the assessment of mergers between non-competitors by prohibiting the transaction with no finding of anti-competitive foreclosure of a rival.
- However, the EC's willingness to pursue unusual theories of harm in specific cases has not (contrary to popular perception) resulted in a more interventionist approach to mergers in general, at least not yet. In 2023, the proportion of deals notified to the EC that were prohibited, subject to remedies or abandoned in phase 2 was the lowest it has been for 12 years, and the second-lowest on record.

New US merger guidelines

In December 2023, the US Department of Justice (DOJ) and Federal Trade Commission (FTC) published the final version of the new 2023 merger assessment guidelines, reaffirming its aggressive merger enforcement approach for the coming years. Key changes include:

- Structural thresholds for presumptions of anti-competitive effects that parties would have to rebut. These would catch, for example, a “7-to-6” merger in a market where competitors have equal market shares, or a combination of two companies with shares of 28% and 2%. These low thresholds are significant and, if applied as written, are estimated to likely double the number of deals that will come in for extended scrutiny.
- Stringent requirements for demonstrating that a deal will not harm labour markets by eliminating competition for employees or increasing co-ordination among the remaining employers, mirroring the proposed changes to the Hart-Scott-Rodino (HSR) Form that would require parties to provide burdensome information on their employees. When challenging mergers, the authorities now frequently cite harm to employees alongside increased consumer prices, *e.g.,* the *Kroger / Albertsons* supermarket merger, which the FTC alleges would "*erase aggressive competition for workers*“ and threaten workers’ ability to secure better wages, benefits and working conditions.
- New emphasis on scrutiny of "roll-up" acquisitions involving multiple acquisitions in the same sector, often by private equity (PE) investors. FTC Chair Lina Khan recently highlighted her strategy to examine more closely anti-competitive PE roll-ups in the healthcare sector and, referring to a study linking PE firms' acquisitions of nursing homes to higher mortality rates, stated that "*this is not even just about pricing, but it can really be life or death*“. PE roll-up deals in the veterinary services sector have also featured in recent merger enforcement activity of the UK Competition and Markets Authority (CMA).

See our briefing for more details on these new guidelines.

“ The EC's *Booking.com / eTraveli* case highlights that the EC does not consider itself bound by its own merger guidelines and will develop new theories to address what it perceives to be new market challenges.”

IWONA TERLECKA
COUNSEL, WARSAW

“ The revised US merger guidelines affirm the agencies' aggressive approach to merger enforcement, in particular in relation to labor market competition.”

TIMOTHY CORNELL
PARTNER, WASHINGTON D.C.

GLOBAL MERGER CONTROL TRENDS
(CONTINUED)

Major merger control authorities are increasingly diverging in their assessment of mergers and are becoming stricter in their approach to remedies

Designing remedies

- **Behavioural remedies**: Behavioural remedies in merger control are now less likely than in the past to be accepted by US, EU, UK and Australian agencies in mergers between non-competitors that give rise to so-called vertical or conglomerate competition concerns (*e.g.,* foreclosure of competing customers or suppliers, or tying of the parties' complementary offerings). This requires parties to assess the issues much earlier and consider up front / fix-it-first remedies in appropriate cases. In Australia, the ACCC has publicly stated that it will not accept behavioural remedies absent clear and compelling evidence of their effectiveness, although it has done so in two out of the ten transactions requiring remedies between 2021-2023. In the US, behavioural remedies are essentially non-existent, and even structural remedies are only accepted by the DOJ in rare cases.
- **Public interest remedies in South Africa**: The South African Competition Commission is increasingly imposing remedies which oblige the parties to benefit historically disadvantaged persons and workers in South Africa, including on deals taking place outside South Africa and with a limited nexus to the country.

Divergent reviews

- Divergences between the EC and the UK CMA post Brexit continue to create further complexities for transaction reviews. In the wake of Brexit, many large deals now require clearance by both authorities and there have been a number of cases in which they have come to different conclusions in their assessments of competition issues in the same or similar markets, and of the remedies required to address such issues (*e.g.*, *Microsoft / Activision, Booking.com / eTraveli*, *Broadcom / Vmware* and *Amazon / iRobot*). See our briefing for more details on this.
- In addition, deals involving critical technologies are increasingly caught in the crosshairs of geopolitical trade wars and face unpredictable outcomes and lengthy global review periods. In 2023, a number of high-profile mergers proposed by semiconductor firms (*MaxLinear / Silicon* and *Intel / Tower Semiconductor*) were abandoned amid intensifying geopolitical tensions between the US and China.

New possibilities for clearance on sustainability grounds

- In 2023, the ACCC accepted sustainability benefits of a merger as a reason to clear (subject to remedies) an otherwise anti-competitive deal, becoming the first major antitrust agency to do so. The ACCC found that the *Brookfield / Origin Energy* merger would "*likely result in an accelerated roll-out of renewable energy generation, leading to a more rapid reduction in Australia's greenhouse gas emissions*". The "merger authorisation" procedure under which the transaction was reviewed permits deals to be cleared if there are net public benefits, *i.e.*, the public benefits outweigh anti-competitive effects. This process means that the ACCC has more scope to consider benefits, including in relation to sustainability and the environment. It is too early to say whether this marks the beginning of a trend as many agencies, particularly in the US, continue to be sceptical of sustainability justifications for mergers.

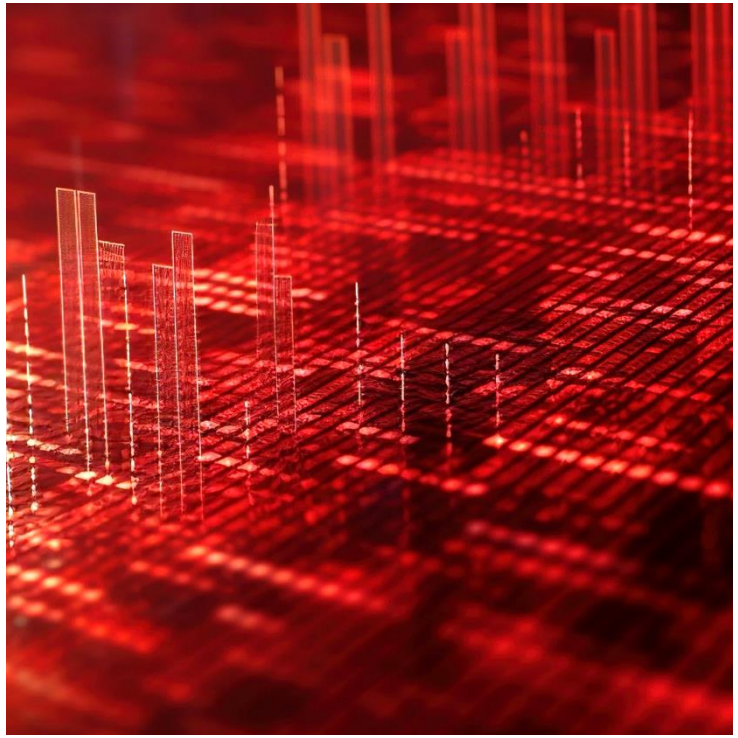
"Cost synergies in mergers between parties with vertically-related or complementary activities are at risk of being undermined by authorities' increasing insistence on divestment remedies. There is growing tension between justifications for behavioural remedies and an ability or willingness to enforce them."

MARK GRIME
COUNSEL, SYDNEY

"Businesses planning deals involving sensitive technologies should factor in the possibility that geopolitical tensions between China and the US could increase in the coming year."

YONG BAI
PARTNER, BEIJING

SECTION



THE EU FOREIGN SUBSIDIES REGULATION IS BEDDING IN

While the European Commission is seeking to apply the new regime pragmatically, the administrative burden on companies remains high and the threshold for problematic cases is not yet clear

- Having imposed new filing obligations for certain large M&A and public tender transactions from October 2023, the Foreign Subsidies Regulation (FSR) is generating many more filings than the European Commission (EC) initially anticipated.
- Our impressions from recent cases are that the EC is keen to make the regime workable and is aware that the vast majority of transactions caught by the regime raise no material subsidy issues. M&A clearances in unproblematic cases are granted on time, although pre-notification typically takes a few months for all but the simplest of cases. However, at the same time the EC is refining the interpretation of high-risk foreign financial contributions (FFCs) and the scope of exemptions. We would expect that as the EC's case teams gain more experience, cases will run more smoothly in future.
- However, while waivers from some of the most burdensome disclosure requirements in the filing forms are being obtained in unproblematic cases, information burdens are still significant. They require extensive information on FFCs received by merging parties in a three-year period and covering all manner of support from non-EU governments: tax breaks (even if generally available), loans, guarantees, equity investments, grants, fiscal incentives and more. For suppliers and purchasers of financial services, even market terms transactions with foreign State-linked counterparties are reportable. Case teams commonly ask very detailed questions on certain areas, such as deal financing, the M&A auction process or limited partner rights and commitments in private equity deals.
- Officials are particularly focused on funding that could fall into one of the categories of so-called potentially "highly distortive subsidies", such as any unlimited State guarantees, non OECD-compliant export financing or certain rescue and restructuring subsidies that have been received by merging parties from a non-EU State. In particular, case teams are adopting a very broad interpretation of the types of foreign State-linked transaction funding that may be viewed as a distortive subsidy "directly facilitating the transaction", including limited partner commitments.
- At this stage, the EC is not treating certain countries more strictly than others. Our experience is that potential subsidies are scrutinised closely irrespective of which non-EU country has granted them.
- We are seeing many investors with links to certain foreign governments structuring their M&A investments to avoid a risk of challenge, *e.g.*, as part of a consortium with private sector investors, or by taking non-controlling interests. While it is to too early to assess whether the FSR is deterring investments into the EU, the way that the EC develops its practices in the coming year will be key to minimising adverse impacts.
- The EC has already opened its first in-depth FSR review in the context of the public tender regime, the outcome of which may clarify the EC's approach to assessing the distortive effects of foreign subsidies and offsetting positive effects. Whether there will be a case in 2024 in which the EC identifies serious subsidy concerns in a merger case remains to be seen.

"While waivers from disclosure requirements can be obtained, hoping for such a waiver is not always a feasible filing strategy for deals with tight timetables, due to the amount of time it takes to gather the information if a waiver is not forthcoming."

ANASTASIOS TOMTSIS
PARTNER, BRUSSELS

"A continual workable and pragmatic approach by the EC in the implementation of the FSR will be essential to soften the impact of the new regime on foreign investment in the EU."

BEGOÑA BARRANTES
COUNSEL, MADRID

FOREIGN INVESTMENT SCREENING IS CATCHING MORE DEALS

When the EU first proposed an EU-wide framework for FDI screening in 2017, 16 of the 27 member states had no national screening regime. Now, just five have no regime, and they are all in the process of creating or implementing one

YES

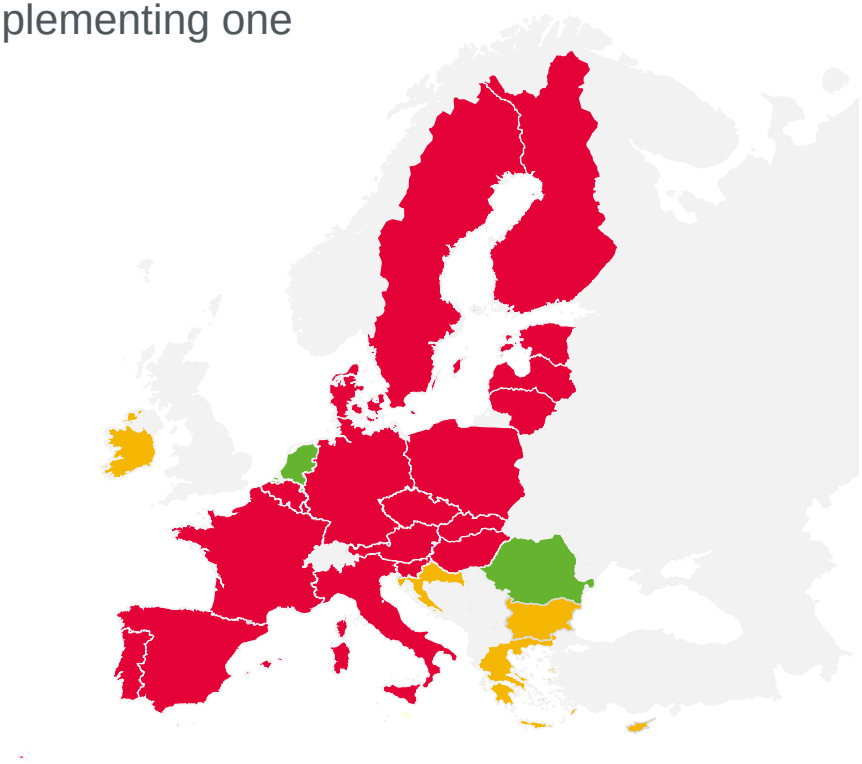
Austria | Belgium | Czech Republic | Denmark | Estonia | Finland | France | Germany | Hungary | Italy | Latvia | Lithuania | Luxembourg | Malta | Poland | Portugal | Slovenia | Spain | Sweden

PENDING

Bulgaria | Croatia | Cyprus | Greece | Ireland

REGIME BEING EXPANDED

Romania | the Netherlands



“The regimes in Europe have multiplied in numbers in recent years; the EU FDI screening regulation proposals will ensure that they also expand in scope, with mandatory filings required for various sectors.”

LUCIANO DI VIA
PARTNER, ROME

“Even investors from friendly countries can face remedies or prohibitions under these regimes, particularly if the deal involves sensitive technological capabilities that could be moved abroad.”

CAROLINE SCHOLKE
COUNSEL, DÜSSELDORF

FOREIGN INVESTMENT SCREENING IS CATCHING MORE DEALS (CONTINUED)

Screening of inbound foreign investment continues to multiply, and the screening of outbound foreign investment is the next potential trend

New EU legislation would mean even more filings

- New proposed EU legislation would further increase the number of foreign direct investment (FDI) filings for large deals in the EU, by imposing a minimum scope of sectors in which filings will be required in all member states (see our briefing for details). These sectors reflect the shift in recent years from a focus on traditional defence and energy sectors to broader scrutiny of investments involving R&D, emerging technologies, data-driven industries and healthcare, among others.
- Almost all EU member states are now taking more stringent approaches in their FDI reviews and tend to ask more questions about Chinese investments. Therefore, Chinese companies are gradually becoming more cautious both in making investment decisions in Europe and often engage strategically with FDI authorities to reduce deal uncertainties, either through consultation or formal filings.

Asian countries are starting to screen indirect investments

- This trend is not limited to the EU. While many countries in Asia have for a long time regulated direct foreign investments (*e.g.*, buying shares of a locally incorporated entity) on primarily protectionist grounds, some are now starting to require filings of indirect investments (*e.g.*, in a foreign parent that already has a locally incorporated subsidiary) on public interest/national security grounds. For instance, South Korea now requires filings for direct and indirect foreign investments in companies with certain "national core technologies" and in Singapore new filing requirements for investments in companies that the government designates as critical to its national security interests will take effect later this year.

Reverse CFIUS set to be fleshed out; will others follow?

- The US decided in 2023 to introduce a "reverse CFIUS" outbound investment screening regime, aimed at "covered" transactions between US investors and China-linked entities with activities in certain sectors, wherever they take place – see our briefing for details. The US has been pressuring its allies to follow suit, but they are not rushing to accede. The EU, in particular, has indicated that it will take until Autumn 2025 to investigate and decide whether to introduce its own outbound investment screening.
- The scope of the US regime is set to be fleshed out in 2024. It will likely catch a much broader range of investments than those focused on China. These include "indirect" transactions – where a US person knowingly invests in a non-US entity that will use the investment to undertake a covered investment with a China-linked entity – and investments into certain entities that are not Chinese but have over 50% of their business, turnover or capital expenditure in China.

"Unlike merger control, many FDI screening regimes can catch intragroup transactions. This creates risks and due diligence burdens for businesses that have not yet assessed whether they have subsidiaries that are in scope of any of the multiple new FDI regimes."

DIMITRI SLOBODENJUK
PARTNER, DÜSSELDORF

"The extraterritorial scope of the new US outbound screening regime will create new compliance costs for international businesses, not just those based in the US or China."

RENÉE LATOUR
PARTNER, WASHINGTON D.C.

SECTION

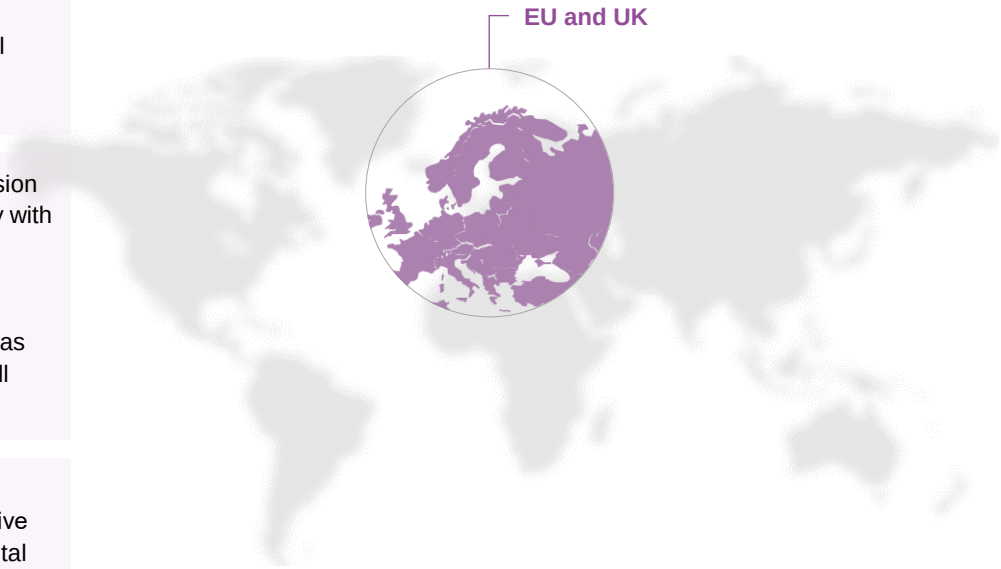
GLOBAL ANTITRUST REGULATION OF DIGITAL SERVICES

New and far-reaching regulation of the global digital economy is multiplying across the globe, through both *ex ante* regulation and evolution of antitrust laws, and led by the EU regulator

The EU continues to be the global trailblazer in the *ex ante* regulation of tech markets. Its Digital Markets Act (DMA), Digital Services Act (DSA), Data Act and the imminent Artificial Intelligence Act (AI Act) are proving to be influential blueprints for other legislators and regulators.

In 2024, some of the largest global digital players – designated by the European Commission (EC) as "gatekeepers" – are revealing the mechanisms that they have designed to comply with the new rules of the DMA. In many cases, rivals and customers are already pushing for additional, far-reaching changes. The scope of covered activities is also in flux: the EC continues to monitor the market to decide whether additional digital services should be designated and, further down the line, the EU General Court will rule on whether the EC has wrongly included certain services of Apple, Meta and ByteDance. These developments will shape the EC's designation powers and processes in the coming years.

UK: The UK's Digital Markets, Competition and Consumers Bill is expected to come into force in October 2024. While focusing on digital services much like the EU's DMA, it will give the UK regulator much more discretion to decide on the regulatory obligations of each digital player designated under the regime.



"Digital markets are becoming subject to multiple, overlapping regulatory and antitrust rules. To ensure agile compliance and to identify opportunities, market players need advisers with a holistic understanding of how these rules interact."

STAVROULA VRYNA
PARTNER, LONDON

"The EU is setting the standard in how big tech conduct is regulated, with antitrust agencies across the globe looking to the DMA, DSA and other key EU texts for inspiration in shaping their own digital competition law regimes."

ASHWIN VAN ROOIJEN
PARTNER, BRUSSELS

GLOBAL ANTITRUST REGULATION OF DIGITAL SERVICES (CONTINUED)

United States: Antitrust enforcement continues to be a primary means of regulation, with major battles being fought – and sometimes won – by antitrust enforcers and complainants in the courts.

India: In 2024, the Indian government is expected to publish a proposed draft Digital Competition Act. The Competition Commission of India has already set up a Digital Markets and Data Unit to tackle antitrust issues related to the digital sector.

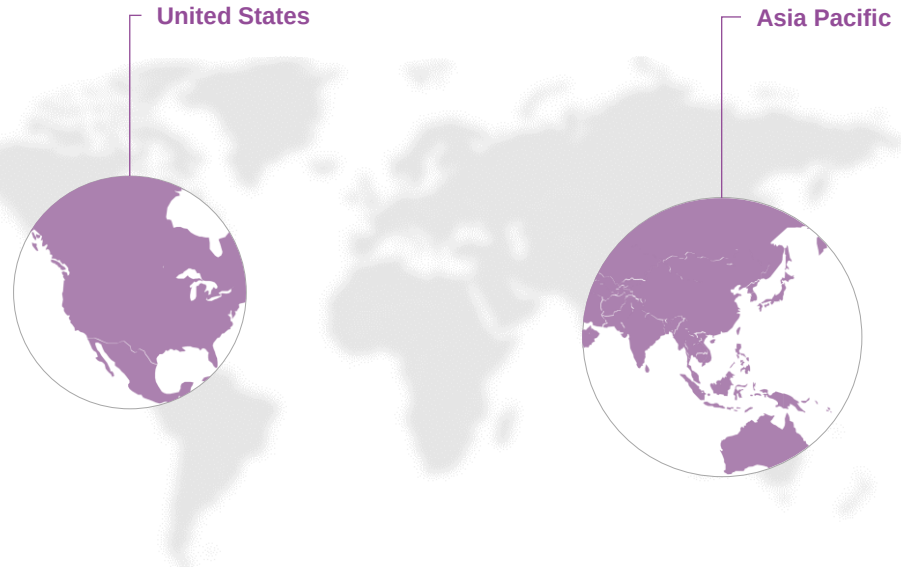
Japan: Draft legislation for *ex ante* regulation of mobile operating system providers is expected in 2024, following a comprehensive review of competition issues regarding mobile ecosystems.

Australia: The Government is currently consulting on an *ex ante* regulation for digital platform services, likely aligned with the EU's DMA and DSA.

Thailand: The Trade Competition Commission has proposed guidelines to address unfair trade practices by digital platform companies which could negatively affect vendor choice and restrict competition.

South Korea: A proposed Act on Promotion of Platform Competition is under preparation, intended to regulate unfair practices of designated platform operators.

China: Multiple local counterparts of the State Administration for Market Regulation recently published guidelines for internet platform companies on how to assess and ensure their compliance with competition law rules.



"Epic's historic 2023 win against Google in its Android app-distribution case shows that the US antitrust laws can be effectively used to challenge unlawful conduct in technology markets."

Clifford Chance acted as a co-counsel for Epic Games

PETER MUCCHETTI
PARTNER, WASHINGTON D.C.

"Asia-Pacific is seeing an emergence of legislation and guidelines clarifying how antitrust rules apply to digital actors and setting out how digital platform operators should comply."

MASAFUMI SHIKAKURA
COUNSEL, TOKYO

SPOTLIGHT ON ARTIFICIAL INTELLIGENCE

Antitrust agencies are studying the potential competition issues arising from the emergence of AI and have started to open investigations

Main antitrust / AI theories of harm

- Antitrust regulators are trying to get a handle on competition issues that may potentially arise in the nascent AI space. In Europe, the Portuguese Competition Authority and the UK's Competition and Markets Authority (CMA) have issued dedicated reports and flagged potential concerns around inputs underlying the AI wave: large datasets, powerful AI models, computing power and hardware.
- In the EU, existing theories of harm, such as self-preferencing, tying and bundling, hindering interoperability and customer lock-in, and unfair default settings, are being extended to the AI space, with vertical integration across AI-relevant inputs remaining on the regulators' radars. Concurrently, the EC is consulting on competition in virtual worlds and generative AI, exploring entry barriers, identifying potential sources of market power and examining the role of data in the industry, and will likely further explore these issues in a public workshop in Q2 2024.
- US competition authorities have expressed concerns that "essential inputs or technologies" underpinning generative AI could become concentrated in the hands of a small number of companies. These inputs could include data required to pretrain a generative AI model; personnel expertise necessary to develop a generative AI model; and computational resources needed to process data, train a model and deploy an AI system. Authorities have also indicated that anti-competitive conduct could include using a platform or ecosystem to discriminate against competing AI products or leveraging power in an input market (*e.g.*, computing services) to discriminate against new entrants.

Key investigations

- Regulators are increasingly comfortable with moving beyond exploring "big data" and examining other sources of market power (*e.g.,* AI chips) in competition investigations. For example, Nvidia has attracted queries in relation to its graphic processing units from the EC and French and Chinese antitrust authorities.
- Cooperation in the AI sector is also attracting scrutiny, much of which focuses on Microsoft's $13 billion investment in its partnership with OpenAI. Both the EC and CMA are considering if they have jurisdiction to review the partnership under merger control laws (Germany has concluded that it does not) and the EC is also collecting information on potential exclusivity and non-compete clauses in the context of large technology companies' AI partnerships.
- The US Department of Justice (DOJ) and Federal Trade Commission (FTC) have challenged mergers based on allegations that they would enable merging parties to gain competitively sensitive data and apply AI to that data to unfairly gain competitive intelligence (*e.g., UnitedHealth / Change* and *IQVIA / Propel Media*). In these cases, enforcers have argued that the merged company could withhold valuable data from rivals and use rivals' data against them, potentially dampening those rivals' incentives to invest in innovation.

"Antitrust agencies see early intervention as key to preventing AI markets becoming monopolised, but they risk stifling innovation in their home markets if they fail to fully understand the industry and competitive dynamics at play."

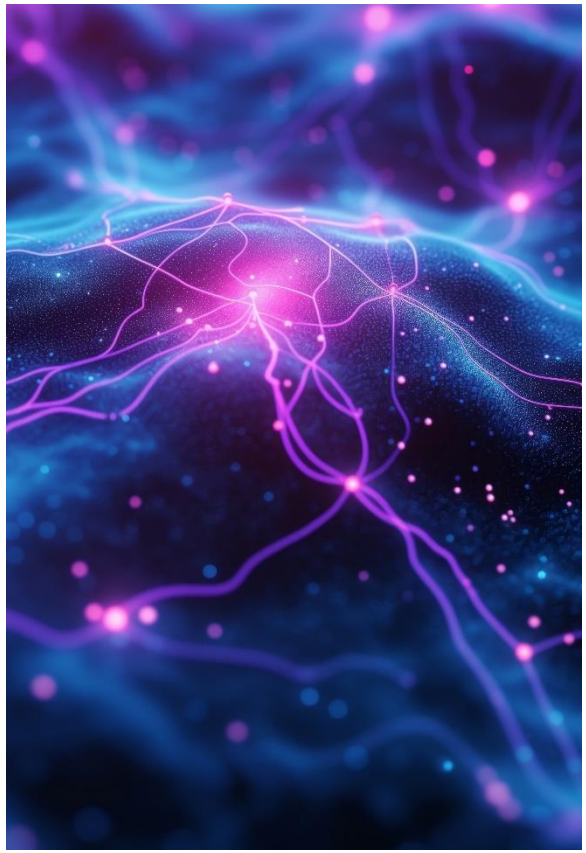
NELSON JUNG
PARTNER, LONDON

"Antitrust authorities' scrutiny is not limited to providers of AI technologies, but also those with inputs, such as cloud computing, large datasets and AI chips."

ANIKO ADAM
COUNSEL, LONDON

SPOTLIGHT ON ARTIFICIAL INTELLIGENCE
(CONTINUED)

Antitrust scrutiny is being accompanied by legislation to regulate the broader potential harms of AI



Regulating AI

- The EU's AI Act is set for final adoption as the EU institutions have agreed a political deal on the landmark bill. Once in force, the AI Act will have a global reach and is likely to establish a world standard in the field. While the legislative text is currently being finalised, the key items are expected to cover the following:
  - A technologically neutral definition of AI, designed to encompass future AI advancements.
  - General-purpose AI models will be regulated in a tiered system, with horizontal rules complemented by special measures (such as model evaluation, adversarial testing, risk mitigation) for general-purpose AI with systemic risks.
  - Prohibited AI practices will likely include social scoring, manipulative practices exploiting user vulnerabilities, certain predictive policing, and remote biometric identification systems, as well as emotion recognition systems at work or in educational institutions.
  - Non-prohibited high-risk AI systems will be codified and subject to specific rules.
- The AI Act provides for significant gradual fines which could reach 7% of global annual turnover (capped at €35 million) for the most important infringements. National authorities will enforce some of the provisions, and the AI Office to be established within the EC is expected to oversee EU-level co-ordination and general-purpose AI models. The draft law is expected to pass after technical details are finalised and the co-legislators enact it in a formal vote, expected soon.
- In the US, President Biden's recent Executive Order on the use of AI tasks federal agencies with promoting AI safety and competition. On the legislative front, bills have been proposed that would require digital watermarking for AI-generated content, repeal internet companies' immunity for claims related to generative AI, and prevent online platforms from using personal information to discriminate in algorithmic processes.

"Once the EU AI act is in force, the landmark law is set to become a benchmark for AI regulation globally, much like the EU GDPR is for privacy."

DIETER PAEMEN
PARTNER, BRUSSELS

"With its Executive Order, the US administration has taken a significant step in protecting innovation and promoting the development of AI systems."

MICHAEL VAN ARSDALL
COUNSEL, WASHINGTON D.C.

Numerous jurisdictions are assessing competition issues in markets for cloud computing and their interplay with AI

Global regulatory scrutiny of cloud services to continue in 2024

- Antitrust authorities around the world are showing increasing regulatory interest in the provision of cloud services within the IT sector. In 2022 and 2023, Australia, Japan, the Netherlands, South Korea and France concluded market studies to assess the impact that cloud services could have on competition. Spain, the UK and the US have also all launched similar market studies or investigations in their respective jurisdictions and are expected to initiate or continue public consultations or to issue provisional findings in 2024.
- France is a particularly active jurisdiction to watch in the coming year. Following the conclusion of its market investigation, the French competition authority raided a graphics card maker (reported to be Nvidia) in relation to suspected anti-competitive practices, in the context of the authority's continued focus on the cloud sector. The French Parliament is also currently debating a draft law aiming to secure and regulate the digital space in France. The draft law includes several provisions concerning cloud services providers (including on interoperability, data transfer fees and cloud credits) and will apply alongside the EU Data Act which came into effect in January 2024.
- While no cloud services provider has so far been designated as a so-called "gatekeeper" under the EU's DMA, the legislation creates wide-ranging powers for the EC to regulate any provider of "cloud computing services" (which have been deemed a "core platform service" under the DMA) should such provider meet the conditions in the legislation. Similar possibilities exist under the UK's Digital Markets, Competition and Consumers Bill, which is expected to come into force in Q3 2024.

Interplay between cloud computing and AI

- In its recent Initial Report on AI Foundation Models, the CMA considered the computational resources required for the development and deployment of generative AI. The report identified cloud computing as one of the sources of required computing power and suggested that the CMA's market investigation into the supply of public cloud infrastructure services could consider issues related to these requirements and cloud service providers.
- More recently, the French Competition Authority has launched a market study into Generative AI and the EC has launched a call for contributions on competition in virtual worlds and generative AI, with both authorities seeking input on the interplay between AI and computing power.
- Across the pond, the FTC is also considering this interplay and has suggested that its cloud services inquiry may further address the risk of anti-competitive practices in relation to cloud services and computing resources for generative AI.

Financial services: resilience in the digital era

- There has been an increased regulatory focus on protecting financial institutions from potential disruptions and threats to their information and communication technology (ICT) caused by concentrations in the provision of critical services by one third party to multiple firms. In January 2023, the EU's Digital Operational Resilience Act (DORA) entered into force, which imposes requirements for the security of ICT systems of firms operating in the financial sector as well as critical third parties which provide ICT-related services to them, such as cloud platforms or data analytics services. Similar proposals are included in the UK's Financial Services and Markets Act 2023.

"Global regulators are showing no signs of slowing down in their scrutiny of cloud services providers, with market investigations and legislative pieces multiplying each year."

SHRUTI HIREMATH
SENIOR ASSOCIATE, LONDON

"The rapid evolution of generative AI puts regulators on the back foot for understanding the interplays of technology, IP, computational power, data and other services."

KATRIN SCHALLENBERG
PARTNER, PARIS

SECTION

ANTITRUST TRENDS IN THE ENERGY SECTOR

International regulators are taking different approaches to assessing cooperation on environmental sustainability projects, while EU State aid rules are allowing more public funding

Compliance challenges for cooperation on environmental sustainability

- Competition authorities in several jurisdictions have taken steps to ensure that competition law does not bar legitimate cooperation to improve environmental sustainability. These include competition authorities in Australia, the EU, France, Italy, Japan, the Netherlands and the UK, and involve new guidance and the opportunity for bespoke consultation. The Japan Fair Trade Commission is expected to update its guidance again in 2024.
- The various new guidelines cover much of the same ground, such as agreements between rivals to set sustainability standards (subject to a soft safe harbour in the EU if created through a transparent and open procedure) or targets, or to phase out unsustainable products. Some have gone further, with more permissive rules for agreements that contribute to combating climate change, recognising that the benefits of such agreements extend well beyond the consumers of the products or services that they cover. We are seeing increased interest from businesses in taking advantage of these new opportunities. See our briefing for more on these developments.
- In contrast, enforcement authorities in the US have generally taken the position that sustainability benefits merit no special treatment under the antitrust laws. State enforcement authorities and federal lawmakers are investigating whether industry climate alliances and coalitions have "colluded" to reach their targets for carbon and greenhouse emissions through concerted action aimed at the fossil fuel industry. Previous investigations include a now-closed investigation by the Department of Justice (DOJ) into whether major automotive manufacturers had colluded to endorse and comply with emissions control standards established by the state of California that were stricter than those endorsed by the Trump administration.
- Conduct with adverse effects on both competition and sustainability is also becoming a priority for enforcers. An early indicator of this trend is the investigation of the European Commission (EC) into allegations that the Greek Public Power Corporation engaged in predatory pricing of electricity and so "deterred investment into more environmentally friendly energy sources".

Ever more flexible access to EU State aid for green projects

- The European Green Deal, the energy crisis and countermeasures to the US 2022 Inflation Reduction Act have prompted a more relaxed and flexible application of EU State aid rules, to accelerate and simplify the award of green subsidies by EU member states to industry players. The EC notably adopted a targeted amendment to the General Block Exemption Regulation and extended the applicability of the Temporary Crisis and Transition Framework until end 2025, with the aim of injecting further flexibility into the grant mechanisms.
- These developments have led to an increase of possible aid in certain key areas of environmental protection and energy (*e.g.,* decarbonisation projects and green mobility), as well as a significant rise in notification thresholds for environmental aid. Indicatively, in December 2023 and early 2024, the EC approved more than €8 billion in French state aid for decarbonisation and renewable energy projects and aid of up to €6.9 billion for a pan-European set of hydrogen infrastructure projects.

“Companies or industry associations keen to collaborate on sustainability projects should form a global compliance strategy to navigate the diverging approaches from international competition regulators.”

MILENA ROBOTHAM
PARTNER, BRUSSELS

“The EU is adjusting its State aid rules to allow member states to compete with the US and China to attract green projects; the EU aims to boost the competitiveness of its market, while not jeopardising its integrity.”

GEORGIOS YANNOUCHOS
COUNSEL, BRUSSELS

MERGER CONTROL AND FDI FOR ENERGY DEALS

There is increased merger control and FDI scrutiny of energy deals, with US regulators keeping a close eye on the consolidating oil & gas sector

International FDI requirements for critical infrastructure projects are proliferating

- Energy infrastructure projects are increasingly being caught by foreign investment (FDI) filing requirements, due to the ongoing multiplication of FDI regimes (see the FDI and subsidy control section of this report).
- A global trend towards protectionism has led to more restrictive government measures, requiring a more strategic and co-ordinated approach towards obtaining FDI clearance.
- Our experience is that the risk of prohibition or remedies for energy infrastructure deals tends to be heightened if an investor has links to a state that is perceived to be hostile to the host country's interests, or if the deal involves technologies or capabilities that could be relocated from the host country. And where concerns do arise, they can often be resolved through behavioural remedies, such as restrictions on governance rights and ring-fencing of information flows.
- We are seeing increasing national security scrutiny in China towards foreign investors in new energy sectors. On the other hand, Chinese investors face stricter FDI reviews when investing in energy projects across the globe, with State-owned enterprises coming under particular scrutiny in South America and Europe.

Heightened scrutiny of consolidation in the oil & gas sector in the US

- In the US the Federal Trade Commission (FTC) is concurrently reviewing several deals in the oil & gas exploration and production space (*ExxonMobil / Pioneer Occidental / CrownRock* and *Chevron / Hess*). US lawmakers have expressed concern about trends toward consolidation and the potential for the deals to harm smaller operators, suppress wages and raise prices for consumers downstream. The FTC is reviewing the effect of the transactions in the aggregate rather than as individual transactions, looking at these issues as well as whether the deals could facilitate explicit or tacit collusion with OPEC.
- As in other sectors, competition authorities are increasingly considering unusual theories of competitive harm. In a recent submission, the US DOJ recommended assessing the competitive effects of a merger between wholesale electricity providers (*Vistra / Energy Harbor*) by looking at the parties' relative supply positions rather than market shares. In that transaction, antitrust authorities are also turning to the more expansive power of other regulatory agencies, *e.g.*, the public interest standard by which the Federal Energy Regulatory Commission is guided.

"US enforcement agencies are watching consolidation in the energy sector closely and are not hesitant to intervene in deals with increasingly innovative theories of harm."

JOSEPH OSTOYICH
PARTNER, WASHINGTON D.C.

In other cases, authorities have examined competitive effects by reference to dynamic geographic markets, which may apply where generating units' output varies over time according to fluctuations in demand in different areas.

- While an increase in price or reduction in output of fossil fuel energy may serve sustainability goals, where such effects stem from a decrease in competition, the US antitrust agencies continue to view them as cognisable anti-competitive harms.

First merger cleared on the basis of environmental benefits

- In 2023, there was the first case in which a major antitrust agency accepted sustainability benefits of a merger as a reason to clear an otherwise anti-competitive deal. The Australian Competition and Consumer Commission found, in the context of a merger authorisation application, that the *Brookfield / Origin Energy* merger would "*likely result in an accelerated roll-out of renewable energy generation, leading to a more rapid reduction in Australia's greenhouse gas emissions*". It is too early to say whether this marks the beginning of a trend as many agencies, particularly in the US, continue to be sceptical of sustainability justifications for mergers.

"As markets become more concentrated and regulated, a co-ordinated global strategy to gain merger control and FDI approvals will be of essence."

JENNIFER STOREY
PARTNER, LONDON

EU COMPETITION LAW IN NASCENT ENERGY MARKETS

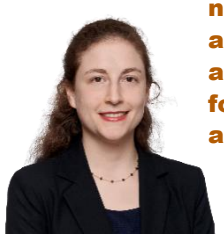
The EU's ambitious energy transition and decarbonisation policies are driving the emergence of new energy markets. The EC and EU member states are taking first steps to assess and regulate them

Carbon capture and storage (CCS)

- A key competition law issue arising from large-scale CCS projects is how to guarantee a non-discriminatory and fair right of access to essential transport networks and storage sites. The EU's 2009 CCS Directive establishes a legal framework for the environmentally safe geological storage of CO_2 and requires EU member states to grant fair and open access to potential third-party users to transport networks and storage sites in a transparent and non-discriminatory manner.
- However, with the first large-scale CCS projects still under development, the CCS Directive has not yet been tested and the EC has provided neither guidance nor interpretative notes to companies active in this nascent area. Concurrently, actors in this space must consider how third-party access has been implemented in more mature energy markets (*e.g.*, gas and electricity), as well as any national CCS regulations and the opinion of the national competent authorities.
- A further area of regulatory scrutiny concerns joint development and operation agreements between potential competitors active in CCS. In the early stages of development of this area, national competition authorities appear to be adopting a relatively lenient approach to assessing whether potential restrictions of competition can be outweighed by efficiencies, pursuant to the criteria for exemption from the EU prohibition on anti-competitive agreements.

Hydrogen

- The EU became the first global jurisdiction to adopt a comprehensive legal and regulatory framework aiming to create a level playing field based on EU-wide rules for the hydrogen market and infrastructure, and to remove barriers that impede their development.
- Due to the novel nature, complexity and high costs of hydrogen projects, numerous competition law questions have emerged and remain to be clarified. First, the novelty of hydrogen production has required competition authorities and industry players to consider new potential delineations of relevant markets for competition law purposes (*e.g.*, distinguishing between "blue" and "green" hydrogen). Second, the high technical complexity and costs of these large-scale infrastructure projects incentivise many potential competitors across the supply chain to join forces. Similar to CCS projects, competition authorities will continue to monitor such cooperation closely in the coming years. Third, it is likely that the EU regulatory rules concerning unbundling and third-party access to essential hydrogen networks and sites will be clarified in the near future, with national EU authorities likely playing an important role depending on the degree of competition and liquidity of the relevant market. Finally, hydrogen projects may qualify for compatible State aid, as shown by the above-mentioned recent approval by the EC of up to €6.9 billion for a pan-European set of hydrogen infrastructure projects.



“ Competition authorities assessing nascent energy markets need to adopt a multidisciplinary approach to take account of both the requirements set forth in emerging sector regulations and existing antitrust rules.”

EPISTIMI OIKONOMOPOULOU
AVOCAT, PARIS

“ Large-scale hydrogen projects often require close cooperation between competitors and will thus increasingly become subject to monitoring by antitrust regulators.”

RICHARD BLEWETT
PARTNER, BRUSSELS

SECTION

INVESTIGATING INNOVATOR AND GENERIC COMPETITION

In the pharma sector, agencies are finding new ways to attack originators with allegations of misuse of patent systems and disparagement of rival products, while public and private enforcement against "pay for delay" cases continues

Misuse of patents and patent systems:

- In **the EU**, the European Commission (EC) is investigating whether Teva abused a dominant position by successively filing and withdrawing divisional patents protecting significantly overlapping inventions and, in doing so, delayed generic entry by forcing competitors to introduce new legal challenges against each successive patent.
- In **the US**, the Federal Trade Commission (FTC) has challenged listings of over 100 patents by major pharmaceutical companies in the US Food and Drug Administration's "Orange Book" of approved drug products and their related patents. The FTC alleges that the listings are improper and risk delaying or thwarting competitive generic alternatives. Companies were given 30 days to withdraw or recertify patents, with several already requesting delisting from the publication.

Disparagement:

- Following earlier cases brought by national competition authorities in the EU, the EC is currently investigating two cases in which an originator is alleged to have abused a dominant position by disparaging a rival product vis-à-vis healthcare institutions and healthcare professionals.

Pay for delay / exit:

- In **the EU**, the General Court confirmed that the EC can establish a "pay for delay" infringement where the "payment" for a generic company's promise, in a patent settlement, to stay out of the market takes the form of concomitant business transactions that would not otherwise have been concluded.
- In **the UK**, the Competition and Markets Authority (CMA) has pursued several pay-for delay cases in recent years, most recently issuing decisions in the *Hydrocortisone* and *Prochlorperazine* cases. These decisions did not involve patent litigation. Instead, the CMA found that the parties incentivised potential generic entrants not to enter the market through advantageous distribution and supply arrangements. The CMA is now also routinely seeking director disqualifications on the back of such infringement decisions.
- In **the US,** in a July 2023 trial, Gilead Sciences Inc. and Teva Pharmaceutical Industries Ltd. defeated antitrust allegations involving a 2014 patent settlement, which plaintiffs alleged resulted in a $3.6 billion payment by Gilead to delay Teva's generic versions of HIV drugs Truvada and Atripla. The jury found no evidence of an illegal reverse payment or abuse of market power, consistent with the defendants' arguments on Gilead's lack of dominance in the broader market of alternative HIV therapies.
- In **China**, in 2023, the State Administration for Market Regulation (SAMR) imposed substantial fines for an agreement by Huihai Pharmaceutical to withdraw from its established activity of selling two active pharmaceutical ingredients for norepinephrine and epinephrine in return for compensation from Grand Pharmaceutical (as noted below, the latter was also penalised for imposing excessively low purchase prices on suppliers).

"The EC wants to set an EU precedent on disparagement in the pharma sector and seems to be willing to include a broad variety of communications to institutions and healthcare professionals under this type of abuse."

DAVID TAYAR
PARTNER, PARIS

"Competition regulators are increasingly comfortable reviewing complex IP practices from an antitrust perspective. This requires companies and their advisers to have a firm grasp of the interplay of antitrust and IP."

SARA ORTOLI
AVOCAT, PARIS

OTHER TRENDS WE ARE SEEING IN HEALTHCARE AND LIFE SCIENCES

Excessive pharma pricing cases continue to set precedents and we expect a new focus on medical devices and information exchanges between rivals

Excessive pricing:

- In **the UK**, three major cases have been brought by the CMA in recent years – *Phenytoin sodium* (Pfizer and Flynn), *Liothyronine* (Advanz) and *Hydrocortisone* (Auden). Each of these cases broke successive fining records for the CMA: £94 million, £101 million and £260 million, respectively. Appeals against these decisions have set important precedents for pharma companies' pricing of off-patent drugs, including the concerning suggestion that pricing risks entering "excessive" territory as soon as it exceeds costs plus a "reasonable" margin. A forthcoming judgment in *Pfizer* will rule on the circumstances in which similarly / higher priced rival products and the therapeutic value of a drug should be taken into account when deciding if its price is unfair.
- In **the EU**, a common feature of recent excessive pricing cases (including the EC's case against *Aspen* and the Netherlands competition authority's case against *Leadiant*) is that prices increased quickly and in multiples of the initial price. Antitrust agencies are taking an aggressive approach to significant increases in prices of old, off-patent pharmaceutical products, in particular where the costs of the product have not increased.
- In **China**, SAMR published an unusual "excessively low purchase pricing" decision in May 2023. It found that Grand Pharmaceutical had abused its market dominance in active pharmaceutical ingredients for norepinephrine and epinephrine by threatening to delay supplies to downstream pharmaceutical companies unless they sold their related downstream products to Grand Pharmaceutical at very low prices, or with substantial rebates.

Medical devices:

- We have seen recent dawn raids on medical device makers by the EC (at Edwards Lifesciences in September 2023, under abuse of dominance rules) and by the Greek competition authority (in December 2023, under the EU and Greek prohibitions on anti-competitive agreements) and expect more antitrust scrutiny in this space.

Information exchange:

- Healthcare and life sciences companies should be particularly alert to the antitrust risks involving information exchanges, both in conjunction with other conduct and as a potential stand-alone infringement. In February 2023, the US DOJ withdrew three antitrust enforcement policy statements related to healthcare, including the Statements of Antitrust Enforcement Policy in Health Care which included the statement that *"participation by competing providers in surveys of prices for healthcare services, or surveys of salaries, wages or benefits of personnel, does not necessarily raise antitrust concerns,"* and *"such surveys can have significant benefits for health care consumers."*
- The EC also updated its Guidelines on Horizontal Cooperation Agreements in 2023. These clarify that it is not just exchanges between rivals of information on future price intentions that are considered to have an anti-competitive object, but also the sharing of other data that gives indications of likely future competitive conduct, such as demand forecasts or future product characteristics.

"We expect antitrust authorities to seek to apply theories of harm seen in the pharmaceutical space across the broader healthcare and life sciences sector. Companies should therefore check that their compliance policies are updated to take account of these expansive potential concerns."

MICHAEL RUETER
COUNSEL, LONDON

"The Chinese Grand Pharmaceutical case is a reminder that abuse of dominance rules can apply to your purchase prices as well as your selling prices. While negotiating low prices with suppliers is rarely considered abusive, that can change if it is accompanied by threats to withdraw supplies of a dominant product."

DAYU MAN
FOREIGN LEGAL COUNSEL, HONG KONG

ANTITRUST HEALTHCARE TRENDS IN THE UNITED STATES

US antitrust authorities are continuing to focus on private equity business models, competitive markets for workers, practices of group purchasing organisations and the impact of AI on healthcare markets

Labour issues in healthcare

- Following unsuccessful attempts to prosecute alleged "no poach" agreements (agreements between employers not to hire each other's employees) under criminal antitrust laws, the Department of Justice (DOJ) withdrew its last remaining criminal no poach case in November 2023. We anticipate that the agencies may now pivot their enforcement efforts towards other transactions and conduct that they believe restricts competitive opportunities for workers. In particular, the new Merger Guidelines state that the agencies will consider whether M&A transactions substantially lessen competition between competing buyers for workers' services or increase the likelihood for co-ordination among remaining buyers of labour services. This is likely to receive particular attention in healthcare transactions, where merging parties often compete to recruit and retain a range of healthcare providers, from physicians to medical technicians.

Pharmacy Benefit Managers and Group Purchasing Organisations

- In 2023, the FTC extended its investigation into the business practices of Pharmacy Benefit Managers (PBMs) to also cover various Group Purchasing Organisations (GPOs). Most recently, in February 2024, the FTC and the Department of Health and Human Services issued a public request for information seeking input on whether market concentration, compensation models, contracting practices and lack of competition among GPOs may influence drug pricing and availability. Although it is unclear what, if any, actions the FTC might take with respect to PBMs and/or GPOs, possibilities include undertaking rule-making, bringing enforcement actions, or issuing advisory opinions.

Private equity in healthcare

- The US antitrust agencies remain focused on the impact of private equity business models on competition in healthcare markets. Their new Merger Guidelines highlight the potential harms of "serial acquisitions" and a trend toward consolidation in the same industry. This theory of harm will be tested in US courts through a novel suit filed by the FTC in September 2023 against US Anesthesia Partners and its private equity owner, in which the FTC alleges that the acquisition of multiple large anaesthesiology practices in Texas, along with alleged anti-competitive agreements, were all part of a scheme that violated US antitrust laws.

Artificial intelligence and health technology

- Competition issues in artificial intelligence (AI) are at the forefront of the antitrust agency agenda (see also the digital services section of this report). In the healthcare sector, agencies will have to balance AI's promise of innovation and efficiency with concerns about competition and the privacy of patient data. From testing an AI "doctor in your pocket" product to using AI to write clinical notes for medical staff, technology and healthcare companies are making strides to integrate AI into healthcare delivery. In October 2023, the Biden Administration called on the FTC to ensure fair competition in the AI marketplace and to protect consumers and workers from harms resulting from AI. Specifically, an Executive Order calls for AI regulation in "critical" fields like healthcare. The FTC hosted a summit on AI in late January 2024 where they explored developing technologies and potential for both competitive and consumer protection-oriented harms.

"In the evolving landscape of AI in healthcare, it is imperative for regulators to strike a balance between safeguarding competition and data privacy, and encouraging innovation, to ensure that government oversight supports rather than obstructs technological advancement."

WILLIAM LAVERY
PARTNER, WASHINGTON D.C.

"In 2024, the US agencies are expected to continue their scrutiny of transactions across the healthcare sector ranging from clinical providers to health tech companies. In addition to downstream effects, agencies will scrutinize potential effects on healthcare labor markets."

LEIGH OLIVER
PARTNER, WASHINGTON D.C.

MERGER CONTROL, FDI AND FOREIGN SUBSIDY SCREENING IN THE HEALTHCARE SECTOR

Regulators globally perceive there to have been underenforcement in merger control in recent years, especially in innovative pharma and healthcare provider markets. Deals are also at greater risk from FDI and foreign subsidy screening regimes

The review net widens

- Small deals in the healthcare and life sciences space now face greater risks of intervention due to merger control agencies' concerns that low revenues might not reflect the parties' potential to compete in innovation. The EC has reviewed a number of deals in this space that fell below the thresholds for mandatory filing, namely *Illumina / GRAIL* (blocked) and *Cochlear / Oticon Medical* (cleared unconditionally by the EC but partly prohibited by the UK CMA – see below).
- FDI regimes continue to proliferate and expand, with FDI authorities focused on ensuring continuity of supply in the healthcare and life sciences space, as well as on deals that could lead to IP or R&D being moved out of a jurisdiction, post closing. This trend will be exacerbated by the proposed new EU FDI Screening Regulation (see also the subsidy control and foreign investment section of this report), which would require mandatory filing in all EU member states for certain FDI into targets active in biotechnologies or critical medicines.
- The new FSR (see the subsidy control and foreign investment section of this report) will also catch many healthcare and life sciences deals given the significant role of public sector purchasers and providers in many countries' healthcare sectors.

Tougher reviews and more divergence

Companies engaging in M&A in healthcare and life sciences need to assess carefully upfront the possibility of both well-established and more unusual theories of harm applying to their deals, including:

- **Scrutiny of consolidation in concentrated healthcare sectors**. The US agencies have hospital mergers in their spotlight, including considering the impact of mergers on wage competition for medical professionals. In the UK, the CMA has required divestitures in completed mergers of veterinary businesses and dental healthcare providers and the Belgian competition authority has published an analytical framework for the review of hospital mergers, signalling that these are on its radar.
- **Vertical foreclosure concerns**, as seen for example in the EC's block of *Illumina / GRAIL* due to its finding that Illumina would have the ability and incentive to cut off its rivals' access to GRAIL's blood-based early cancer detection technology, or otherwise to disadvantage them.
- **Concerns around potential competition**, such as those of the CMA in its partial prohibition of *Cochlear / Oticon Medical* that, absent the merger, the parties would have become closer competitors in active bone conduction solutions for hearing implants.
- **Expansion into related markets**, the EC's (non-healthcare) *Booking / eTraveli* case (see the merger control section of this report) could have implications for healthcare players with market power, as it suggests that any expansion into a related sector now carries risks if it could increase market share in the dominant market, even if only marginally. In the US, the FTC secured remedies in Amgen's 2023 acquisition of Horizon Therapeutics, after arguing that the deal would allow Amgen to bundle its own “blockbuster” portfolio drugs with Horizon's, thus entrenching Horizon’s monopoly and hindering future entrants.

“Obtaining regulatory clearances for M&A in healthcare and life sciences is likely only to continue to become more challenging, with potential for divergent outcomes across jurisdictions. Companies need a coordinated but flexible global strategy for deals.”

KATHARINE MISSENDEN
COUNSEL, BRUSSELS

“Healthcare and life sciences businesses need to be more careful now when expanding through M&A into upstream, downstream or related markets. Sophisticated antitrust analysis may be required for even the smallest of deals.”

TORSTEN SYRBE
PARTNER, DÜSSELDORF

GLOBAL ANTITRUST CONTACTS

YONG BAI
PARTNER, BEIJING
T +86 10 6535 2286
E yong.bai@cliffordchance.com

ZIBO LIU
COUNSEL, BEIJING
T +86 10 6535 4925
E zibo.liu@cliffordchance.com

RICHARD BLEWETT
PARTNER, BRUSSELS
T +32 2 533 5023
E richard.blewett@cliffordchance.com

KATHARINE MISSENDEN
COUNSEL, BRUSSELS
T +32 2 533 5913
E katharine.missenden@cliffordchance.com

DIETER PAEMEN
PARTNER, BRUSSELS
T +32 2 533 5012
E dieter.paemen@cliffordchance.com

MILENA ROBOTHAM
PARTNER, BRUSSELS
T +32 2 533 5074
E milena.robotham@cliffordchance.com

ASHWIN VAN ROOIJEN
PARTNER, BRUSSELS
T +32 2 533 5091
E ashwin.vanrooijen@cliffordchance.com

ALEKSANDER TOMBINSKI
COUNSEL, BRUSSELS
T +32 2 533 5045
E aleksander.tombinski@cliffordchance.com

ANASTASIOS TOMTSIS
PARTNER, BRUSSELS
T +32 2 533 5933
E anastasios.tomtsis@cliffordchance.com

GEORGIOS YANNOUCHOS
COUNSEL, BRUSSELS
T +32 2 533 5054
E georgios.yannouchos@cliffordchance.com

ELEONORA UDROIU
OF COUNSEL, BUCHAREST
T +40 216666 127
E eleonora.udroiu@cliffordchance.com

MARC BESEN
PARTNER, DÜSSELDORF
T +49 211 4355 5312
E marc.besen@cliffordchance.com

ULRICH PFEFFER
COUNSEL, DÜSSELDORF
T +49 211 4355 5455
E ulrich.pfeffer@cliffordchance.com

CAROLINE SCHOLKE
COUNSEL, DÜSSELDORF
T +49 211 4355 5311
E caroline.scholke@cliffordchance.com

JOACHIM SCHÜTZE
OF COUNSEL, DÜSSELDORF
T +49 211 4355 5547
E joachim.schuetze@cliffordchance.com

DIMITRI SLOBODENJUK
PARTNER, DÜSSELDORF
T +49 211 4355 5315
E dimitri.slobodenjuk@cliffordchance.com

TORSTEN SYRBE
PARTNER, DÜSSELDORF
T +49 211 4355 5120
E torsten.syrbe@cliffordchance.com

DAYU MAN
FOREIGN LEGAL COUNSEL HONG KONG
T +852 2826 3467
E dayu.man@cliffordchance.com

ITIR ÇIFTÇI
MANAGING PARTNER ISTANBUL
T +90 212339 0 077
E itir.ciftci@cliffordchance.com

ANIKO ADAM
COUNSEL, LONDON
T +44 20 7006 2201
E aniko.adam@cliffordchance.com

CHANDRALEKHA GHOSH
COUNSEL, LONDON
T +44 20 7006 8438
E chandralekha.ghosh@cliffordchance.com

SUE HINCHLIFFE
PARTNER, LONDON
T +44 20 7006 1378
E sue.hinchliffe@cliffordchance.com

NELSON JUNG
PARTNER, LONDON
T +44 20 7006 6675
E nelson.jung@cliffordchance.com

ALEX NOURRY
CONSULTANT, LONDON
T +44 20 7006 8001
E alex.nourry@cliffordchance.com

GREG OLSEN
PARTNER, LONDON
T +44 20 7006 2327
E greg.olsen@cliffordchance.com

MICHAEL RUETER
COUNSEL, LONDON
T +44 20 7006 2855
E michael.rueter@cliffordchance.com

MATTHEW SCULLY
PARTNER, LONDON
T +44 20 7006 1468
E matthew.scully@cliffordchance.com

JENNIFER STOREY
PARTNER, LONDON
T +44 20 7006 8482
E jennifer.storey@cliffordchance.com

LUKE TOLAINI
PARTNER, LONDON
T +44 20 7006 4666
E luke.tolaini@cliffordchance.com

STAVROULA VRYNA
PARTNER, LONDON
T +44 20 7006 4106
E stavroula.vryna@cliffordchance.com

GLOBAL ANTITRUST CONTACTS
(CONTINUED)

SAMANTHA WARD
PARTNER, LONDON
T +44 20 7006 8546
E samantha.ward@cliffordchance.com

BEGOÑA BARRANTES
COUNSEL, MADRID
T +34 91 590 4113
E begona.barrantes@cliffordchance.com

BELEN IRISSARRY
COUNSEL, MADRID
T +34915907519
E belen.irissarry@cliffordchance.com

MIGUEL ODRIOZOLA
PARTNER, MADRID
T +34 91 590 9460
E miguel.odriozola@cliffordchance.com

JOHN FRIEL
PARTNER, NEW YORK
T +1 212 878 3386
E john.friel@cliffordchance.com

ROBERT HOUCK
PARTNER, NEW YORK
T +1 212 878 3224
E robert.houck@cliffordchance.com

MICHEL PETITE
OF COUNSEL, PARIS
T +33 1 4405 5244
E michel.petite@cliffordchance.com

KATRIN SCHALLENBERG
PARTNER, PARIS
T +33 1 4405 2457
E katrin.schallenberg@cliffordchance.com

DAVID TAYAR
PARTNER, PARIS
T +33 1 4405 5422
E david.tayar@cliffordchance.com

JAN DOBRY
COUNSEL, PRAGUE
T +420 222 55 5252
E jan.dobry@cliffordchance.com

SELMAN ANSARI
COUNSEL, RIYADH
T +966 11 481 9735
E selman.ansari@cliffordchance.com

LUCIANO DI VIA
PARTNER, ROME
T +39 064229 1265
E luciano.divia@cliffordchance.com

MARK GRIME
COUNSEL, SYDNEY
T +61 2 8922 8072
E mark.grime@cliffordchance.com

ELIZABETH RICHMOND
PARTNER, SYDNEY
T + 61299478011
E elizabeth.richmond@cliffordchance.com

MASAFUMI SHIKAKURA
COUNSEL, TOKYO
T +81 3 6632 6323
E masafumi.shikakura@cliffordchance.com

IWONA TERLECKA
COUNSEL, WARSAW
T +48 22429 9410
E iwona.terlecka@cliffordchance.com

MICHAEL VAN ARSDALL
COUNSEL, WASHINGTON D.C.
T +1 202 912 5072
E michael.vanarsdall@cliffordchance.com

BRIAN CONCKLIN
PARTNER, WASHINGTON D.C.
T +1 202 912 5060
E brian.concklin@cliffordchance.com

TIM CORNELL
PARTNER, WASHINGTON D.C.
T +1 202 912 5220
E timothy.cornell@cliffordchance.com

RENÉE LATOUR
PARTNER, WASHINGTON D.C.
T +1 202 912 5509
E renee.latour@cliffordchance.com

WILLIAM LAVERY
PARTNER, WASHINGTON D.C.
T +1 202 912 5018
E william.lavery@cliffordchance.com

PETER MUCCHETTI
PARTNER, WASHINGTON D.C.
T +1 202 912 5053
E peter.mucchetti@cliffordchance.com

LEIGH OLIVER
PARTNER, WASHINGTON D.C
T +1 202 912 5933
E leigh.oliver@cliffordchance.com

JOSEPH OSTOYICH
PARTNER, WASHINGTON D.C.
T +1 202 912 5533
E joseph.ostoyich@cliffordchance.com

SHARIS POZEN
PARTNER, WASHINGTON D.C.
T +1 202 912 5226
E sharis.pozen@cliffordchance.com

THOMAS VINJE
SENIOR COUNSEL, WASHINGTON D.C.
T +1 202 912 5932
E thomas.vinje@cliffordchance.com